ANTITRUST COMPLIANCE – RELUCTANCE TO EMBRACE AND RECOGNIZE CORPORATE COMPLIANCE EFFORTS

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I. INTRODUCTION

It is widely believed – certainly by antitrust agencies, but also by antitrust practitioners and well-informed companies – that cartels are pernicious and must be eradicated. No-one need ask "why comply?" – the benefits of competition are well understood in terms of fostering innovation, promoting consumer welfare and choice, ensuring allocative efficiency and stimulating economic growth. Genuine antitrust compliance efforts help to protect and promote a level playing field, where companies compete "on the merits" and consumers benefit from that competition.

While the winds of change are in the air (see Section 2 below), the focus of antitrust agencies has been on enforcement, ever increasing penalties and the use of leniency programs to "encourage" compliance. These all have an important place – but do not by themselves encourage a compliance culture, rather a fear of "getting it wrong" – or perhaps (in a very small percentage of cases) a fear of "being caught." Yet antitrust infringements still occur, so it is time to rethink the approach to "encouraging" compliance, and see whether (to use a colloquial expression) results would best be obtained only by using the stick, or whether better results for society might be achieved by using both a "carrot and stick" approach.

In considering the optimal approach, it is important to recall that EU Competition Commissioner Almunia famously (and rightly) observed in 2010[2] that the purpose of antitrust enforcement is not in itself to impose high fines and other penalties – rather the ultimate policy goal of antitrust is to have no need to impose penalties at all. While Mr. Almunia was undoubtedly thinking about the benefits of imposing fines and encouraging the European Commission's ("EC's") leniency / immunity program in uncovering covert cartels, Mr. Almunia (almost certainly unintentionally) highlighted a fundamental truth which antitrust agencies should consider and take to heart: the ultimate (and the proper) policy goal of antitrust enforcement is to encourage and to achieve genuine compliance by changing behaviors and culture. Behavioral research into organizational ethics demonstrates that culture can be used as a tool to improve compliance as a law-abiding culture creates norms that push for more effective compliance.[3]

While enforcement will remain an important tool, focusing only on penalties and not on behavioral expectations will do little to change societal norms. This involves antitrust agencies, academia and business organizations such as the International Chamber of Commerce ("ICC") working together to change compliance values, so that businesses "doing the right thing" when it comes to fair competition becomes normal and accepted – and even expected – by society at large.

2 See https://europa.eu/rapid/press-release_SPEECH-10-586_en.htm Business Europe & U.S. Chamber of Commerce Competition conference October 25,2010.

3 Lynn Sharp Paine, Managing for Organizational Integrity, HARV. BUS. REV., Mar.–Apr. 1994, at 106.

This article will argue that while much has been done (and continues to be done) by antitrust agencies in the antitrust compliance arena, there is still much work to be done and greater progress to be achieved. The time truly has come to rethink compliance.

II. ATTITUDE OF ANTITRUST AGENCIES TO COMPLIANCE EFFORTS

The attitude of many (but not all) antitrust agencies to corporate antitrust compliance efforts has developed considerably over the last two decades. However, there is still a significant degree of skepticism (and even positive distrust) among even some of the sophisticated antitrust agencies about the true purpose of antitrust compliance efforts. The purpose of this article is not to trace the history of the development of agency thinking (or what has molded agency thinking) towards compliance. One need only look at the language used in the past to describe antitrust compliance programs to see that some antitrust agencies may be reluctant to recognize the true policy objective of real compliance as an enforcement goal.

The U.S. Department of Justice ("DOJ") Antitrust Division and the European Commission ("EC") were historically among the most skeptical of the leading antitrust agencies on the benefits of encouraging compliance (or, to their minds, "rewarding compliance failure").[4] Possibly this view was driven in part on a reliance on amnesty and leniency as the primary enforcement incentive (and perhaps an underlying belief that antitrust compliance efforts were "self-serving" and not likely to be genuine).

Times, however, are changing. In April 2018 the DOJ Antitrust Division held a public Roundtable[5] to consider antitrust compliance programs – and, specifically, how the Division's (then) policy of giving no credit to credible compliance programs "sat" with the U.S. Federal Sentencing Guidelines and with the rest of the DOJ's policy (outside the Antitrust Division) of recognizing and crediting robust compliance programs.

Following this roundtable, on July 11, 2019, Makan Delrahim, the Assistant Attorney General in the Antitrust Division announced a new policy to incentivize corporate antitrust compliance.[6] The Antitrust Division will in future consider genuine and robust compliance efforts at the charging stage in criminal antitrust investigations, and the Division published a guide to prosecutors[7] to assist them in evaluating corporate compliance programs at both the charging and sentencing stages. This guidance document will provide a useful "roadmap" to companies of the Division's expectations of antitrust compliance programs.

The DOJ's policy change is very much to be welcomed (and long wished for), as is AAG Delrahim's statement that "*the Antitrust Division is committed to rewarding corporate efforts to invest in and instil a culture of compliance.*" It is to be hoped that this policy change – which is a dramatic shift for the Antitrust Division – will be followed in other jurisdictions, including those that only have a system of administrative rather than criminal enforcement (such as the EU).

Some other jurisdictions give some sort of credit (or at least incentives) for antitrust compliance programs,[8] notable among them is Canada, where an antitrust compliance program can be a mitigating factor, and the implementation of compliance measures may be imposed as part of alternative forms of resolution. The Canadian Competition Bureau also gives detailed and useful guidance on the necessary elements of an effective (or robust) antitrust compliance program.[9]

Most recently, in September 2019 the Peruvian Competition Authority ("Indecopi") issued a public consultation on antitrust compliance programs (including detailed guidelines similar to the Canadian Competition Bureau guidelines) indicating that it may be prepared to take into account genuine compliance efforts when considering an infringement that has already occurred.[10]

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4 "… *a company involved in a cartel should not expect a reward from us for setting up a compliance programme, because that would be a failed programme by definition.*" J. Almunia, SPEECH/11/268, April 14, 2011.

5 See https://www.justice.gov/atr/public-roundtable-antitrust-criminal-compliance.

6 See https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance.

7 See https://www.justice.gov/atr/page/file/1182001/download.

8 See F. Thepot, "The Interaction Between Competition Law and Corporate Governance," (Cambridge University Press, 2019).

9 Canadian Competition Bureau, Corporate Compliance Programs (2015) available at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04297.html.

10 See Section 9.3, Indecopi draft Guidelines on Antitrust Compliance Programs, September 2019.

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III. IS ANTITRUST THE "POOR RELATION" IN THE COMPLIANCE WORLD?

Antitrust has been described as an "outlier" when it comes to how antitrust agencies treat compliance compared with other enforcement agencies.[11]

Antitrust compliance cannot be viewed in isolation or exist in a vacuum. In today's world, companies must comply with a vast array of compliance topics, including laws relating to Anti-Bribery and Corruption ("ABC"), Anti-Money Laundering, Data Privacy, Trade Controls and Sanctions and Health and Safety to name but a few.

Companies and their internal advisers can feel overwhelmed at the sheer range of compliance requirements and confused at the (very) different approaches some enforcement agencies take in terms of positively encouraging and rewarding genuine compliance efforts.

In relation to Foreign Corrupt Practices Act ("FCPA") enforcement, the DOJ has a long history of taking account of ABC compliance programs.[12] This constructive approach by the DOJ's FCPA enforcers has been at least partly driven by the policy objective that a key goal of enforcement is to achieve a compliance culture in practice.

The FCPA enforcers have indeed gone further than "merely" giving credit by way of a reduction in a fine or a reduced criminal sentence for credible compliance efforts. In April 2012, the DOJ for the first time declined to prosecute an FCPA violation by a corporation, while prosecuting an individual within that corporation. The declination related to Morgan Stanley, and was on the grounds that a Morgan Stanley employee had:

> [...] used a web of deceit to thwart Morgan Stanley's efforts to maintain adequate controls designed to prevent corruption. Despite years of training, he circumvented those controls for personal enrichment.[13]

The same policy objective (that a key goal of ABC enforcement is to achieve a compliance culture in practice) motivated the UK's Ministry of Justice to include a compliance defense of "*adequate [compliance] procedures*" in the UK Bribery Act[14] and to provide significant amounts of guidance on what compliance "adequate procedures" would entail.[15]

Recently a number of commentators have advocated that antitrust agencies should give more credit for genuine compliance efforts, since rewarding robust and genuine compliance programs in the context of an investigation can improve the effectiveness of corporate sanctions in providing ex ante incentives to companies to deter and detect illegal behavior internally.[16]

Certainly, these approaches of the authorities in giving compliance guidance and giving positive incentives for companies to invest in ABC/FCPA compliance (including the possibility of a complete defense for the corporation) have had a very dramatic impact on how much time, effort and (above all) resources that companies dedicate to this area of compliance. While it would be comforting to think that all companies will invest significant amounts of money and time in a compliance program from a sense of public spiritedness, that is perhaps a little naïve. The reality is that corporate resources – even in large companies – are limited, so that the in-house Legal and Compliance functions have to "compete" internally for precious resources (and the resource of employee and management time) that could otherwise be devoted to other matters – such as investing in the organic or inorganic growth of the business to increase profitability.

This does not mean that companies are not serious about antitrust compliance – generally they are, and most companies want to comply. But the reality is that they also want to invest in their business – so anything agencies can do to encourage and incentivize companies to devote sufficient and appropriate resources to the important area of antitrust compliance will support the policy objective of reducing antitrust violations.

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11 Riley and Sokol J. of Antitrust Enforcement 31 (2015), University of Florida Levin College of Law Research Paper No. 16-3, available at http://ssrn.com/abstract=2475959.

12 In fact, when it came to criminal enforcement, antitrust was (until the recent change of policy in the Antitrust Division) the only area in the entire DOJ that did not recognize the value of compliance programs.

13 DOJ Press Release https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required (April 24, 2012).

14 UK Bribery Act 2010, s7 (2).

15 https://www.gov.uk/government/publications/bribery-act-2010-guidance.

16 See F. Thepot at fn 8 *supra*.

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Although there is little empirical evidence to support the following statement (as companies are understandably reluctant to discuss their compliance spend publicly), the author believes that the reluctance of antitrust agencies to engage actively in a dialogue with companies of the financial benefits to those companies of investing in a credible antitrust compliance program (in terms of mitigation of fines) has meant that antitrust might not be a top priority. The author believes that antitrust might be "left behind" in some companies (but not in all) when it comes to a decision whether to invest (for example) in ABC compliance (where the benefits of the investment are tangible) or in antitrust compliance, where the benefits of the resource allocation may not be immediately obvious to management, since mitigation of fines by antitrust agencies is rare.

IV. WHAT DRIVES NON-COMPLIANCE?

This article will not attempt to give any in-depth analysis of the behavioral psychology of non-compliance (although there are many excellent resources available),[17] but it is important (for companies in designing a compliance program and for antitrust agencies in assessing a program) to understand that human nature has a significant role to play in whether an individual within a company is likely to comply or not. Sometimes, whatever the efforts a company makes, and however many resources a company devotes to compliance, some people are just determined to break the law (or do not care whether they follow company policy or not).

Enforcement agencies need to recognize that there is no such thing as zero risk – a company with even the best approach to compliance and with a good corporate culture may still have individuals within the organization who – despite a company's best efforts – decide to flout the law and ignore the company's own culture and policies.[18]

A "perfect" compliance program, while undoubtedly a laudable goal, may perhaps be an unrealistic goal, given that "humans are human." Ultimately it is not inanimate companies that decide to break the law – it is the human beings within those companies – and each person will have his / her own personal drivers – whether these are positive, such as the desire to behave ethically and with integrity, or negative such as ego, hubris, arrogance and greed.[19]

V. A WAY FORWARD IN TERMS OF RECOGNIZING ANTITRUST COMPLIANCE EFFORTS?

If the policy objective of antitrust enforcement is to "have no need to impose fines at all,"[20] the goal of antitrust enforcement agencies should be to take every step to encourage business integrity, and to support good corporate cultures and sincere compliance efforts.

If a company has made sincere and consistent efforts to comply, the antitrust agencies should understand that a company compliance program has not "failed" because one or more employee has circumvented company policy. Companies should rather be encouraged by the agencies to learn from any past compliance incidents and continuously improve their compliance efforts.

There is a credible argument (in terms of encouraging compliance in practice) for antitrust agencies to think more creatively about how corporate antitrust compliance programs could help enforcement,[21] for example by antitrust agencies:

- Giving credit for pre-existing genuine antitrust compliance efforts and a truly robust program, as the U.S. DOJ Antitrust Division has indicated it will now do;

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17 See for example Kaptein, Muel, Why Do Good People Sometimes Do Bad Things? 52 Reflections on Ethics at Work (July 25, 2012). Available at https://ssrn.com/abstract=2117396 or http://dx.doi.org/10.2139/ssrn.2117396.

18 T Banks and J Murphy "But it is also an inescapable fact of our human existence that people are fallible, and that in some cases people will ignore instructions and do things that they were expressly forbidden to do" *40 Denver Journal of International Law & Policy 368 (2012)* available at http://ssrn.com/abstract=2787970.

19 This view of human nature is not universally accepted by all commentators – see Wouter Wils*; "Because companies benefit from the antitrust infringements engaged in by their employees, companies would have an incentive to encourage violations. Companies would have an incentive to recruit those employees most likely to engage in antitrust infringements, and to give them the authority necessary to do so."* Journal of Antitrust Enforcement, Vol. 1, No. 1, April 2013, pp. 52-81 and available at http://ssrn.com/author=456087.

20 See Almunia at fn 2 *supra*.

21 Bloom and Riley A. Riley and M. Bloom, 'Antitrust Compliance Programmes – Can Companies and Antitrust Agencies Do More?' (2011) Journal of Competition Law 21.

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- Actively and openly requiring the adoption of an antitrust compliance program in decisions and settlements, and in grants of immunity or leniency;[22] and /or

- Acknowledging genuine compliance efforts in looking at parental liability for acts of a wayward subsidiary, such as by not fining the parent company. This is considered further below as a possible avenue for DG COMP to explore.

Since much depends on the attitude of agencies in (positively) encouraging antitrust compliance, the remainder of this section considers the attitude of DG COMP, which has so far resisted calls to give credit for genuine compliance efforts.

To be clear, the author is not criticizing DG COMP for taking this position, and appreciates that the agency has moved from not wishing to discuss compliance efforts at all more than a decade ago, to issuing a booklet encouraging antitrust programs (without giving credit for them),[23] to its current (perhaps informal) position of actively encouraging discussion of antitrust compliance issues in the International Competition Network ("ICN").

Given the U.S. DOJ Antitrust Division's recent policy change in relation to genuine antitrust compliance efforts, DG COMP may be inclined to move its position slightly closer to that of the DOJ (even if it is not minded yet to give credit for antitrust compliance programs).[24]

DG COMP could consider advising the EC to recognize genuine compliance efforts by acknowledging (and even crediting) the genuine compliance efforts of a parent company in cases of parental liability for the acts of miscreant subsidiaries and joint ventures. This would surely incentivize parent companies to increase their compliance efforts and their commitment to compliance and to take all reasonable steps (bearing in mind the legal principle of "corporate separateness") to ensure that its subsidiaries and joint ventures acted ethically in compliance with the law.

Of course, with joint ventures ("JVs"), all jointly controlling parents would need to demonstrate a corporate commitment to genuine compliance for each to receive credit, but there is no reason in principle why this could not be applied to alleviate the parental responsibility of one JV shareholder/owner[25] and not the other(s) if one could demonstrate a real compliance culture and the others did not.

Another area that DG COMP could consider giving recognition to credible antitrust compliance efforts in a parental liability case is in relation to the "recidivism multiplier" in the EC's Fining Guidelines.[26] Under Paragraph 28 of the EC's Fining Guidelines, the basic amount of a fine may be increased where the EC finds that there have been "aggravating circumstances," including where an undertaking continues or repeats the same or a similar violation. The so-called "recidivism multiplier" is punitive, since the increase can be up to 100 percent for each previous infringement established (up to the maximum of 10 percent of turnover under Regulation No. 1/2003).

These two steps (while not going as far as reducing the absolute level of a fine by giving credit for credible compliance to the company directly involved in the infringement) might be extremely effective in terms of incentivizing real compliance efforts at the group corporate level.

Certainly, the disapplication of the recidivism multiplier would be a huge incentive for a company which had had previous violations in the past, to ensure that they took all appropriate steps to ensure compliance for the future. Even just the existence of the possibility of the recidivism multiplier being disapplied would create this incentive.

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22 An argument sometimes put forward by antitrust agencies is that they do not have the resources to monitor compliance on an ongoing basis, but that could be resolved in appropriate cases by appointing an independent antitrust compliance monitor– perhaps the appointment of an antitrust compliance monitor should be limited only to the more egregious cases such as in *United States v. Apple* Inc 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

23 "Compliance Matters" https://ec.europa.eu/competition/antitrust/compliance/index_en.html.

24 The author, of course cannot speak for or influence DG COMP or the EC, so the following are merely suggestions of possible courses of action DG COMP may choose to consider.

25 The term JV "owner" is used because many JVs – particularly in the energy and infrastructure sectors - are unincorporated, in which case the JV is co-owned but there are no shareholders.

26 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, p. 2-5.

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VI. WHAT HAVE COMPANIES BEEN DOING TO ENCOURAGE ANTITRUST COMPLIANCE?

Compliance programs and codes of ethics have become a fundamental part – not merely of antitrust compliance but of compliance overall for companies.[27] While most major companies invest significant amounts of time, effort and resources in trying to ensure that they have a credible and robust antitrust compliance program, business organizations such as the ICC have been working tirelessly to advocate the of benefits of competition and the importance of antitrust compliance to all businesses, both large and small.

In 2013, the ICC launched the Antitrust Toolkit for companies.[28] The purpose of the Toolkit is to provide practical tools for companies wishing to build a robust antitrust compliance program. It seeks to complement materials produced by antitrust agencies and other sources of guidance,[29] by focusing on practical steps companies can take internally to embed a successful compliance culture. To ensure that the Toolkit can be easily accessed by business, it is (currently) available free of charge online, and has been translated into several languages, including several European languages, Chinese Mandarin and Russian. The main Toolkit was followed in 2015 by a very short and simple Toolkit specifically designed for SMEs.[30]

Since the publication of the Toolkits, the ICC has organized or presented at more than 100 workshops and conferences around the world, ranging from Canada in the north to Australia in the south, and also across the globe from east to west, to explain to businesses the benefits of competition, and to encourage agencies to give more guidance on their expectations of what a robust antitrust compliance program would entail. The advocacy work of the ICC continues, and the ICC is considering updating the main Toolkit (as an online-only version) in 2020, and is working on a Toolkit for Trade Associations, as well as a compliance story for children.

VII. CONCLUSIONS

There are many pressures facing businesses today – and many compliance challenges, both in relation to antitrust and in relation to the myriad of other laws they need to comply with. Research has shown that most businesses want to "do the right thing" – they want to act with integrity and protect their reputation – they just need to understand how to do that. Research by the UK Competition and Markets Authority demonstrates that the knowledge of the requirements of competition law among small and micro businesses (in particular, but also among some medium sized and even some larger companies) is deplorably low. Antitrust agencies as well as business organizations have a vital advocacy role in changing this.

Encouraging antitrust compliance is not just about programs and processes – although these are helpful – and perhaps even necessary to provide structure. Antitrust compliance is fundamentally about encouraging companies to do the right thing. It is about achieving and sustaining the right corporate culture.

27 Sokol, D. Daniel, Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement (June 6, 2012). Antitrust Law Journal, Vol. 78, 2012. Available at https://ssrn.com/abstract=2079336.

28 See https://iccwbo.org/publication/icc-antitrust-compliance-toolkit.

29 See for example the publication by the Society of Corporate Compliance and Ethics ("SCCE"): "A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs" J. Murphy, SCCE, 2010, available at http://www.corporatecompliance.org/Portals/0/PDFs/Resources/ResourceOverview/CEProgramDollarADay-Murphy.pdf.

30 See https://iccwbo.org/publication/icc-sme-toolkit-complying-competition-law-good-business.

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An antitrust compliance program is not an "end in itself" – it is merely a tool to help businesses achieve a culture of ethics and integrity. Joseph (Joe) Murphy of the SCCE has said that "*one cannot get the right culture from applying magic fairy dust.*"[31] Mr. Murphy argues that the "*misty notion of culture*" can be another excuse for not doing the hard work required to establish a truly credible and robust compliance program. Mr. Murphy is of course absolutely correct. An aspiration to achieve an "ethical culture" will not on its own achieve real compliance – it requires the hard work envisaged by the U.S. Federal Sentencing Guidelines, the U.S. Antitrust Division compliance guidelines[32] and the Canadian Competition Bureau guidelines on compliance.[33] The program must be well designed, with procedures to follow up on breaches, and effective communication that does not merely give a forgettable and bland compliance message but that "gets inside someone's head."[34]

On the other hand, an antitrust compliance program on its own that is not underpinned and reinforced by a culture of compliance – involving "Tone at the Top," "Tone in the Middle," and "Tone all the way Down" the organization – will be unlikely to be effective. So, a robust antitrust compliance program needs appropriate policies and procedures that reflect and enforce the company's real commitment to conducting business ethically and in compliance with the law. If antitrust agencies continue (or start) to regard genuine compliance programs more positively and do more to encourage antitrust compliance efforts, those efforts, are likely to increase, and hopefully more compliant behavior will be the outcome. This can only benefit business, society and consumers generally.

31 See https://www.joemurphyccep.com/a-comment-on-ethics-trainings-are-even-dummer-than-you-think-so-is-magic-fairy-dust-the-answer-to-corporate-crime.

32 See fns 6 and 7 *supra*.

33 See fn 9 *supra*.

34 Hui Chen and Eugene Soltes: "Why Compliance Programs Fail and How to Fix them," Harvard Business Review March-April 2018 Issue, available at https://hbr.org/2018/03/why-compliance-programs-fail.

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