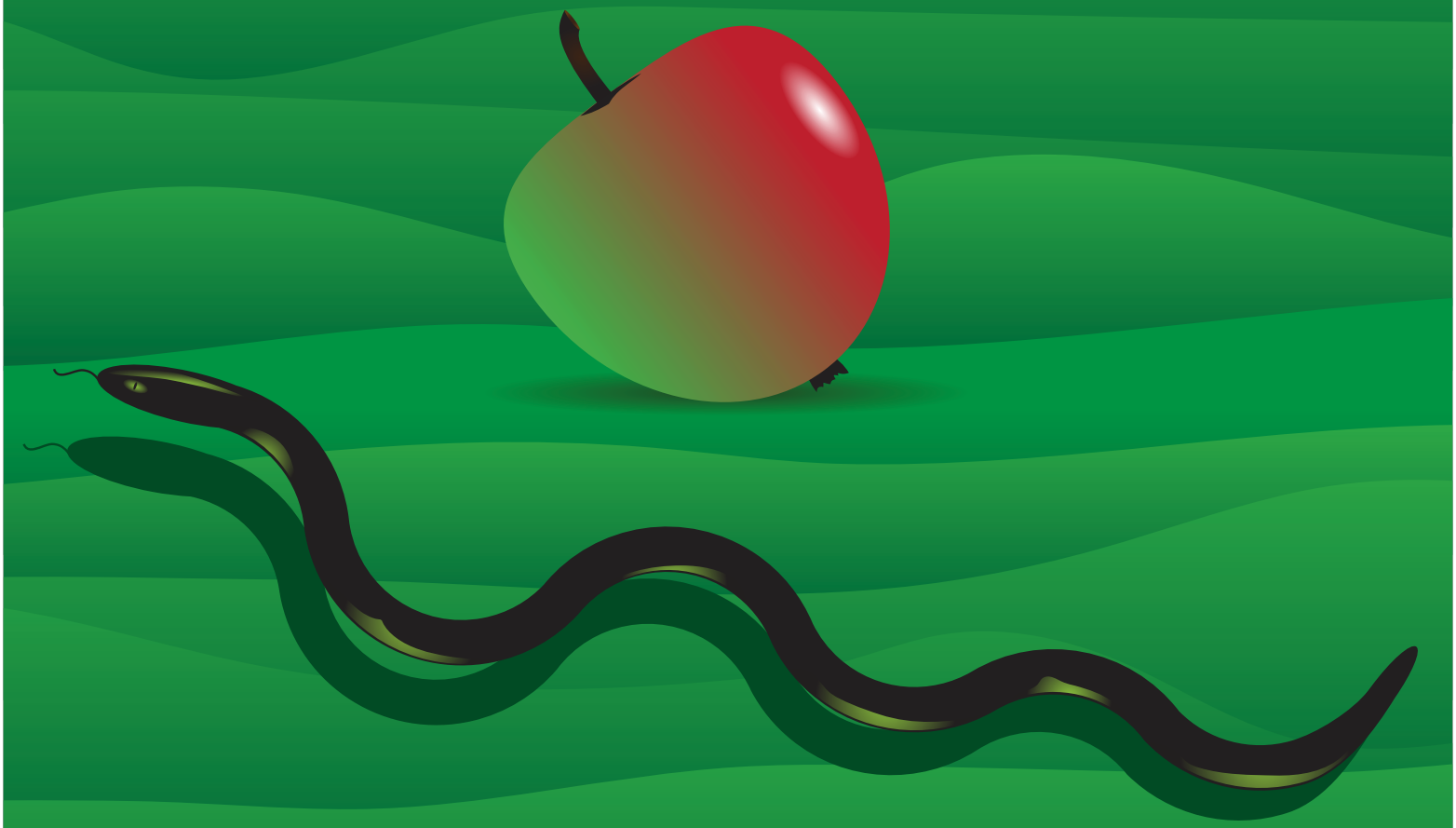
Antitrust Chronicle

NOVEMBER · FALL 2021 · VOLUME 2(3)



Corporate Compliance

CPI COMPETITION POLICY INTERNATIONAL

TABLE OF CONTENTS

LETTER FROM THE EDITOR

Dear Readers,

Compliance programs are, by definition, the first line of defense against antitrust violations. Yet compliance programs raise inherent conflicts of interest. To what extent can one expect the hunter to be the groundskeeper?

This is the inherent dilemma to the treatment by regulators and courts of compliance programs in enforcement, fining guidelines, and countless other contexts.

The pieces in this Chronicle address this perennial dilemma in light of recent experience in numerous jurisdictions. The authors draw on their knowledge of how compliance programs work in practice, as well as how they are dealt with by enforcers and courts in their respective jurisdictions. They also provide practical guidance on how such programs should be implemented, based on their detailed experience.

As such, this Chronicle provides both a detailed overview of the operation of compliance programs and a useful primer in their design and implementation, based on global experience.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

Antitrust Compliance and the Criminal Antitrust Anti-Retaliation Act

By Jennifer M. Dixton, Rebecca D. Ryan & Anthony Rosa

The Criminal Antitrust Anti-Retaliation Act of 2019 ("CAARA") provides protections for employees, contractors, and agents who notify their employers or the federal government of antitrust violations. Given CAARA's enactment, there are several reasons why it is in companies' best interest — now more than ever — to adopt effective internal antitrust compliance programs that support the reporting of violations without reprisal. First, CAARA complements and bolsters the Antitrust Division's Leniency Program that allows companies first to report a criminal antitrust violation to the government to avoid prosecution for itself and its employees. Second, when making charging decisions and sentencing recommendations, Division prosecutors holistically evaluate the effectiveness of a company's compliance programs, including its reporting mechanisms. Finally, employers that do not support reporting efforts may become the subject of a CAARA complaint and faced with penalties generated by the Occupational Safety and Health Administration's Whistleblower Protection Program. With CAARA's passage, companies must implement effective internal reporting mechanisms; the risks of not doing so are too great.

Competition Law Compliance: Ten Key Points for Agencies and Compliance Professionals to Consider

By Paul Lugard & Anne Riley

In this contribution, the authors, Anne Riley, former Head of Royal Dutch Shell's global antitrust group, and Paul Lugard, (Baker Botts (Belgium) LLP, provide a tour d'horizon of antitrust compliance-related topics. Drawing on their decades-long experience as, respectively, inhouse antitrust counsel and private practitioner, the authors discuss ten key points for both competition enforcement agencies and compliance professionals to consider. In addition, they provide valuable insights into antitrust compliance-related work of the OECD, the International Competition Network and the International Chamber of Commerce. But above all, this contribution seeks to provide practical insights and suggestions on how to optimize the use of antitrust compliance programmes.

Antitrust Compliance: Have You Considered These 10 Questions?

By Joseph E. Murphy

Every compliance program plays to two audiences. One is your people: is it effective in reaching them and preventing violations. The second is the government: is your program credible and will it convince enforcers to give you credit for your compliance work. There is quite a bit of guidance about compliance programs out there, from governments and from the private sector. Drawing from parts of these that have not received enough attention among companies, and adding points that are essential yet not fully recognized even in the government standards, this article offers ten questions to ask yourself, to see if you have caught important points that can determine the success of your compliance efforts in the antitrust/competition law area.

The Compliance Program Crucible: The Art of the Internal Investigation

By Donald C. Klawiter

This paper explores the most difficult, challenging, and usually concluding portion of a corporate compliance program – the internal investigation. Unlike the other major components of the compliance program – training and audits – the internal investigation is triggered by a government investigation, whistleblower, or even rumor – it is not an action planned by the company. For that reason, the conduct of the investigation has no fixed agenda. It is truly art, not science. This paper sets out the basic steps that a company must take, providing illustrative situations from actual investigations that worked for me and my Internal Investigative Teams.

SUMMARIES

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Competition Compliance: The Path Travelled and the Way to Go…The CNMC's Experience

By Cani Fernández Vicién

Compliance is every effort an authority does to increase awareness on the importance of competition law, its benefits, and the consequences of infringements. The main goal remains to be the consolidation of a true culture of competition that reflects in the way in which companies do business. In line with this, the CNMC's efforts to promote a culture of competition compliance are multifaceted: we need vigorous competition enforcement, guidance on compliance programmes, effective communication policy and competition advocacy initiatives to increase awareness and true understanding of competition policy benefits for society as a whole.

Antitrust Compliance in Brazil

By Alexandre Cordeiro Macedo & Aldén Caribé de Sousa

Antitrust compliance programmes are not mandatory in Brazil. Nevertheless, the Brazilian antitrust authority, CADE, pays special attention to them. In this regard, CADE institutionally promotes the compliance agenda and, when examining anticompetitive conduct or merger review proceedings, is receptive to compliance programmes' clauses. Compliance programmes are valuable tools to multiply the effects of competition law enforcement, as they decentralise enforcement, and detect and deter wrongdoings in a prompt and documented manner. Considering 73 percent of antitrust immunity applications are rejected for untimeliness or lack of documentation, the authority recently launched evidential guidelines, which can be a useful resource in improving compliance routines.

Competition Compliance in Brazil: Retrospective and Perspective

By Mariana Tavares de Araujo & Gabriela Costa Carvalho Forsman

CADE has been one of the lead authorities in Brazil to disseminate a compliance culture through its rules, guidance, and case law, which evolved considerably since 2004 and in particular over the past five years. Its enforcement policies and procedures made public in guidelines and proposed regulations confirm that the agency is aware that ensuring legal certainly and transparency is a work in progress. Its approach to competition compliance over the years does as well. This article discusses CADE's efforts to promote competition compliance programs and considers the impact of its 2016 Guidelines to business activities, as well as points to potential areas of improvement.

What Can Make Competition Compliance Programmes Really Effective?

By Sabine Zigelski & Lynn Robertson

This article draws the business community's and competition agencies' attention to selected topics that would benefit from more attention when considering effective competition law compliance programmes. It draws on recent discussions in the OECD Competition Committee and the related background paper on Competition Compliance Programmes, however, the views expressed reflect solely the opinion of the authors. We identify five major compliance topics – detection and prompt reporting, senior management involvement, monitoring and auditing, compliance incentives, and third-party compliance – and suggest possible courses of action to enhance compliance programmes' effectiveness.

WHAT'S NEXT?

For December 2021, we will feature Chronicles focused on issues related to (1) **CRESSE Insights**; and (2) **Grocery Sector**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2021, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES MARCH 2019

For January 2022, we will feature an Antitrust Chronicle focused on issues related to **Predatory Pricing**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

ANTITRUST COMPLIANCE AND THE CRIMINAL ANTITRUST ANTI-RETALIATION ACT

JENNIFER M. DIXTON, REBECCA D. RYAN & ANTHONY ROSA[1]



1 Respectively, Assistant Chief, Competition Policy & Advocacy Section, Special Counsel for Policy & Intellectual Property, Antitrust Division, Department of Justice; Counsel to Directors of Criminal Litigation and Enforcement, Antitrust Division, Department of Justice; and Acting Director, Directorate of Whistleblower Protection Programs, Department of Labor, Occupational Health and Safety Administration. The views expressed in this article do not necessarily represent the views of the authors' respective organizations.

The Criminal Antitrust Anti-Retaliation Act of 2019 ("CAARA") was enacted to enhance protections for employees, contractors, and agents who blow the whistle on criminal antitrust violations to their employer or to the federal government.[2] Specifically, it prohibits employers from taking punitive action against employees or agents who report potential antitrust crimes or assist a federal government investigation.[3] The Antitrust Division of the Department of Justice (the Division) applauded CAARA's passage, stating that "[b]y incentivizing disclosures of anticompetitive conduct, the Act will strengthen the Antitrust Division's criminal enforcement program, a cornerstone of [the Division's] mission to protect the American consumer."[4] Indeed, CAARA's whistleblower protections support individuals reporting to, and cooperating with, both internal and government investigations, and complement the Antitrust Division's Leniency Program.[5]

Recognizing that CAARA can play an important role in criminal antitrust enforcement, Department of Justice leadership has sought to ensure its effective implementation. Associate Attorney General Vanita Gupta issued a memorandum instructing the Division to strengthen its partnership with the Department of Labor and Occupational Safety and Health Administration ("OSHA") by offering antitrust training, guidance on antitrust laws, and technical assistance to help implement CAARA.[6] The memorandum followed President Biden's Executive Order to all executive branch agencies to take measures to promote the whole-of-government approach to protecting competition in the American economy.[7]

Self-reporting, of course, is in the Division's interest: its goal is to deter antitrust violations in the first place and encourage good corporate citizenship — and when that fails, to encourage prompt detection, reporting, and remediation. The Division therefore welcomed CAARA's passage and is assisting OSHA in its implementation of this new whistleblower protection.

In light of CAARA's new whistleblower protections and the Justice Department's demonstrated commitment to CAARA's implementation, as well as other recent developments, it is more imperative than ever before that companies invest in effective antitrust compliance programs — and that those programs include strong internal reporting mechanisms. It is in a company's best interest to promote prompt self-reporting for several reasons:

- it may allow the company to quickly detect an antitrust violation, stop the conduct, and seek leniency;
- when leniency is unavailable, the Division still considers self-reporting, corporate compliance efforts, and cooperation when making charging decisions;[8]
- effective compliance and reporting mechanisms may mitigate a corporate sentence;[9] and
- it may avoid a CAARA complaint.

Robust antitrust compliance programs foster a culture of good corporate citizenship and provide the first line of defense in preventing, detecting, and addressing antitrust violations. And, in light of the risk or reward calculus created by leniency, compliance program credit, and CAARA, compliance programs are essential.

I. CAARA MAKES THE RACE FOR LENIENCY EVEN MORE COMPETITIVE

The Division's Leniency Program already creates a race among corporate and individual co-conspirators to report an antitrust violation to the Division.[10] To win that race, a company must be able to detect and report a violation more quickly than any of its competitors — and a simple way to do that is to

2 Criminal Antitrust Anti-Retaliation Act of 2019, Pub. L. No. 116-257, 134 Stat. 1147.

3 *Id.*

4 Press Release, U.S. Dep't of Justice, Justice Department Applauds Passage of the Criminal Antitrust Anti-Retaliation Act (Dec. 24, 2020), https://www.justice.gov/opa/pr/justice-department-applauds-passage-criminal-antitrust-anti-retaliation-act.

5 U.S. Dep't of Justice, Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters 1 (Jan. 26, 2017), https://www.justice.gov/atr/page/file/926521/download.

6 Memorandum from Assoc. Att'y Gen. Vanita Gupta on Promoting Competition in the American Economy to the Antitrust Div. (July 9, 2021), https://www.justice.gov/asg/page/file/1410836/download.

7 Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

8 U.S. Dep't of Justice, Justice Manual § 9.28-900.

9 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 11 (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

10 See U.S. Dep't of Just., Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters 5-6 (Jan. 26, 2017), https://www.justice.gov/atr/page/file/926521/download.

provide the proper incentives and mechanisms for employees who are involved in the misconduct to come forward internally. The benefits of winning the race are enormous. A company that qualifies for leniency avoids criminal conviction and will be eligible for Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA) protections in any parallel civil litigation.[11] On the flipside, the costs of losing the race can be catastrophic. A company faces potential felony criminal charges which may result in substantial fines for the corporate entity — with a statutory maximum of $100 million per charge — and significant prison terms for culpable individuals (for example, one executive was recently sentenced to forty months in prison).[12]

CAARA raises those stakes even higher by providing protection for employees and agents that blow the whistle on antitrust crimes. This protection allows the Leniency Program to work as intended because employees and agents can report crimes internally or to the Antitrust Division without fear of reprisal.[13] And CAARA adds to the self-reporting race a new set of contestants who are now eligible for whistleblower protection: employees or agents who are aware of a company's antitrust violations, and report them to the company or directly to the federal government.[14]

As mentioned, CAARA prohibits employers (or any officer, employee, contractor, subcontractor, or agent of an employer) from retaliating against employees, contractors, subcontractors, or agents for engaging in protected activity. An employer may not discharge or otherwise retaliate against an employee, contractor, subcontractor, or agent for reporting certain information to the federal government, the individual's supervisor, or a person working for the employer who has the authority to investigate, discover, or terminate misconduct; or for initiating, testifying in, participating in, or otherwise assisting in certain federal government investigations or proceedings. The information, investigation, or proceeding must relate to an antitrust law violation prosecuted under Sections 1 or 3 of the Sherman Act (15 U.S.C. § 1 and § 3) or another criminal violation committed in conjunction with a potential antitrust violation, or violation related to a Justice Department investigation into an antitrust violation.

This has significant implications for the leniency race. If a whistleblower reports internally, a company has the opportunity to seek Type A leniency, obtaining protection for itself, its management, and its employees.[15] However, if a whistleblower — now protected and incentivized by CAARA — reports not internally but directly to the Division, a company will be eligible only for Type B leniency.[16] There is an important difference between obtaining Type A and Type B leniency: companies risk losing coverage for highly culpable corporate executives and leadership if the whistleblower has already provided sufficient evidence against them. Therefore, a company would be well served by ensuring that employees are encouraged to self-report internally — giving the company the opportunity to pursue Type A leniency. In short, investing in robust, effective self-reporting mechanisms is a prudent business decision.

II. ENCOURAGING SELF-REPORTING IS AN ESSENTIAL ELEMENT IN WELL-FUNCTIONING COMPLIANCE PROGRAMS

In an ideal world, a compliance program would prevent anticompetitive conduct entirely or, if wrongdoing occurs, would allow a company to qualify for leniency. But, failing that, implementation of a compliance program that protects employees who report violations is still critical, as the Division evaluates the effectiveness of a company's compliance program in making charging decisions and sentencing recommendations.[17] Part of that evaluation is whether the company has a reporting mechanism, including whether that mechanism permits employees to report or seek guidance regarding potential criminal conduct "without fear of retaliation."[18]

A. The Evaluation of Compliance Program Effectiveness

The Division's approach to crediting compliance programs has shifted over the past decade. Historically, the Division did not credit compliance programs during the charging phase of an investigation, because it held the view that any compliance program that failed to prevent the criminal

11 *Id.* at 20; see also Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661.

12 See Press Release, U.S. Dep't of Justice, Former Bumble Bee CEO Sentenced to Prison for Fixing Prices of Canned Tuna (June 16, 2020), https://www.justice.gov/opa/pr/former-bumble-bee-ceo-sentenced-prison-fixing-prices-canned-tuna.

13 15 U.S.C. § 7a-3.

14 Criminal Antitrust Anti-Retaliation Act of 2019, Pub. L. No. 116-257, 134 Stat. 1147.

15 *Leniency Program*, U.S. Dep't of Justice (Sep. 24, 2021, 1:10PM), https://www.justice.gov/atr/leniency-program.

16 *Id.*

17 Richard Powers, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Criminal Antitrust Enforcement: Recent Highlights, Policy Initiatives, and What's to Come, Remarks at the 29th Annual Antitrust, UCL, and Privacy Section Golden State Institute (Nov. 14, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-29th-annual-antitrust.

18 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 11 (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

behavior or did not allow for early detection, timely disclosure, and a successful application for leniency, was not a credit-worthy compliance program.[19] In 2019, recognizing the role that compliance programs play in detecting and deterring criminal antitrust conduct and to further incentivize companies to prioritize compliance, the Division changed its policy to consider a company's compliance program at the charging stage of its investigations.[20] A company with an effective antitrust compliance program can be eligible for a deferred prosecution agreement, which occupies an important middle ground between a guilty plea and a declination. This pivot now aligns the Division's policy with broader Justice Department policy, which considers the effectiveness of a company's compliance program, along with several other factors, in determining the appropriate resolution under the Justice Manual's Principles of Federal Prosecution of Business Organizations.[21]

Whether a company resolves a criminal antitrust investigation through a deferred prosecution agreement or a guilty plea, a company's criminal fine or penalty will be based on the U.S. Sentencing Guidelines — and a robust compliance program that encourages self-reporting can also confer substantial benefits at that stage. Under the U.S. Sentencing Guidelines, a corporate defendant may be eligible for a reduction in culpability score if it has an "effective" antitrust compliance policy as defined by the Guidelines.[22] Although many antitrust defendants will have difficulty qualifying for this sentencing "credit,"[23] a company's compliance program, including its internal reporting mechanisms and response to a violation, is still relevant to the recommended corporate fine and whether a downward departure is appropriate. The effectiveness of a company's program also affects whether the Division will recommend that the company be placed on probation to ensure the company improves its compliance program.[24] Indeed, the failure to have an effective program can even subject the company to monitoring to ensure the company's compliance program improves during the terms of probation.[25]

B. Corporate Compliance Policies Under Department of Justice Guidance

To be clear, the mere existence of an antitrust compliance program does not automatically merit credit at the charging or sentencing stage, and it certainly does not absolve a corporation of liability.[26] When the Division evaluates compliance programs, it scrutinizes whether the program is merely a "paper program" or a well-designed, well-funded, well-implemented, and well-supported program.[27] This includes whether the company has provided the requisite staffing and resources to implement, audit, and re-evaluate the compliance program and utilize the evaluation results. Overall, there are no "formulaic requirements regarding corporate compliance programs"[28] and the Division's factors are not a checklist. Instead, Division prosecutors take a holistic view of the company — including its size and the industry — in deciding whether its program is effective.[29]

A compliance program is unlikely to be effective unless the company gives careful consideration to reporting mechanisms and ensures that employees, contractors, and agents know about those mechanisms and are comfortable using them.[30] For example, companies should allow

19 See Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Compliance Is A Culture, Not Just A Policy, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop (Sept. 9, 2014), https://www.justice.gov/atr/file/517796/download.

20 *Id.*; see Richard Powers, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Criminal Antitrust Enforcement: Recent Highlights, Policy Initiatives, and What's to Come, Remarks at the 29th Annual Antitrust, UCL, and Privacy Section Golden State Institute (Nov. 14, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-29th-annual-antitrust.

21 U.S. Dep't of Justice, Just. Manual § 9-28.800.

22 U.S. Sent'g Guidelines Manual § 8C2.5(f) (U.S. Sent'g Comm'n 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf.

23 The reduction will not apply if there was a delay in reporting the anticompetitive conduct, or if "high-level" or "substantial authority personnel" are involved in the antitrust crime. *Id.*

24 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 14 (July 2019), https://www.justice.gov/atr/page/file/1182001/download. The Division has recommended fine reductions under 18 U.S.C. § 3572 based on extraordinary efforts to create effective "forward looking" compliance programs. Plea Agreement, *United States v. Kayaba Industry Co.*, 15-cr-00098-MRB (S.D. Ohio Sept. 16, 2015), https://www.justice.gov/atr/case-document/file/791911/download; Plea Agreement, *United States v. Barclays PLC*, 15-cr-77-SRU (D. Conn. May 5, 2015), https://www.justice.gov/atr/file/838001/download.

25 Plea Agreement, *United States v. Hoegh Autoliners AS*, GLR-17-0505 (D. Md. Dec. 8, 2017), https://www.justice.gov/atr/case-document/file/347164/download.

26 See *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees . . . even if . . . such acts were against corporate policy or express instructions."); *United States v. Potter*, 463 F.3d 9, 25-26 (1st Cir. 2006) (finding a corporation is not automatically absolved of liability by "adopting abstract rules" that prohibit employees or agents from engaging in illegal acts).

27 U.S. Dep't of Justice, Just. Manual § 9-28.800.

28 *Id.*

29 U.S. Dep't of Justice, Antitrust Division Manual III.G.2.c (5th ed. 2012), https://www.justice.gov/atr/file/761166/download.

30 U.S. Dep't of Justice, Just. Manual § 9-28.900.

for reports to be made "anonymously or confidentially and without fear of retaliation."[31] Antitrust Division prosecutors will also consider whether employees know where to seek antitrust guidance and the positive or negative incentives in place for doing so.[32]

The Division also considers whether compliance is promoted and championed by senior leadership, how well reporting mechanisms are known, how often the mechanisms are used, and what the company did to investigate the antitrust violations at issue.[33] A compliance program is not effective if it is not supported by the company's leadership and internal controls. Employees should be "convinced of the corporation's commitment to [the compliance program]"[34] which includes the company's support for individuals who report wrongdoing. When corporate leadership fosters an environment where employees and agents feel comfortable reporting suspected wrongdoing without the fear of reprisal, this serves as evidence of a strong culture of compliance.

C. Evaluating the Compliance Response

Reporting mechanisms also enhance a company's compliance efforts in myriad other ways. As the Division's Compliance Guidelines recognize, "effective antitrust compliance programs not only prevent, detect, and address antitrust violations, they also further remedial efforts and help foster corporate and individual accountability by facilitating a corporation's prompt self-reporting."[35] Similarly, the Justice Manual states that "the Department encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities."[36] To that end, Antitrust Division prosecutors consider not only whether and how employees and agents report possible antitrust violations, but also what the company does to investigate and respond.[37] An effective reporting mechanism has little value if the company did nothing to investigate and determine whether the reports received had merit. Indeed, "[d]eciding to do nothing or sweep misconduct under the corporate rug can be a costly mistake that deprives the company of the benefits of leniency and severely undermines any subsequent claims for compliance credit."[38] Prosecutors will consider how the company processed reports of misconduct including whether the company used the information gleaned from its reporting mechanisms to identify "patterns or other red flags of a potential antitrust violation."[39]

D. The Importance of Timeliness

Finally, robust self-reporting mechanisms are critical to allowing a company to detect and report its misconduct to the Division in a timely way. Even when a company does not qualify for leniency, timely disclosure, cooperation, and remediation are still relevant considerations at the charging stage, under the Principles of Federal Prosecution of Business Organizations.[40] Because time is often of the essence in criminal investigations, prosecutors may consider a corporation's "timely and voluntary disclosure, both as an independent factor and in evaluating the company's overall cooperation."[41] For a company that loses the race for leniency, the existence of an otherwise effective compliance program as evidenced by prompt self-reporting may allow for a deferred prosecution agreement.[42] Timeliness also matters at sentencing, where a company that provides timely and thorough self-reporting and cooperation can receive up to a five-point reduction in its culpability score — which can translate into a substantial reduction in its criminal fine.[43]

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31 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 11 (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

32 *Id.* at 11-12. For example, a company might discipline an employee for failing to report a known antitrust violation.

33 *Id.* at 5, 11.

34 *Id.* at 5; U.S. Dep't of Justice, Just. Manual § 9-28.800.

35 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 1 (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

36 U.S. Dep't of Justice, Just. Manual § 9-28.900.

37 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 12-13 (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

38 Richard Powers, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Criminal Antitrust Enforcement: Recent Highlights, Policy Initiatives, and What's to Come, Remarks at the 29th Annual Antitrust, UCL, and Privacy Section Golden State Institute (Nov. 14, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-29th-annual-antitrust.

39 U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 11, 13 (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

40 U.S. Dep't of Justice, Just. Manual § 9-28.300.

41 U.S. Dep't of Justice, Just. Manual § 9-28.900.

42 Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.; U.S. Dep't of Justice, Just. Manual § 9-28.300.

43 U.S. Sen'g Guidelines Manual § 8C2.5(g)(1)&(2), cmt 13 (U.S. Sent'g Comm'n 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf.

III. CAARA AND OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION WHISTLEBLOWER PROTECTION PROGRAM

Investing in effective reporting mechanisms makes sense for a third, independent reason: antitrust whistleblowers are now protected under CAARA. As explained, supporting CAARA's successful implementation is a priority for Justice Department leadership. The Justice Department will work in partnership with OSHA to provide antitrust training, guidance on antitrust laws, and technical assistance to help implement CAARA. Thus, failing to facilitate self-reporting without fear of reprisal not only subjects a company to increased risk of criminal charges, conviction, and substantial fines, it also subjects it to civil penalties under this new law that protects efforts to disclose antitrust crimes.[44]

OSHA's Whistleblower Protection Program enforces protections for employees who suffer retaliation for engaging in protected activities under 25 federal laws including CAARA. Covered individuals who believe that they have suffered retaliation in violation of CAARA may file a retaliation complaint with OSHA, either on their own or through an attorney or designated representative, within 180 days of the unfavorable personnel action alleged in the complaint. Employees, or their representatives, can file whistleblower complaints with OSHA via mail, fax, telephone, in person, or online. After receiving a retaliation complaint under CAARA, OSHA will interview the employee to obtain information about the alleged retaliation, and will determine whether the allegation is sufficient to initiate an investigation.[45]

If the allegation is sufficient to proceed with an investigation, the complaint will be assigned to an OSHA Whistleblower Investigator who is a neutral fact-finder and does not represent either party.[46] The investigator will notify the Complainant, Respondent, and the Justice Department's Antitrust Division that OSHA has opened an investigation.

Whistleblower investigations vary in length of time. The parties may settle the retaliation complaint at any point in the investigation either through OSHA's Alternative Dispute Resolution program, with the assistance of the assigned investigator, or through their own negotiated settlement that OSHA approves.

At the conclusion of the investigation, OSHA will issue a findings letter to both parties stating whether OSHA has reasonable cause to believe that retaliation occurred. If OSHA finds retaliation, its findings may include an order for reinstatement, back pay, and other appropriate remedies. Either the individual or the employer may object to OSHA's findings and request a hearing before a Department of Labor Administrative Law Judge ("ALJ"). If no objections are filed, OSHA's findings become the final order of the Secretary of Labor in the case. If an ALJ hearing is requested, the ALJ's decision may be appealed to the Department of Labor's Administrative Review Board, which issues the Department of Labor's final decision in CAARA whistleblower cases, subject to discretionary review by the Secretary of Labor. The Administrative Review Board's final decision may be appealed to a court of appeals.

Under CAARA, the individual may file their CAARA retaliation complaint in federal district court if there is no final order of the Department of Labor and 180 days has passed from the filing of the complaint with OSHA.

IV. CONCLUSION

It is critical that companies invest in effective antitrust compliance and reporting mechanisms. The rewards for having effective compliance are significant, including avoiding an antitrust violation altogether, and when that fails, at least quickly detecting and reporting it. By contrast, the risks of not having effective compliance and reporting are even more severe with CAARA's passage. The Justice Department and OSHA are working together in partnership to ensure CAARA protects those who have the courage to report antitrust crimes. This partnership adds to the Antitrust Division's detection toolkit and is likely to result in enhanced criminal enforcement consistent with President Biden's call for all agencies to promote competition in the American economy.

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44 See infra Part I.

45 More information about OSHA's investigation is available on OSHA's website. See Occupational Safety and Health Administration, Whistleblower Investigations Manual (Jan. 28, 2016), https://www.osha.gov/sites/default/files/AnnotatedWIM.pdf.; *What to Expect During a Whistleblower Investigation*, U.S. Dep't of Labor (last visited Sept. 24, 2021), https://www.whistleblowers.gov/whattoexpect.

46 During the investigation, the employee who files the complaint is referred to as "the Complainant," and the employer, against whom the complaint is filed, is referred to as "the Respondent." Neither side is required to retain an attorney, but if a party designates a representative, the designee will serve as the point of contact with OSHA.

COMPETITION LAW COMPLIANCE: TEN KEY POINTS FOR AGENCIES AND COMPLIANCE PROFESSIONALS TO CONSIDER

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I. INTRODUCTION

In many respects, competition law compliance remains an important and topical issue, both for companies and competition enforcement agencies. Importantly, the area of competition law compliance is also highly dynamic. Indeed, while the foundations for successful and credible compliance programs in many areas of law outside antitrust have become almost universally accepted in the last two decades, antitrust compliance programs are not being so widely accepted yet. But the world has moved on, and antitrust needs to catch up.

For one thing, over the past decade, successful implementation of compliance programs has become more sophisticated and costly. Programs have had to evolve to cater for significant developments of competition law in established jurisdictions, the adoption of competition law regimes in areas and jurisdictions with little or no competition law enforcement, the proliferation of compliance requirements in other areas, such as anti-bribery and corruption, trade controls and sanctions requirements, tax evasion, data protection and privacy. In parallel, many – but not all – antitrust authorities have introduced guidance for compliance programs as well as policies that recognize robust corporate compliance programs in calculating the fine or even at the charging stage.[2]

But as life becomes more sophisticated and the predominance of the digital world increases, there are (increasingly) other challenges that competition law compliance programs must also consider. Modern technologies and ways of communication present new risks for a company and new challenges for compliance - it may be increasingly more likely that their personnel could collude with competitors using virtual means, such as social media, or even algorithms. At the same time, while conventional ways of doing business have changed, especially during the Covid-19 pandemic, with most business being conducted "virtually" with staff in their home locations, it has presented a huge challenge to business in ensuring that all staff are appropriately trained.

In summary, in the past 20 years, competition law compliance has developed from a (sometimes ancillary) activity into a genuine specialty that requires up-to-date insights into new compliance initiatives, intimate knowledge of the company's business models and potential risk areas, management skills to successfully deploy tailored compliance programs and communication skills to communicate effectively with management, personnel and, above all, external stakeholders. And increasingly, it requires a holistic approach that takes account of compliance efforts in other areas than antitrust.

This contribution does not purport to provide an exhaustive overview of companies' compliance programs or an account of enforcement agencies' advocacy efforts.[3] It merely provides a number of propositions that we believe might be worth considering by competition enforcement agencies and companies in their respective efforts to step up competition law compliance. In that respect, it is telling that, as former EU Commissioner Joaquín Almunia correctly once observed4, the purpose of antitrust enforcement is not, in and of itself, to impose high fines and other penalties. Rather, the ultimate policy goal of antitrust enforcement is to have no need to impose penalties at all. Thus, the focus of – and the proper public policy goal of antitrust enforcement – and so the goal of the antitrust agencies themselves agencies should be to focus on the key questions: "How can antitrust violations be prevented most effectively? How can companies be encouraged and incentivized to comply?" This, we submit, underscores the notion that in many respects, the interests of competition enforcement agencies and companies run in parallel.

The – admittedly simple, but nonetheless persuasive – proposition has a number of important implications. For example, we believe that there is significant scope for competition enforcement agencies to intensify collaboration with individual companies, trade federations or other business organizations jointly to enhance compliance programs and related advocacy efforts. Similarly, because some antitrust agency policies towards compliance programs may still diverge (and in some cases, significantly), international organizations such as the OECD and the International Competition Network ("ICN") are ideally placed to help disseminate knowledge and develop meaningful best practices in the field of antitrust compliance advocacy and enforcement.

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2 See for example Department of Justice, "Evaluation of Corporate Compliance Programs," at https://www.justice.gov/criminal-fraud/page/file/937501/download; Competition Bureau Canada, Corporate Compliance Programs, at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04297.html; https://www.indecopi.gob.pe/documents/1902049/2501877/Guidelines+on+Antitrust+Compliance+Programs.pdf/0aae5618-9069-14e3-624b-2719d45259ef and more generally: https://www.oecd.org/competition/latinamerica/2021forum/.

3 For a useful overview of antitrust compliance practices, see the June 2021 OECD Roundtable on Competition Compliance Programmes, https://www.oecd.org/daf/competition/competition-compliance-programmes.htm

4 Joaquín Almunia Vice President of the European Commission responsible for Competition Policy Compliance and Competition policy Business Europe & U.S. Chamber of Commerce. Competition conference Brussels, October 25, 2010 *("The ultimate aim of our cartels and antitrust policies is not to levy fines – the objective is to have no need for fines at all")* available at http://europa.eu/rapid/press-release_SPEECH-10-586_en.htm?locale=en.

II. PROPOSITION 1: CLEAR RULES AND PREDICTABLE ANTITRUST ENFORCEMENT THAT IS PERCEIVED AS LEGITIMATE AND IN LINE WITH INTERNATIONALLY ACCEPTED NORMS SUPPORTS COMPLIANCE

Let us start with the proposition that there is a correlation between predictable, transparent, and fair competition law enforcement on the one hand and competition law awareness and compliance with the law on the other hand.

The basis for this proposition is the notion that people and, by extension, companies, are more inclined to comply with the law if they understand the applicable rules and perceive those rules as fair and legitimate. The law will not be followed if it is not understood. Empirical research supports this proposition.[5] We therefore respectfully submit that agencies have a moral obligation to make the law clear – not just by imposing fines and other traditional enforcement actions, but by making the principles very clearly understood. Many agencies, including the Hong Kong Competition Commission, the Competition and Consumer Commission of Singapore and the Brazilian agency, CADE, have embraced this concept in their advocacy.

While there are some studies suggesting that agency advocacy efforts have a positive effect on the level of competition law awareness, there are unfortunately also a number of studies showing rather disappointing results.[6] Importantly however, research also shows that companies' own compliance efforts are capable to significantly increase awareness (and prevent competition law violations).

One obstacle for competition enforcement agencies is the reality that competition law rules in many areas of the economy are unclear, have become extraordinarily complex and are often viewed by business as "counterintuitive" (such as hub and spoke "cartels") and thus difficult to understand. Another example is the law in relation to platform-based industries. This is already complex and risks becoming even more complicated with governments' initiatives to adopt regulation to manage competition in those areas. It is possible that the perception of antitrust enforcement in those areas as complex and perhaps even irrational may also have a negative impact on competition law compliance generally. Similarly, irrational, or unpredictable antitrust enforcement, which is not seen as not legitimate by the business (and even consumer) community, may have a negative impact on the legitimacy of global competition law enforcement and compliance.[7]

On balance we believe that investing in tailored advocacy efforts, coupled with meaningful collaboration with business actors that may be instrumental to legitimize agencies' enforcement actions, is a good policy choice. There are already numerous examples of such collaboration being fruitful, for example the collaboration between the ICC Competition Commission and a large number of competition agencies, including the Canadian Bureau.[8] Moreover, a recent OECD overview lists a number of interesting and successful collaborative initiatives between agencies and the private sector.[9]

III. PROPOSITION 2: ENCOURAGING COMPLIANCE IS IN EVERYONE'S INTEREST

No-one need ask "why comply?" – the benefits of competition to the economy 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.

Accordingly, encouraging compliant behavior in the antitrust field is very clearly in everyone's interest. It assists agencies in their policy goal of increasing consumer welfare, it assists companies in their goal to compete fairly on the merits and to avoid the reputational damage and

5 See for example J.L. Short, 'Competing Normative Frameworks and the Limits of Deterrence Theory: Comments on Baker and Griffith's Ensuring Corporate Misconduct,' Law & Social Inquiry 2013, vol. 38, issue 2, p. 493-511, and W. Huisman & A.M. Beukelman, Invloeden op regelnaleving door bedrijven. Inzichten uit wetenschappelijk onderzoek, Den Haag: Boom Juridische uitgevers 2007.

6 See for instance ICM Unlimited (2018), Competition law research 2018 – report on behalf of the CMA, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750149/icm_unlimited_cma_competition_law_research_2018.pdf.

7 One corollary of this hypothesis is that it is in the interest of the international competition law system to monitor the implementation of best competition law practices, to assist younger agencies and to prevent ill-informed and incorrect enforcement decisions of those agencies.

8 For example, since 2014, the ICC has conducted over one hundred seminars and "round tables" promoting antitrust compliance all around the world, from China, Malaysia, and Singapore in East Asia to Canada and Brazil in the Americas – and in almost all European countries. For more information see https://iccwbo.org.

9 See OECD (2021), Competition Compliance Programmes, OECD Competition Committee Discussion Paper, available at https://www.oecd.org/daf/competition/competition-compliance-programmes-2021.pdf.

shareholder criticism that is necessarily (and rightly) attaches to violations and fines. But not least, it assists consumers by avoiding the very real harm that flows from antitrust infringements. In every sense, therefore, encouraging genuine antitrust compliance efforts can (and should) be seen as increasing consumer welfare and social good.

Having said this, agencies should recognize that a single failure to comply does not mean that a compliance program has "failed" or is not "effective" – violations are ultimately committed by people, and human beings make mistakes – so compliance efforts (and indeed enforcement actions) should perhaps recognize that there is no such thing as zero risk – and possibly no such thing as 100 percent perfect compliance. Focusing only on penalties and not on behavioral expectations does little to change societal norms.

As Hodges and Steinholtz observed when considering the effectiveness of deterrence in encouraging compliance, most people want to do the right thing and only a few do not.[10] It is logical therefore to use an approach that is geared towards most "good" people, but also to ensure that compliance efforts are targeted at those who might "go off the rails." We have mentioned above that antitrust laws (in particular) can seem complex - and even counter-intuitive to business, so that the enforcement agencies have a real responsibility in terms of educative advocacy in this regard.

IV. PROPOSITION 3: BUSINESS ORGANIZATIONS ARE AGENCIES' ALLIES IN ENHANCING COMPLIANCE

Every respectable business organization (and every respectable business) accepts that cartels are bad for business. This fact is now understood by many antitrust agencies, which have engaged actively and fruitfully with the business community, not just to spread the compliance message, but to educate businesses (particularly the SME business community) and to recognize genuine compliance efforts. This has become such an important part of the agency-business dialogue that the issue of antitrust compliance programs is now regularly discussed at the International Competition Network – both in their annual meeting and in various working group webinars, and this is very much to be welcomed and encouraged.[11]

A number of business organizations have worked hard to spread the message among the business community. For example, already in 2013 and the again in 2015, the ICC has issued Antitrust Compliance Toolkits[12] for both larger and smaller businesses and supported these with more than one hundred interactive workshops around the world. The work of the ICC has further been supported by the American Bar Association[13], and indeed many antitrust agencies themselves[14]

V. PROPOSITION 4: COMPLIANCE EFFORTS NEED TO BE DYNAMIC AND FORWARD THINKING

Almost all larger companies now recognize the need for dedicated competition law compliance efforts – indeed this is also recognized by many (and one may say most) smaller companies who wish to "do the right thing" but may not understand the rules or know exactly what to do.

As mentioned above, this puts a social responsibility on enforcement agencies not just to take enforcement action and impose fines, important as those are, but also to educate the community, to explain the rules and to give clear and helpful guidance. There has not been enough of this, but what there has been, is very welcome.

Agencies are encouraged to do more, and business associations also should redouble their efforts – not only responding to emerging risks (such as AI and digital challenges), but also to respond to new risks a company may face as it enters new markets – whether those new markets come about because a company extends its geographic footprint or through acquisition or merger. The need for a dynamic and a forward-thinking compliance approach applies not only to companies, but also to antitrust agencies when giving compliance guidance or considering genuine compliance efforts.

10 See Hodges & Steinholz, Ethical Business Practice and Regulation: A Behavioural Values-Based Approach to Compliance and Enforcement; Hart Publishing 2017.

11 See https://www.internationalcompetitionnetwork.org/.

12 See International Chamber of Commerce (2013), ICC Antitrust Compliance Toolkit, https://iccwbo.org/publication/icc-antitrust-compliance-toolkit/ (accessed on 2 February 2021) and International Chamber of Commerce (2015), ICC SME Toolkit, https://iccwbo.org/publication/iccsme-toolkit-complying-competition-law-good-business/.

13 See The Antitrust Compliance Handbook: A Practitioner's Guide, available at https://www.americanbar.org/products/inv/book/392696071/.

14 See footnote 3 above.

VI. PROPOSITION 5: COMPLIANCE EFFORTS SHOULD TAKE A "HOLISTIC APPROACH"

Many compliance professionals view antitrust practitioners – and indeed antitrust agencies – as living in an "Ivory Tower," where the specialist practitioners seem to think that the only compliance consideration should be for antitrust law and antitrust compliance. As antitrust lawyers, we naturally have some sympathy for this view. However, this is not how the world works.

Companies are increasingly facing a myriad of compliance issues – from anti-bribery and corruption compliance, to trade controls and sanctions compliance, data privacy compliance, anti-slavery, and human rights compliance – and so forth. Antitrust compliance – while rightly important in its own right – is simply one of a large number of compliance issues that a company must deal with in modern times.

To deal properly with the large variety of compliance challenges, companies are finding it increasingly essential to take a "holistic" approach to all compliance topics, ensuring that compliance efforts in antitrust are integrated into their compliance efforts in other areas outside antitrust. For example, it may make sense to offer sales departments of companies that often respond to public procurement tenders a comprehensive compliance program including both antitrust and bribery -related topics. Such a holistic approach is not only essential to ensure that resources are appropriately deployed, and real risks adequately and appropriately addressed, but it also helps minimize the very real risk of "compliance fatigue" that "overtraining" might create.

VII. PROPOSITION 6: CREATING BETTER INCENTIVES FOR COMPLIANCE EFFORTS PAYS OFF

Building, implementing, maintaining, and continuously improving a robust competition law compliance program across any organization, regardless of its size, is a costly and complex task. In-house antitrust lawyers often face great difficulties in persuading leadership to allocate adequate resources and headcount for antitrust compliance. This is not the case because companies are unwilling to comply – far from it. The challenge for internal resources occurs because not only are there very many compliance-related demands outside antitrust which need resources, but enforcement agencies really need to understand that compliance is not the only resource demand a company has. There are very many demands that a company must deal with – continuing R&D, product development, innovation and market growth being some of the many legitimate demands a company needs to cater for to serve its customers well.

A key development in recent years has been the consideration of genuine and robust antitrust compliance program as a mitigating factor in the sanctioning and/or the charging stage after a violation has occurred. A growing number of jurisdictions now take the existence of a robust compliance program into consideration when assessing violations.

In the U.S., the existence of a robust compliance program (i.e. a program that detects, addresses and mitigates antitrust issues), as well as early cooperation with a cartel investigation, have long been associated with recommended reductions in penalties.[15] In 2019, the Department of Justice ("DOJ") Antitrust Division announced a broader policy that takes antitrust compliance program into account already at the charging stage, i.e. in considering whether to file criminal antitrust charges against a company.[16] These guidelines are complementary to a similar set of DOJ guidelines relating more broadly to corporate compliance program.[17] The 2019 U.S. antitrust compliance guidelines are a welcome development and bring the Antitrust Division's practice more in line with the rest of the DOJ prosecutors and indeed closer to other antitrust agencies.[18]

15 See OECD, Promoting Compliance with Competition Law—Note by U.S., DAF/COMP(2011)20, 193-200, 199 (Aug. 30, 2012), available at https://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf.

16 See Press Release, U.S. Dep't of Justice, Antitrust Div., Antitrust Division Announces New Policy to Incentivize Corporate Compliance (July 11, 2019), available at https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance; and U.S. Dep't of Justice, Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), available at https://www.justice.gov/atr/page/file/1182001/download.

17 See U.S. Dep't of Justice, Crim, Div., Evaluation of Corporate Compliance Programs (June 2020), available at https://www.justice.gov/criminal-fraud/page/file/937501/download.

18 See, e.g. Competition Bureau Canada, Bulletin: Corporate Compliance Programs (June 2015), available at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html [hereinafter Canadian Compliance Guide]; Italian Competition Auth., Guidelines on Antitrust Compliance, available at https://en.agcm.it/dotcmsdoc/guidelines-compliance/guidelines_compliance.pdf; Comisión Nacional de los Mercados y la Competencia, CNMC Proposal For a Guide to Compliance Programs Concerning the Defense of Competition, available at https://www.cnmc.es/sites/default/files/editor_contenidos/Competencia/20200221 Compliance Guidelines_Draft_Public Consultation EN.pdf; Australian Competition & Consumer Comm'n, Guidelines for the Use of Enforceable Undertakings (Apr. 2014), available at https://www.accc.gov.au/system/files/Guide%20to%20Section%2087B.pdf; Fiscalía Nacional Económica, Programas de Cumplimiento de la Normativa de Libre Competencia (June 2012), available at https://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf; Competition & Mkts. Auth., CMA's Guidance as to the Appropriate Amount of a Penalty (Apr. 18, 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf.

A recent (2021) OECD study finds that the number of jurisdictions which will grant credit for compliance programs has increased significantly since 2011 and lists Canada, Germany, China, Hungary, the Netherlands, and Brazil as jurisdictions that have introduced credit systems for existing and/or new programs.[19]

Giving appropriate recognition to good (sincere) compliance efforts will encourage greater investment, more dedicated resources, and further efforts to enhance real compliance efforts in practice. Many in-house lawyers, the backbone of compliance efforts, argue from experience that taking into account a compliance program for the purpose of a fine would allow them to show why their businesses should invest in the program and resist budget limitations and help them in making their case for adequate compliance resources in the "internal" competition for resources.

An obvious conclusion to this proposition is that – as considerable variance continues to exist among jurisdictions – competition enforcement agencies should continue their dialogue to converge more closely on the treatment of compliance programs (and should look to fellow enforcers outside the antitrust field for useful lessons in recognizing and promoting credible and sincere compliance efforts).

VIII. PROPOSITION 7: BENCHMARKING COMPLIANCE EFFORTS MAKES SENSE

Nowadays, the critical components of a robust antitrust compliance program are well understood. For example, the ICC Antitrust Compliance Toolkit emphasizes that compliance should be embedded in the company's culture and be explicitly supported by senior management, that compliance initiatives should be tailored to the specific risks that the company faces and that compliance programs require adequate monitoring and continuous improvement.[20]

Tailoring compliance initiatives in the form of online training, in-person meetings, audits and the like can be a complex task, in particular if the company is active on many different markets, each with different competitive conditions and perhaps different legal regimes. For example, a company may wish to deploy apply a differentiated compliance approach for online and offline activities. One question that in-house compliance personnel will then often face, is whether the company's compliance initiatives are effective and sufficient.

Benchmarking compliance programs with companies active in the same or comparable markets may help to optimize compliance programs and ensure that the company's program can withstand scrutiny and may qualify for compliance credits in jurisdictions where compliance credits are available. Such benchmarking initiatives could for instance be useful – and are already explored – in the Oil & Gas sector, where companies are confronted with a limited, but very specific set of antitrust risks.

As there is no established infrastructure for antitrust compliance benchmarking initiatives, it is up to the interested parties and their advisors to reach out to potentially interested peer firms and, importantly, to put a robust governance structure in place to prevent the sharing of any competitively sensitive information and other antitrust concerns.

In any event, a critical conclusion for companies is that not only should they consider benchmarking their compliance efforts with their peers but that the companies should take the opportunity to gain experience from other companies in terms of tailoring, updating, and improving their compliance efforts continuously.

IX. PROPOSITION 8: ANTITRUST COMPLIANCE IS PARTICULARLY IMPORTANT IN THE AFTERMATH OF M&A TRANSACTIONS

It is a well-known that acquirer companies may be liable to pay damages for the anticompetitive conduct of acquired companies.[21] Attributing liability for antitrust damages to an undertaking instead of a legal entity may expand the legal exposure of companies in a company group that are considered to be part of the same undertaking in sometimes in unexpected way. Accordingly, there are good reasons to be particularly vigilant that an acquiring company does not "import" any antitrust liability as a part of an M&A transaction.[22]

19 See OECD (2021), footnote 4 above.

20 See International Chamber of Commerce (2013), ICC Antitrust Compliance Toolkit, footnote 12 above.

21 For the EU, see in particular Case C-724/17, *Skanska*.

22 This may also occur in the context of full-function or even non-full-function joint ventures.

In our experience, it is often difficult – if not impossible – to conduct a comprehensive antitrust due diligence as part of the M&A process with a view to identifying any antitrust exposure. Second, wide-scope representations and warranties are frequently not acceptable, or altogether not effective, for example if the acquisition concerns a stand-alone target company.

Establishing and implementing an effective antitrust compliance program covering newly acquired companies may in addition involve specific obstacles. In particular, antitrust audits and compliance programs may not be a top priority when the target company is being integrated in the acquirer's company's business. Second, as an effective program requires a robust compliance organization and reporting lines, it may take a while before inhouse counsel may actually be able to accurately identify the most relevant antitrust risks, decide on appropriate compliance approaches and implement adequate measures. And this may be particularly complex if the corporate cultures of the two companies are not yet well aligned.

Nonetheless, it is important for antitrust inhouse counsel to quickly come to grips with the potential antitrust exposure in the aftermath of M&A transactions and to take preparatory steps at an early stage.

X. PROPOSITION 9: EFFECTIVE ANTITRUST COMPLIANCE PROGRAMS REQUIRE UP-TO-DATE KNOWLEDGE OF THE LAW

In our experience, most antitrust compliance programs are centered around a number of well-known hardcore or per se antitrust violations, in particular price cartels, the exchange of competitively sensitive information, bid-rigging, collective boycotts and, particularly outside the U.S., resale price maintenance. This is often a good starting point.

However, in many instances, antitrust risks may also arise in connection with specific business practices and may sometimes even occur because of changes in antitrust enforcement or enforcement priorities. It is important for the company to be well aware of these changes and to timely integrate those in compliance initiatives. For example, the antitrust treatment of wide and narrow parity clauses in relation to platform-based businesses has undergone remarkable changes in the past few years. Similarly, a number of antitrust agencies, including the European Commission, are increasingly concentrating on potential antitrust violations on the interface between IP and antitrust law.

The implication of this proposition is that antitrust compliance professionals should preferably have a solid understanding of the law, as well as changes to the law, next to being well-integrated in the company's organization. And this in turn may influence the staffing of antitrust compliance functions and the relationship with the (corporate) legal department of the company and external advisors.

XI. PROPOSITION 10: DON'T BE OBLIVIOUS TO TECHNOLOGICAL CHANGES

Finally, when embarking on compliance initiatives, it may be useful to appreciate the significance of the new digital business environment and innovative technologies. This is because antitrust violations may occur online, or be facilitated by digital technologies, such as technologies to monitor competitors' market conduct.[23] And competition enforcement agencies are known to utilize new technologies themselves to uncover illegal conduct.[24]

At the same time, new technologies using big data and artificial intelligence tools are also increasingly used by companies for compliance purposes. For example, AB InBEV has developed its own data analysis tool and machine-learning technology to identify bribery and antitrust risks.[25] And, significantly, some competition enforcement agencies expect companies to utilize sophisticated data analytics as part of their compliance programs.[26]

23 See for the June 2017 OECD Competition Committee Roundtable on algorithms and collusion, available at https://www.oecd.org/competition/algorithms-and-collusion.htm.

24 For example, the Dutch competition enforcement agency, the ACM, recently imposed a fine of € 39,875,500 on Samsung for coordinating the retail prices of Samsung television sets together with various retailers. The ACM evaluated the use by Samsung of web crawlers to monitor its retailers. See https://www.acm.nl/en/publications/acm-fines-samsung-for-influencing-the-online-prices-of-television-sets.

25 See note four, above, p. 40.

26 See for example https://clsbluesky.law.columbia.edu/2021/10/19/skadden-discusses-government-expectations-for-companies-data-driven-compliance-programs/.

ANTITRUST COMPLIANCE: HAVE YOU CONSIDERED THESE 10 QUESTIONS?

BY JOSEPH E. MURPHY [1]

1 Joseph E. Murphy has 40 years' experience in the field of organizational compliance and ethics. He practices law in the compliance and ethics field through Joseph E. Murphy, PC and is co-founder of Integrity Interactive Corporation (now part of SAI Global).

Every compliance program plays to two audiences. One is your people: is it effective in reaching them and preventing violations. The second is the government: is your program credible and will it convince enforcers to give you credit for your compliance work.

There is abundant guidance about compliance programs available, both from governments and the private sector. Drawing from parts of these that have not received enough attention among companies, and adding points that are essential yet not fully recognized even in the government standards, this article offers ten questions to ask yourself, to see if you have caught important points that can determine the success of your compliance efforts in the antitrust/competition law area.

1. Will your employees be your advocates?
2. Are your program steps up to industry practice?
3. Do you use screening and data analysis?
4. Have you ignored incentives in your program?
5. Do you have an empowered, independent, connected CECO?
6. Do you communicate, or only train?
7. Does your CEO actually care or just talk?
8. Do you really do nothing to prevent retaliation?
9. Does your program exist outside of headquarters?
10. Have you isolated yourself in an antitrust silo?

I. WILL YOUR EMPLOYEES BE YOUR ADVOCATES?

Are you sure all your employees can and will present your case? When someone talks with your people, will they come away with the impression that your compliance program is deeply ingrained in the company? Why does this matter?

When it comes to convincing the antitrust enforcers that you have a program that deserves their respect (and credit), there is still an assumption that the enforcers will wait for you to put on a formal presentation before making any decisions. But this is because too many people do not read carefully what the government has said.

The Antitrust Division, in its compliance program evaluation questions, spells out very clearly that the Division is not just sitting back waiting for your presentation:

> "Division prosecutors should evaluate compliance programs throughout the course of their investigation, including asking relevant compliance-related questions of witnesses, and should not wait for companies to offer a compliance presentation before beginning their evaluation of a company's antitrust compliance program."[2]

The Canadian Competition Bureau also takes this logical approach: "[I]nformation gathered during the investigative process that pertains to the credibility and effectiveness of a compliance program will be shared with the C[compliance] U[nit."[3]

The important message here is that you need to assess your program by talking with your employees. What would they say about your program if asked in a grand jury? Yes, you should be able to put on a convincing presentation and show what you have done. But you need to be sure it has reached your people, all throughout the business.

2 U.S. Department of Justice Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 2-3 (July 2019) https://www.justice.gov/atr/page/file/1182001/download (hereinafter "Antitrust Division Guidance").

3 Competition Bureau Canada, Bulletin - Corporate Compliance Programs 6 (June 3, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/$FILE/cb-bulletin-corp-compliance-e.pdf (hereinafter "Canadian Bulletin").

II. ARE YOU UP TO INDUSTRY PRACTICE?

How does your program compare to programs in other companies, and does that matter? The Antitrust Division addresses this in language that is usually ignored by commentators:"Is the company's antitrust compliance program . . . consistent with industry best practice?"

What does the Division mean by this, and where does this language come from? The Division here is drawing on the Federal Sentencing Guidelines standards, in the notes which include these two references:

> *"2. Factors to Consider in Meeting Requirements of this Guideline.—(A) In General.—Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include: (i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct. (B) Applicable Governmental Regulation and Industry Practice.—An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmentalr egulation weighs against a finding of an effective compliance and ethics program.*[4]

Note that the literal language here reflects a drafting error in the Sentencing Guidelines. It is not that a program must only be what others do. Rather, this just represents a minimum standard.

Finally, the idea of comparing industry or best practices goes back to the 1980s and an organized attempt to develop industry-wide best compliance practices, the Defense Industry Initiative, which included conferences among member companies to discuss and demonstrate best practices. See Defense Industry Initiative (Best Practices Forum) https://connect.dii.org/events/event-description?CalendarEventKey=812e6c09-a188-410c-ad7c-680e42ad2186&Home=%2fhome Here members convene to compare notes on best compliance practices among the defense contractors.

No one needs to remind an antitrust lawyer about the risks of industry participants agreeing not to compete on something, even compliance standards. But here we are talking about what the government can expect in a good program. For example, if most others in the industry are doing screening and you claim it is not possible, you are very likely to lose that argument. If you have been lazy and lagged behind industry peers you will have this used against you.

III. DO YOU USE SCREENING AND DATA ANALYSIS?

The Antitrust Division expects companies to use data analysis to detect misconduct. As its guidance asks:

> "Does the company use any type of screen, communications monitoring tool, or statistical testing designed to identify potential antitrust violations?"[5]

Perhaps the first reference to "screening" in a government standard was in the Chilean competition law enforcer's standards for competition law compliance programs, which stated:

> "Both monitoring and auditing can even incorporate techniques referred to as "screening," which consists of the use of econometric tools that detect the existence of possible harmful practices that threaten competition. It is advisable, in principle, to hire specialized outside personnel for its implementation."[6]

Screening involves the structured analysis of business data to detect unusual patterns in the business' numbers and possible markers for collusive conduct. Thus, business numbers such as changes in market share and trends in margins may indicate patterns inconsistent with a competitive market and more indicative of collusion.[7]

4 U.S.S.G. section 8B2.1 Commentary app. note 2 (A) & (B) (emphasis added). https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-8 (hereinafter "Sentencing Guidelines").

5 U.S. Department of Justice, Antitrust Division, Compliance Guidance, Article10.

6 Fiscalía Nacional Económica (FNE), "Competition Compliance Programs: Complying with Competition Law" 14 (June 2012), http://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf .

7 Abrantes-Metz, Bajari & Murphy, "Antitrust Screening: Making Compliance Programs Robust," http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648948.

The Antitrust Division Guidance provides options to satisfy this standard, and the effort should be commensurate with the size of the company. A small company should be looking for abnormal patterns in its data, but would not be expected to have a sophisticated artificial intelligence program. On the other hand a big company with significant risk is expected to use more sophisticated tools to analyze its data.

While companies should be following this guidance and reviewing their numbers for signs of improper conduct, it remains the case that there is no substitute for being with your people and really listening to them. You should also listen to customers; they may detect patterns you won't see, because they are the victims of cartel conduct. Data can be a helpful tool, but we also need to avoid data hubris by thinking that data is a cure-all. The human element is always needed as well.

IV. HAVE YOU IGNORED INCENTIVES IN YOUR PROGRAM?

Why do businesses use incentives to drive behavior? Because they work. Why does the Antitrust Division expect incentives to be part of your compliance program? Because they work.

Among the Division's evaluation questions are:

> "What incentives does the company provide to promote performance in accordance with the compliance program. See U.S.S.G. § 8B2.1(b)(6)(A)
> Has the company considered the implications on antitrust compliance of its incentives, compensation structure, and rewards?
> Does the company incentivize antitrust compliance?" Antitrust Division Guidance 12.

Nor is this focus in incentives unusual in program standards. The Spanish Competition Commission, in its guidance asked: "Does your company have an incentive system that promotes and fosters compliance with competition law and policies?"[8]

The Competition Commission in Singapore also observed that "Adherence to compliance policy could also be used as one of the criteria against which an individual's and department's performance is appraised."[9]

In the same vein, the Canadian Competition Bureau has observed that: "Incentives work as effective tools for a business that wishes to promote compliance by employing concrete actions."

In other words, incentives belong in any program.[10] Failure to address incentives is one of the biggest recurring weaknesses in compliance programs, and a prime reason they fall short.[11]

V. DO YOU HAVE AN EMPOWERED, INDEPENDENT, CONNECTED CECO?

The head of your compliance program, your Chief Ethics and Compliance Officer ("CECO"), needs to be empowered, independent, and connected to those with power in the organization, and must have line of sight into all parts of the business.

This is an essential point that enforcers have recognized. The Antitrust Division observes that those responsible for the program must have "sufficient autonomy, authority, and seniority . . . as well as adequate resources . . . ." The Division also asks "How often does the compliance officer or executive meet with the Board, audit committee, or other governing body?" "How does the company ensure the independence of its compliance personnel?" Antitrust Division Guidance 6.

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8 Comision Nacional de los Mercados y la Competencia, Antitrust Compliance Guidelines 16 (June 10, 2020) https://www.cnmc.es/sites/default/files/editor_contenidos/Competencia/Normativas_guias/202006_Guia_Compliance_FINAL_eng.pdf (hereinafter "Spanish Guidance").

9 "Conducting a Compliance Programme," Singapore Government, Competition Commission Singapore https://www.cccs.gov.sg/faq/compliance-with-competition-law.

10 The white paper Murphy, "Using Incentives in Your Compliance and Ethics Program" (SCCE; 2012), https://assets.hcca-info.org/Portals/0/PDFs/Resources/library/814_0_IncentivesCEProgram-Murphy.pdf explores the broad variety of ways companies can do this.

11 See Joseph E. Murphy, Policies in conflict: Undermining corporate self-policing, 69 Rutgers U.L. Rev. 421, 473-76 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3685529.

The Spanish Competition Commission also reflects this focus in its questions: "Does the compliance officer have full autonomy and independence in performing their duties?" "Is the compliance officer in direct communication with the governing body and top executives?" Spanish Guidance 18.

The Canadian Competition Bureau addresses this important point in detail: The compliance officer should have "high visibility" and "independence, professionalism, and the authority to implement and enforce a credible and effective program across the company;" and "the opportunity to participate in senior management decision making". "The company's board of directors should appoint the Compliance Officer . . . ." "The Compliance Officer should only be removable by the board of directors on terms set in advance by the board." Canadian Bulletin 11.

A company wishing to show leadership on this important point could also recruit a CECO from another company to have on its board of directors, and could have a strong employment contract for the CECO.

VI. DO YOU COMMUNICATE, OR ONLY TRAIN?

Often it seems compliance work is weakened by a failure of imagination. Given the many innovative communications methods we experience when online, it has to be a deep failure for compliance experts to limit their efforts to conventional training. Here we hit an odd discrepancy. Although the Sentencing Guidelines clearly uses both the words "training" and "communicate," they are often read as if they only referred to training. But training without other, recurring communication is a weak way to promote compliance.

Compliance professionals need to be up-to-date on the state of the art in communications. If apps and short video clips work for other purposes, why not use them in compliance? People remember stories better than lectures. Why not use any tool that can illustrate antitrust risks in a memorable way? Why not provide short examples of those who broke the rules and were held accountable? Having just been exposed to the addictive characteristics of TikTok, a logical question is whether the short video format could be used to present short but pointed compliance messages. Will employees remember it? That is always the question.

Each day we experience a constant stream of messages. Why not observe which ones work for you, and then see what you can use to develop effective communications tools? Do posters work in your environment? Do your employees still read emails? Will a series of short video compliance dramas reach your people? Consider also just taking one of your marketing and advertising experts out to lunch and hearing from experts about what really works to reach people. Training, if it is a very high priority, may happen once a year. People receive communications messages constantly. If you want to compete effectively for their attention, you should not limit yourself to a one shot approach.

VII. DOES YOUR CEO ACTUALLY CARE OR JUST TALK?

There are powerful sayings about the powerlessness of mere talk. When enforcers call for commitment and leadership by the top executives, it can never mean mere talk. The question is, how do the CEO and other leaders show support for the compliance program. For example, the Antitrust Division Guidance (p. 5) asks "What concrete actions have [senior leaders] taken to demonstrate leadership in the company's antitrust compliance … efforts?" The International Chamber of Commerce, in its toolkit on compliance (which was referenced in the Antitrust Division's Guidance as a useful resource), provides a helpful list of things senior managers can do. It includes "[a]ttendance of your company's senior management at training sessions with lower level employees" and "Senior managers … consistently asking about compliance in meetings business briefings."[12]

VIII. DO YOU REALLY DO NOTHING TO PREVENT RETALIATION?

There are many areas the various government guidance materials cover well. But there is one that they, and most compliance programs, almost completely fail to address in any useful way: retaliation. There are few things more toxic to effective compliance programs than retaliation, yet it is one of the most prevalent occurrences and one of the least addressed in practical terms.

12 International Chamber of Commerce, The ICC Antitrust Toolkit: Practical antitrust compliance tools for SMEs and larger companies 9 (2013), https://iccwbo.org/publication/icc-antitrust-compliance-toolkit/ (hereinafter "ICC Toolkit"). More examples can be found in Murphy, "Tone at the top: How the CEO can do more than just talk," Compliance & Ethics Professional 80 (Oct. 2014). For example, instead of just attending a training session, have the CEO be the first to attend (and actually ask questions). The CEO can also personally champion tough discipline for senior people who go against the compliance program.

Generally, every governmental guidance, and every company's policy says the same thing: Don't retaliate. Don't tolerate retaliation. That's it, not a word more. But if you are a compliance person you can count on one thing in this area: you are underestimating this risk. Retaliation is not some exotic category of risk rarely seen in the real world. To the contrary, absent serious intervention it will happen. Those who speak up will be knocked down.

Some standards do talk about allowing people to report "anonymously or confidentially" and "without fear of retaliation." And when it comes to reporting, these standards will call for allowing "anonymous and confidential" reporting. But these concepts are very limited in their effectiveness, given how devoutly people try to figure out who called, and probably in most work units can figure this out fairly quickly. (Note, too, that the enormously broad language of privacy laws like GDPR will invite those who are targets of whistleblower reports to use this broad law to undercut investigations and smoke out those who file reports.) Merely calling for confidential treatment will not prevent bosses and colleagues from figuring out who blew the whistle and finding ways to get even.

Yet despite this ostensible concern about retaliation, these guidance materials typically provide no details on how to prevent retaliation. The Canadian Bulletin does use strong words on this point, calling for programs to: "ensure that staff can report contraventions . . . confidentially and without the threat of retaliation." (p. 18) "Anyone reporting a concern or cooperating in an investigation should be guaranteed the strongest of protections from retaliation by others in the business, including management." (p. 19) The Bulletin offers this guidance: Companies, in assessing their program, should check whether, for a reporting system, "are employees willing to use it, or whether there is a fear of retaliation." (p. 22).

Consider these specific steps to address this pervasive risk:

a) Include retaliation as a separate risk, to be addressed in your risk assessment and risk abatement plans.

b) Hire a whistleblower from another company to an important position in your company. That will demonstrate a real commitment.

c) Survey employees on how they feel about reporting misconduct in your company. See Canadian Bulletin 19.

d) Train managers on how to respond to concerns and how to avoid retaliation.

e) Follow up with those who have raised concerns. Compare their treatment over time. If you do this and find no difference you are likely not looking carefully enough.

f) Severely discipline those who threaten or engage in retaliation and then publicize this as broadly as possible (while shielding the actual identity of the person).[13]

IX. DOES YOUR PROGRAM EXIST OUTSIDE OF HEADQUARTERS?

In compliance and ethics, we recognize that compliance does not just happen by waving a magic wand or spreading magic compliance dust (credit to Kristy Grant-Hart for this magic compliance dust concept). A program does not happen in a company unless there is a manager or managers with specific responsibility for making this happen. This point is generally recognized when applied to corporate headquarters. But logic and experience compel the next point: If you want your program to reach all departments and all locations there also needs to be managers there to make this happen. In other words, there need to be field compliance people. The titles for these positions may vary, and include: ethics ambassadors, compliance coordinators, compliance liaisons, compliance champions, compliance and ethics leaders, ethics liaisons, facility compliance officers, and business unit compliance officers.

Unfortunately, this is an area where much of the guidance, including that from the Antitrust Division, falls flat. Is there someone in your sales offices, someone in your bidding unit, someone in HR responsible for helping to get the word out about compliance, and also giving feedback to the CECO, so the program is working effectively throughout the business? Of course the local compliance person need not be full time, but this important responsibility should be part of this person's job description and part of their evaluation. The CECO should play a role in this, having a say on who is selected in each business unit, and distinct input on the person's assessment. There should also be some training for this role. It is best if this role counts as a positive in issues like promotability.[14]

13 Further steps to address retaliation are available in materials from the US Equal Employment Opportunity Commission, "EEOC Enforcement Guidance on Retaliation and Related Issues" (Aug. 25, 2016)(V. "Promising Practices") See https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues.

14 See Murphy, "Field & Business Unit Compliance & Ethics Managers – Bibliography," https://www.linkedin.com/pulse/field-business-unit-compliance-ethics-managers-joe-murphy-ccep-1e/?trackingId=T1eKyM3isF%2Bc1%2F0Q4dKVlg%3D%3D.

X. HAVE YOU ISOLATED YOURSELF IN AN ANTITRUST SILO?

Maybe, if you were doing antitrust compliance work in the 1960s you could legitimately focus just on antitrust and not worry about how other compliance risks are handled. But the 60s are long past. It makes no sense to pretend that antitrust is a company's only risk, or that somehow it is significantly different from all other types of compliance risk. Antitrust compliance efforts should not be isolated in an antitrust silo. Antitrust is just one risk and needs to be integrated into a strong, overall compliance and ethics program.

If, instead, it is treated as standalone then it can lose the independence and access to power that is so necessary for effective compliance program leadership. It is not realistic to think that each compliance area will have full access to the board, sufficient independence to act, and full line of sight into all of the businesses' operations. Instead, separation breeds duplication, training fatigue, and resentment by employees of what they perceive as wasteful interruptions. It is essential to coordinate compliance efforts for efficiencies of scale, minimal intrusion in the business, and effective use of resources.

This is an important point recognized by the OECD in the context of compliance programs to fight corruption. Referring to the Good Practice Guidance that addresses bribery the OECD's Working Group on bribery says that:

> "It recognises that to be effective, such programmes or measures should be interconnected with a company's overall compliance framework."[15]

In the context of competition law compliance, the Canadian Competition Bureau noted that "[to] evaluate the effectiveness of an existing program, the Compliance Officer could … [minotior] developments from areas of corporate compliance outside of competition law and, when appropriate, incorporate their best practices into the program."

Similarly, the International Chamber of Commerce, in its antitrust compliance toolkit, observes that options may include "Recognizing that antitrust risk is just one of the risks your company may face, and integrating the antitrust programme with other compliance programmes, controls and governance policies."[16]

Those engaging in antitrust compliance work should recognize that they are operating in a field that is separate from the practice of antitrust law – the field of compliance and ethics. It has its own literature, professional standards, and accumulated learning. No compliance person should be cut off from the experience and wisdom the rest of the field offers.

XI. CONCLUSION

These 10 questions are offered as a stimulus to broaden the thinking about antitrust compliance. It does not purport to be comprehensive; government materials like the Antitrust Division Guidance, the Canadian Bulletin and the Sentencing Guidelines are excellent sources of overall guidance. But even with these it is important to keep challenging ourselves and staying up with developments in our field. We should always be challenging ourselves to keep ahead of antitrust violations and be successful in our missions.

15 OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Appendix II, Introduction, http://www.oecd.org/daf/anti-bribery/44884389.pdf.

16 ICC Antitrust Compliance Toolkit, Article 4. See https://iccwbo.org/publication/icc-antitrust-compliance-toolkit/.

THE COMPLIANCE PROGRAM CRUCIBLE: THE ART OF THE INTERNAL INVESTIGATION

BY DONALD C. KLAWITER[1]

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I. INTRODUCTION: THE CRITICAL ROLE OF THE INTERNAL INVESTIGATION

A compliance program that meets the requirements set forth by the Antitrust Division of the U.S. Department of Justice is a complex mechanism composed of many moving parts. A program that is "well designed," "applied earnestly and in good faith" and "works in practice" is much, much more than an annual lecture, a multiple-choice test, or even an audit.[2] Indeed, the full-scale internal investigation usually occurs only when a government investigation is rumored or initiated, or a whistleblower emerges within the company or the industry. Because of its scope, substantial cost and impact on the business, it is not something to be approached casually or handled internally. The investigation should always be authorized by the corporate board or the board committee responsible for the investigation, and it must be conducted by experienced outside counsel for the protection of the company and its executives and employees.

A well-planned and well-executed internal investigation requires a creative approach to gathering evidence to achieve a result that puts the company in the best possible position to gain a good result from the Antitrust Division. In an era of superior technology that makes document production and document review much more scientific, rapid and reliable, the true skills in conducting a successful internal investigation are experience and creativity – in other words, it is art, not science.

Given that beauty in art is in the eye of the beholder, there can be many successful approaches to the internal investigation. The strategies and tactics described in this article worked for me and my colleagues; they also evolved over time, particularly in addressing international cartel investigations. This article, therefore, is intended to open the mind to successful and innovative strategies that internal investigation teams have used successfully for our clients.

There are truly excellent books and articles that set out, in detail, how to conduct internal investigations and how to prepare witnesses.[3] I highly recommend those materials to organize and conduct the investigation step-by-step. Mike Tigar's books, in particular, speak with reverence on the relationship between the client/witness and counsel, noting that witnesses look to counsel for "guidance and strength."[4]

This article proposes ideas that may improve the internal investigation, some by careful and deliberate planning and strategy – and some by simple luck. It is my hope and intention that you use these strategies to conduct a more inspired investigation and obtain the best possible result for your client.

II. THE ART OF BUILDING THE INTERNAL INVESTIGATION TEAM

The Team Leader should always strive to build the "dream team." The Team must be diverse – by gender, race and ethnicity – with a special focus on Asian counsel, especially if there are language challenges. To the extent possible, a native speaking counsel should be a senior team member, since counsel will be important to the witnesses – and to the nuances of language and culture.

A. The Value of Trial Experience on the Team

To the extent possible, at least one team member should have tried a criminal antitrust trial to verdict. It is vitally important that a team member have experienced the investigation and prosecution of a criminal case to understand how the evidence is developed, how the witnesses are positioned and how the discipline of a judge presiding affected counsel's thinking and action. I had the great advantage of trying my first criminal antitrust case as an Antitrust Division prosecutor at age 27 and several of the techniques discussed in this paper flow directly from that experience.

2 The Antitrust Division's corporate compliance policy, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigation," was released by the Antitrust Division in July 2019.

3 The most comprehensive volume on how to conduct a full-scale internal investigation is Brad D. Brian, Barry F. McNeil & Lisa J. Demsky, editors, Internal Corporate Investigations, Fourth Edition, ABA Section of Litigation, 2017; a fine article on preparing the witness is Daniel Nathan, et al., The Art of Prepping a Witness, Litigation Magazine, Volume 47, Number 3 (Spring 2021). For a truly outstanding analysis of witness development, see Michael E. Tigar, Examining Witnesses, Second Edition, ABA Section of Litigation, 2003 and Michael E. Tigar, Persuasion: The Litigator's Art, Second Edition, ABA Section of Litigation, 1999.

4 Tigar, Examining Witnesses at 468-472., *supra* note 3.

B. The Importance of Diversity to Witness Relationships

Gender, racial, and ethnic diversity are important because witnesses relate to different styles and different personalities. We have extensive experience with switching off questioners to test whether a certain witness relates to a certain examiner, and, at the end of the case, we have asked which team member they felt most comfortable with when discussing bad conduct. My experience has demonstrated that senior executives tend to prefer women examiners to men. We have gotten more detail and more incriminating evidence when a woman leads the questioning. When the witness displays all the attributes of a bully, however, an older male examiner appears better, although the likelihood of that type of witness providing incriminating evidence is very remote.

C. The Enormous Value of Native Translator/Counsel

When representing non-U.S. companies and individuals, it is critical to have senior counsel on the team who is a native speaker of the company's home. In most situations, this person would be from the company's outside counsel in its home country. The counsel will generally serve as the chief translator in the investigation and a true partner in setting strategy.

Non-U.S. counsel has an even more critical role when it comes to presenting witnesses to the Antitrust Division. The Division usually brings its own non-lawyer professional translator, who translates the questions and answers in the witness interviews. In our experience, Division staff never invited defense counsel to bring their own translator. Our strong recommendation is that defense counsel **always** bring a native translator/counsel who is familiar with the case to any meeting with the Antitrust Division, and any internal investigation interviews as well.

In one early international cartel case, we prepared and presented three key witnesses to the Division in an effort to obtain corporate leniency. The Division staff brought a non-lawyer professional translator. We brought along native translator counsel who had worked with the team throughout the investigation. She had a full understanding of the facts, the corporate and national cultures and the concerns of the witnesses with being interrogated by Division counsel. Early in the interview, the witness became visibly upset and had difficulty answering questions. Our native translator/counsel intervened and raised serious objections to the questions of the Division's translator, who was asking for incriminating conclusions, not facts. Our vigilant native translator/counsel changed the tone of the interviews for the rest of the presentation and the witness performed well. Without her knowledge of the case and her courage in questioning the Division's practices, the witness would not have provided the excellent evidence he did. Ultimately, we qualified for leniency, and the witnesses were pleased to be protected and defended.

From that day to this, a native translator/counsel has always been a major participant in our internal investigation teams for non-U.S. jurisdictions. It makes an enormous difference for the Team, for Division staff, and, especially for the client.

D. The "Common Interest" Relationship with Independent Counsel for Executives

In virtually all criminal investigations, several senior executives are advised that they require independent counsel to avoid actual or potential conflicts with the company. In most situations, company outside counsel recommends counsel to the executives. Although they are not a formal part of the Internal Investigation Team, counsel for the senior executives generally have a common interest with the company since the company operates through its executives. The executives, through their independent counsel will likely join a joint defense agreement with the company and its counsel. It is, after all, company outside counsel and they are the ones who conduct the internal investigation that recommend independent counsel to the executives. Matching up independent counsel to senior executives is, itself, an art. Independent counsel, therefore, should be considered an important of the Internal Investigation Team within the limits of the joint defense agreement. We maintain a list of outstanding counsel that focuses on the special skills of those counsel – trial experience, relationships with Division staff, substantive knowledge that will be of great value to the entire Team – corporate and individual.

III. THE INITIAL APPROACH TO THE ANTITRUST DIVISION STAFF

As soon as we are retained as the Internal Investigation Team, our practice is to call the Antitrust Division to advise staff that we are acting for the company and wish to open up communications that hopefully will be of mutual value. We always advise the staff that we have not yet started our investigation, and then ask two questions: (1) is corporate leniency available to our client, and (2) what type of evidence could the client produce which would further the Division's investigation and the client's situation. I believe that counsel must have this conversation before the internal investigation begins (although it will be important be advise the Division of the existence of the company's compliance program, if they have one) to make certain counsel is being honest and direct with the Division.

Over the years, we have asked the "is leniency available?" question over twenty times, and we have at least three leniencies and numerous "second in" results to show for it. Whether leniency is available or even vaguely possible (as it often is) is important information for how to conduct the internal investigation and what to tell the client.

Whether the Division staff provides any information in response to counsel's "what should we be looking for as we begin the investigation" depends on the staff and whether the staff has a degree of trust in counsel. This is not a one-time conversation – it is a process that should begin at the first meeting and continue to resolution. Most Division staffs will provide some helpful information; there will, however, always be those prosecutors who respond to your inquiry by folding their arms and responding: "Your client knows what it did." Do not allow that attitude to stop you from attempting to engage them in discussions about the evidence. One area of comfort is that the stonewalling prosecutor is treating everyone the same way, so you have a level playing field. Make it very clear to that prosecutor that you will be back to discuss the evidence on a regular basis.

IV. ENTER THE COMPANY HEADQUARTERS WITHINDEPENDENCE, EMPATHY AND DIGNITY

The Internal Investigation Team must project a feel of independence and skepticism towards all corporate executives, including the general counsel's office. There must be a dignified, arms-length relationship, even if the Team and general counsel and staff are good friends with outside counsel. At the same time, the relationship must not be hostile – the corporate management and general counsel's office are scared and are looking for guidance and strength from the Internal Investigation Team. It should be a kind and empathetic relationship, and, at the same time, a disciplined and formal business dealing. We always tell the executives and the general counsel that, at the end of the matter, we want them to be able to truthfully say that we were tougher and more demanding than the Antitrust Division staff. Happily, most of them do. An example from an actual investigation illustrates the situation: The Team was invited to the company's national sales retreat to interview all employees potentially involved in the conduct (which was an efficient way to conduct a nationwide investigation). Because we needed to demonstrate our empathy, we properly and politely declined to attend the lengthy social events each evening. That turned out to be an important decision given a serious disagreement with senior management before the retreat ended. Not attending the events gave everyone time to reset and develop a proper strategy.

The Team can learn an enormous amount at the initial "all hands" meeting by the Team Leader with the company's executives. There are two elements that are critical at this stage: first, the opening group meeting should be direct and frank. The Team Leader needs to set out the scope and seriousness of the investigation, the liability executives could face, the need for separate counsel in certain instances and the serious liability for obstruction of justice and perjury or false statement, along with prohibitions on discussions about the investigation with each other. Second, at the opening group meeting, a member of the Team should position himself or herself to observe the executives in the meeting – and, if possible – create a seating chart to identify executives. We have experienced situations where executives in such a meeting become visibly uncomfortable or turn to make eye contact with a colleague or colleagues, as well as situations where executives in the room take a contrary view of the facts when asking questions. These executives can inadvertently provide key information to the investigation. In one illustrative case, a very senior executive angrily shouted "that conduct is not illegal in this country." He was technically right; however, the case involved bid rigging in the United States, not in Europe where he worked. He did not realize it, his outburst provided us with significant information for the investigation.

The Team should always look and act professionally. Despite the casual dress policies of most companies – and in contrast to it – the Team should look like prosecutors and FBI agents in the grand jury. Our teams were instructed by several general counsel to wear casual clothing at the interviews to have the executives feel comfortable and secure. That is exactly why the investigative team should wear business attire. Business attire should be worn even for virtual interviews on Zoom or Microsoft Teams. The witnesses should also be addressed as Mr., Ms. or Dr., not by first name. This is common practice in Europe and Asia, and it is very effective in instilling in witnesses the seriousness of the process. Several general counsel who have questioned our business attire rule later acknowledged its importance and value, as they understood that it made the executives more serious and respectful of the process.

V. THE ART OF GATHERING EVIDENCE: DISCOVERING "INVISIBLE" EMPLOYEES

Before interviewing the key senior executives, the Team should develop a plan based on what they have learned from the Antitrust Division, general counsel and early document production. From that meeting, the Team should develop a list of what we call the "invisible employees." These are employees who know how the company operates – from pricing and knowledge of the activities of senior management to knowing industry jargon and having familiarity with competitor relationships. These employees, in our experience, have told the Internal investigation Team some incredible things. This has two possible effects: first, on pricing, the Team can learn about strange and unexplained patterns of pricing (from

people far more likely to explain why the pricing decisions make no sense); and second, on industry practices, explaining industry jargon and acronyms that will show the executives that the investigative Team knows the facts and behavior of the industry.

Finding the "pricing person" is often the key to deconstructing industry pricing. The person is usually underappreciated by the executives, underpaid given the importance of their jobs, and probably much smarter than their superiors. They know a great deal and are happy to talk about their career for as long as you can manage. In one case, the individual was the technical arbitrator of price sequences – and was instructed to talk to pricing people at all the other companies in the market so that the prices were uniform. As it developed, that individual was a critical witness in the case.

Learning industry jargon, especially with regard to competitor relationships, is a key method to show the executives that the Team is serious and knows what happened. In one case, an assistant to a pricing executive told the Team of confidential terminology about a trade association that suggested that it was a front organization for discussions of price. When a certain acronym was mentioned in the executive interviews in a very matter of fact manner, the executives looked stricken and soon explained how the conspiracy worked. They later confided that they were shocked by the Team's knowledge, since everyone was sworn to secrecy by the key conspirators. One break in the wall is usually all you need to develop the case – and obtain a favorable deal.

Finally, make certain that the Team meets with personal assistants and secretaries who know the senior executive's travel patterns, activities in the office and correspondence, documents, and telephone activity.

A real-life situation involved a corporate head of sales who proved to be a difficult and evasive witness. He gave the Team no useful information. When he left the office for a customer call, we questioned his assistant about his demeanor. Asking if anything unusual was going on in the office or in his life, she thought for a moment and said that the one strange thing he did the night before was to ask how the office shredder worked. She said in 10 years he had never asked about the shredder. She offered to shred the documents, but he refused. She believed that the documents he was shredding were pricing documents. When confronted the next day, he claimed the documents were personal financial documents that he shredded every week. He was terminated two hours later by the General Counsel.

VI. THE ART OF PREPARING THE VERY BEST WITNESSES FOR COOPERATION WITH THE ANTITRUST DIVISION

In evaluating executives as witnesses, the Team should cultivate its best witnesses based on performance and credibility. The company, through the Internal Investigative Team, should never be reluctant to recommend its best witnesses to the Antitrust Division staff, especially if it has applied for leniency or is looking for a deferred prosecution agreement or a 'second in' deal. It is incumbent on the company and the Team to support its cooperating executives and prepare them to be excellent witnesses.

There are two real life situations – one of them very successful, and one less so at that moment – that illustrate the art of preparation and its success. First, when your most senior executive implodes as a witness, look down the organization chart to one of the "invisibles."

Several years ago, the most senior executive at a key company was an impossible witness to deal with. His assistant, however, was the best witness I have ever encountered. When asked any question about meetings or conversations with competitors, he would raise his head as if staring into space and recount events and conversations in amazing detail. When we asked the witness and his colleagues whether he had a photographic or identic memory, they all said he had a good memory, but nothing else. At trial, he was a prosecution witness who, staring into space, presented the details of a key meeting and identified everyone's position around the meeting table – corroborated by the check where the person who paid wrote the names of the individuals in the order of seating. Defense counsel decided to argue with him, suggesting the meeting was a golf outing; the witness, staring into space, described the color of the suits, ties, and shirts everyone was wearing. It was truly a breathtaking and dramatic moment in an antitrust trial.

Discovering the witness' special skill and fitting it into the examination took a good deal of time and clearly kept the witness from prosecution – unlike his boss. Although this is likely a once-in-a-lifetime witness, it demonstrates the importance of having the patience to work with a witness, especially when he is the second-tier witness who made the case.

The second real-life situation developed in the earliest period of the international cartel era when the Antitrust Division was developing its 'leniency plus" and "penalty plus" policies. Many of the international companies manufactured and sold multiple products, and, as history

shows, were involved in multiple conspiracies. As a result, the Division began to ask witnesses what they called the "omnibus question." The question was, essentially, "are you aware of any discussions or agreements on pricing or allocation of territories or customers relating to any product in the United States or in any country of the world?"

The first witness to confront the question simply said no, and the Division staff did not comment, but later raised the issue with us. We knew it could jeopardize the deal the company was negotiating. We immediately visited and interviewed the senior executive staff responsible for the second product the company sold. Within a week, we presented several key executives to the Antitrust Division staff. The Division was satisfied with the evidence; the deal was unaffected; and we knew that the "omnibus question" would become a regular fixture of Division interviews.

Since that time, each witness that the Team prepares is questioned in detail on price activity in other product areas. The witnesses are advised of the dangers to the company and to the executive by not taking the "omnibus question" seriously. This topic also became a critical subject in compliance training.

VII. CONCLUSION – ENCOURAGING ART

It is my hope that this approach to internal investigations will help antitrust defense counsel think about investigations differently – and creatively. These other practices worked for me; others were likely less successful. All investigations and cases are unique. All face different issues at different points in time. That's what makes antitrust practice so fascinating and exciting. That's what makes antitrust internal investigations an art.

ALL THAT GLITTERS – A LOOK BACK AT THE ANTITRUST DIVISION'S EVALUATION OF CORPORATE COMPLIANCE PROGRAMS AND WHAT TO EXPECT

BY CRAIG LEE & ALEXANDRA GLAZER [1]

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In July 2019, the Antitrust Division of the Department of Justice issued its first guidelines for the evaluation of corporate compliance programs.[2] The guidelines were groundbreaking as the Division's first written policy advising on the importance and benefits of a robust internal compliance program in criminal antitrust investigations. In a major change of course, the Division noted that it would begin to "consider compliance at the charging stage," meaning a company could potentially avoid being charged for a crime or receive a reduced sentence based on demonstration of a comprehensive compliance program.

The new guidelines and the Division's subsequent showcase of robust compliance programs to mitigate criminal consequences signify a clear change from the previous attitude of the Division. Up until 2019, the Division traditionally viewed an antitrust violation as evidence of an *ineffective* or deficient compliance program that warranted no positive consideration.[3] In announcing the Division's new view of compliance programs, former Assistant Attorney General, and head of the Antitrust Division Makan Delrahim insinuated that the previous philosophy reflected an impractical and outdated view of compliance programs in the real world.[4]

The Division's published position to reward companies with strong compliance programs is a welcome change and indicates efforts to do away with the "all-or-nothing" calculus that companies face through the Division's Corporate Leniency Program.[5] The Division rebutted the notion that crediting a compliance program at the charging stage would disincentive companies from seeking leniency in the first place.[6] In theory, if a company loses the race to leniency, it may still mitigate criminal liability through the existence of a strong internal compliance program.

The evaluation of an effective compliance program may come into play when a company faces criminal charges and hopes to enter into a deferred prosecution agreement ("DPA"). The Department of Justice's Justice Manual considers DPAs an "important middle ground between declining prosecution and obtaining the conviction of a corporation."[7] Such agreements present opportunities for companies to delay prosecution of filed charges for a time in exchange for compliance with a set of terms. The terms range from monetary penalties to agreements to cooperate in investigations. The rise in the Division's use of DPAs in recent years for companies of all sizes in a variety of industries could indicate the Division's desire to give prosecutors more latitude to determine the outcome of any particular case.

The Antitrust Division's guidelines are based, in part, on the Department's Criminal Division's guidelines for evaluating corporate compliance programs and the U.S. Sentencing Guidelines.[8] The Criminal Division's guidelines were updated in 2020. This article looks at notable modifications to the Criminal Division's revision of its guidelines and assesses whether practitioners and the business community can expect similar changes to the Antitrust Division's guidelines in the future.

I. REVIEW OF THE CRIMINAL DIVISION'S UPDATED GUIDELINES

The guidelines drafted by the Antitrust and Criminal Divisions are intended to be a window into the factors federal prosecutors consider at the charging stage of a criminal investigation.[9] At the same time, the guidelines seek to incentivize companies to enhance its internal compliance programs and meet the expectations of the Department. Former Assistant Attorney General Delrahim quoted Benjamin Franklin in saying, "an ounce of prevention is worth a pound of cure" when it comes to incentivizing corporations to create programs that facilitate quick reporting, cooperation, remediation, and prevention of future misconduct.

The Criminal Division's updated guidelines from June 2020 may tell us what to expect of future changes to the Antitrust Division's guidelines.[10] Acting Assistant Attorney General of the Antitrust Division Richard Powers has remarked on the need for the Department's divi-

2 U.S. Dep't Justice, Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019).

3 Richard A. Powers, Acting Assistant Att'y Gen., U.S. Dep't Justice, Antitrust Div., Criminal Antitrust Enforcement: Individualized Justice in Theory and Practice, Remarks at the Symposium on Corporate Enforcement, and Individual Accountability (July 21, 2021).

4 Makan Delrahim, Assistant Att'y Gen., U.S. Dep't Justice, Antitrust Div., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019).

5 *Id.*

6 Powers, *supra* note 3.

7 Delrahim, *supra* note 4.

8 *Id.*

9 *Id.*

10 U.S. Dep't Justice, Criminal Div., Evaluation of Corporate Compliance Programs (June 2020).

sions to take a "consistent approach" and to adapt "policies and practices to reflect the realities of a changing world."[11] The updated Criminal Division guidelines echo this approach and appear to grant prosecutors a wider range of context-dependent factors to consider when assessing the effectiveness of a compliance program. The updated guidance also provides more tenable, data-driven, and objective factors for companies to reference when instituting or enhancing its own programs.

Both the Criminal Division's and Antitrust Division's guidelines focus on three similarly nuanced questions. The Antitrust Division's "fundamental questions" ask: (1) is the corporation's compliance program well designed; (2) is the program being applied earnestly and in good faith; and (3) does the corporation's compliance program work?[12]

The Criminal Division's three key questions ask: (1) is the corporation's compliance program well designed; (2) is the program being applied earnestly and in good faith – in other words, is the program adequately resourced and empowered to function effectively; and (3) does the corporation's compliance program work in practice?[13]

II. QUESTION 1 – IS THE CORPORATION'S COMPLIANCE PROGRAM WELL DESIGNED?

In assessing the design of a compliance program, the Criminal Division's updated guidelines include new "risk assessment" factors. Of significance, is the notion that a company should actively track and assess "lessons learned either from the company's own prior issues or from those of other companies operating in the same industry and/or geographical region." This factor puts the onus on corporations to not only pay attention to and learn from its own actions – but to actively follow and react to the public misconduct and/or allegations of peer companies.

The Antitrust Division's guidelines do not reference the expectations the Division has when it comes to a company reacting to allegations of another company. The Antitrust Division may expect companies to look outward as well and assess not just what its peers are doing but also more generally what the recent criminal antitrust developments are. For example, with the recent employee wage-fixing and no-poach criminal charges making their way through the court system, the Antitrust Division may update its guidelines to include an expectation that a corporate compliance program internally react and quickly adjust according to new prominent criminal antitrust developments.

Additionally, under the "training and compliance" section of the Criminal Division's guidelines, there is a new push for companies to institute "shorter, more targeted training sessions" to effectively train employees to identify and raise compliance issues.[14] This factor similarly emphasizes the significance of a company paying attention to external events and conducting internal trainings accordingly.

The Antitrust Division's current guidance around training and compliance is more particularized to the nuanced antitrust compliance obligations. The guidelines already emphasize the need for training programs to be detailed and thorough to effectively instruct employees of the fine line between legitimate collaboration and an antitrust violation. As to be expected, companies should be equipped to articulate the complexities of antitrust compliance when communicating its antitrust policies to employees.[15]

III. QUESTION 2 - IS THE PROGRAM BEING APPLIED EARNESTLY AND IN GOOD FAITH? IN OTHER WORDS, IS THE PROGRAM ADEQUATELY RESOURCED AND EMPOWERED TO FUNCTION EFFECTIVELY?

The second question of the Criminal Division's guidelines go to the heart of whether a compliance program – regardless of how well it is designed – is "adequately resourced" to actually "function effectively" in practice. The Criminal Division's update to this question further explains what it means to implement a program effectively by asking whether a company provides adequate resources and empowerment to its program for it to function.

11 Powers, *supra* note 3.

12 Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, *supra* note 2, at 2.

13 Evaluation of Corporate Compliance Programs, *supra* note 10, at 2.

14 Evaluation of Corporate Compliance Programs, *supra* note 10, at 5.

15 Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, *supra* note 2, at 8.

The Antitrust Division's guidelines already comment on the need for an antitrust compliance program to have adequate resources for "training, monitoring, auditing and periodic evaluation of the program" and a focus on "high antitrust risk areas."[16] Even so, we may expect the Antitrust Division to further push for a well-resourced compliance program in any forthcoming update.

The Criminal Division's update to this question further includes a "data resources and access" bullet that asks prosecutors to consider whether those in charge of the compliance program have "sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of policies, controls and transactions"[17] With the added impetus on data, the Division may be trying to create more objective and concrete considerations for prosecutors when assessing a compliance program. Time will tell if the Antitrust Division takes a similar approach.

IV. QUESTION 3 – DOES THE CORPORATION'S COMPLIANCE PROGRAM WORK IN PRACTICE?

The central update to this question again asks if a company actively reviews and adapts its compliance program based on "lessons learned" from its own misconduct or the misconduct of "other companies facing similar risks." Here, the Criminal Division continues to expect companies to actively monitor and respond to developments by other companies in the same sector or geographic area.

V. STILL SEARCHING FOR A "GOLD STANDARD" COMPLIANCE PROGRAM

The Antitrust Division's central mission revolves around deterrence, detection, and prosecution of antitrust crimes.[18] With the Division's recent emphasis on the deterrence factor, practitioners and the business community should welcome any update that seeks to provide even an ounce of further clarity to the guidelines.[19]

The Division's emphasis on corporate compliance programs is belied by the fact that the Division has yet to point publicly to a "worthy compliance" program to highlight. In remarks made by Acting Assistant Attorney General Powers in January 2021, Powers seemed to downplay the fact that the Division has yet to highlight a worthy compliance program by noting that such programs are just one of the factors the Division considers at the charging stage.[20]

Since the issuance of the Division's first set of guidelines in July 2019, the Division has issued a nearly a dozen DPAs—a large increase as compared to previous years.[21] None of the DPAs or related documents and statements lauded a successful compliance program as the central reason for entering into the DPA in the first place. While it is clear that the Division wants to see the implementation of robust compliance programs in response to the guidelines, a company has yet to be rewarded publicly for doing so.

For example, in April 2020, the Division entered into a DPA with Florida Cancer Specialists & Research Institute and simply noted that the Institute "has implemented and will continue to implement a compliance program.[22] In May 2020, the Division announced a DPA with Apotex Corporation after the generic pharmaceutical company agreed to pay a fine for conspiring to artificially raise the price of a cholesterol medication.[23] The Apotex DPA only mentions that the company "has implemented and will continue to implement a compliance program."[24]

In January 2021, the Division entered into a DPA with Argos USA, a producer and seller of ready-mix concrete, after the company was

16 *Id.* at 6-7.

17 Evaluation of Corporate Compliance Programs, *supra* note 10, at 12.

18 Powers, *supra* note 3.

19 *Id.*

20 *Id.*

21 U.S. Dep't Justice, Antitrust Div., Antitrust Division Press Releases.

22 Deferred Prosecution Agreement at 11, *U.S. v. Fla. Cancer Specialists & Research Inst.*, LLC, No. 2:20-cr-78 (M.D. Fla. Apr. 30, 2020).

23 Press Release, U.S. Dep't of Justice, Generic Pharmaceutical Company Admits to Fixing Price of Widely Used Cholesterol Medication (May 7, 2020).

24 Deferred Prosecution Agreement at 9, *U.S. v. Apotex Corp.*, No. 2:20-cr-169 (E.D. Pa. May 7, 2020).

indicted for participating in a conspiracy to fix prices, rig bids, and allocate market sales. In granting the DPA, the Division noted several facts that guided its consideration, including the fact that the illegal conduct was limited to a small number of employees, that two employees who were primarily responsible for the company's participation in the conspiracy had previously been indicted and terminated, and that Argos' was cooperating with the DOJ and made an agreement to aid in the prosecution of co-conspirators. The DPA did not go so far as to recognize Argos' compliance program, other than noting Argos' promise to continue to enhance its' compliance program going forward.

The Division also entered into two separate DPAs with two foreign-language training companies, Comprehensive Language Center Inc., ("CLCI") and Berlitz Languages, after the companies were charged in a conspiracy to defraud the U.S. by impeding, impairing, obstructing and defeating competitive bidding for a multi-million dollar foreign language training government contract.[25] The DPA with CLCI notes that the company ceased doing business and intended to dissolve but would be required to implement a compliance program were it to resume operations.[26] The Berlitz DPA states that Berlitz committed to "continuing to enhance" its compliance program.[27]

The rise in DPAs in the last few years reinforces the Division's desire to more actively "reward and incentivize good corporate citizenship." Though without an example that highlights an effective compliance program, it is unclear what exactly a display of good corporate citizenship looks like in practice as it relates to compliance. In July 2021, Acting Assistant Attorney General Powers gave insight as to why the Division may have entered into more DPAs with companies in a larger variety of industries rather than doing so in recognition of a strong compliance program. Powers said the Division considers the harm a company's guilty plea may have on innocent third parties.[28] This has led the Division to enter DPAs with large market players, for example, in "instance[s] where a company's mandatory debarment would have considerable consequences for health care patients" and small market players, when a neutral analysis indicates "their convictions would cause similar consequences."[29]

We stand at a turning point as the Division awaits the confirmation of President Biden's newly nominated head of the Antitrust Division, Jonathan Kanter. Although we expect continued emphasis on corporate compliance, whether Kanter will revise the Antitrust Division's guidelines, continue the trend of favoring DPAs, or highlight a company's compliance program as the gold standard remains to be seen.

25 Press Release, U.S. Dep't of Justice, Foreign-Language Training Companies Admit to Participating in Conspiracy to Defraud the United States (Jan. 19, 2021).

26 Deferred Prosecution Agreement at 4, *U.S. v. Comprehensive Language Center, Inc.*, No. 3:21-cr-50 (D.N.J. January 19, 2021).

27 Deferred Prosecution Agreement at 4, *U.S. v. Berlitz Languages, Inc.*, No. 3:21-cr-51 (D.N.J. January 19, 2021).

28 Powers, *supra* note 3.

29 *Id.*

CREDITING CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST CASES: HOW STRONG A WIND OF CHANGE?

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The Principles of Federal Prosecution of Business Organizations[2] (Principles) provide a list of standardized factors that federal prosecutors consider in deciding whether to recommend criminal charges against a company. The existence and effectiveness of a company's compliance program is among the factors to be considered.[3] Application of the Principles, including assessment of a company's compliance program, may result in a prosecutorial decision to decline charges against the company altogether or to enter into a non-prosecution agreement ("NPA") or deferred prosecution agreement ("DPA") in lieu of criminal charges in appropriate cases.[4]

Notwithstanding the above, the Principles historically have not required any consideration of *antitrust compliance programs* in deciding whether to charge a company for a criminal violation of the Sherman Act, 15 U.S.C. § 1. The Principles distinguished the nature of antitrust crimes from other types of corporate criminal violations,[5] and the U.S. Department of Justice, Antitrust Division (the "Division") had steadfastly refused to credit antitrust compliance programs either in its charging decisions or even at sentencing.

This refusal to credit antitrust compliance programs was motivated significantly by the Division's desire to protect the efficacy of its Corporate Leniency Policy. The Division was concerned that corporate incentives to self-report criminal antitrust violations through its leniency program would be undermined if a company with an antitrust compliance program potentially could avoid criminal charges even if it did not receive corporate leniency.

Despite this longstanding concern, the Division announced in July 2019 that the Principles had been revised and that, thereafter, antitrust compliance programs would be taken into consideration in making both criminal antitrust charging decisions and sentencing recommendations. This announcement was viewed as a sea change in the treatment of antitrust compliance programs and raised both fears and hopes among antitrust practitioners.

The fear is that the Division's historic concerns will come to fruition and that its leniency program will be undermined, leading to less effective enforcement against hardcore cartels. By contrast, the hope is that the prospect of improved enforcement outcomes for companies with antitrust compliance programs will incentivize greater corporate investment in such programs, enhancing prevention or early detection and self-reporting, thereby strengthening leniency and enforcement.

Two years after the Division's policy shift, it is possible to begin making some assessments. The reality is that both the fears and hopes were likely overstated and that most enforcement outcomes in the near term will continue to be similar to what they would have been prior to the Division's 2019 policy revision. Nonetheless, there are clear benefits of strong antitrust compliance programs and companies should be willing to invest in them.

I. PRE-2019 APPROACH TO ANTITRUST COMPLIANCE PROGRAMS: PROTECT CORPORATE LENIENCY

The Division has had a highly successful corporate leniency policy since 1993.[6] The leniency policy provides complete immunity from criminal prosecution and related fines for the first entity – and only the first – to self-report a criminal antitrust violation and, thereafter, fully cooperate in the Division's investigation. The leniency policy has been a central pillar of the Division's cartel enforcement work and has long been lauded

2 U.S. Department of Justice, Justice Manual §§ 9-28.000 *et seq.* (hereinafter "Justice Manual").

3 See *id.* at §§ 9-28.300(A)(5); § 9-28.800 (discussing evaluation of compliance programs).

4 An NPA results in the government filing no criminal charge against the company in return for the company's agreement, among other things, to admit its conduct, pay a monetary penalty, and fully cooperate with the government's investigation. A DPA, on the other hand, results in the government filing a criminal charge, the prosecution of which is deferred and ultimately dismissed if the company complies with all aspects of its agreement, including payment of a monetary penalty and full cooperation with the government's investigation.

5 For instance, prior to revision in 2019, Justice Manual § 9-28.800 stated that "the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program."

6 The Division first adopted a corporate leniency policy in 1978, but it was not meaningfully utilized by companies until after revisions were made in 1993 in order to limit the Division's discretion in its application and to extend the company's immunity to its current directors, officers, and employees.

as the most effective tool in the detection and prosecution of hard-core antitrust violations.[7]

The threat of severe sanctions for a criminal antitrust violation is a prerequisite for a successful leniency program.[8] This threat combined with the "winner takes all" nature of the U.S. program incentivizes a race for leniency.[9] The greater the disparity in treatment between receiving leniency and not receiving leniency, the greater the incentive a company has to race in for leniency immediately upon learning of a potential criminal antitrust violation.

For that reason, only a single company involved in a cartel can obtain leniency and, with it, immunity in the United States. All other companies involved in the same cartel have, in the past, borne the full brunt of enforcement and been required either to plead guilty to a criminal antitrust charge or be indicted.[10]

Not surprisingly, the Division has taken care over the years not to undermine this fundamental incentive structure of its leniency program. As a result, the Division historically has refused to credit antitrust compliance programs, especially at the charging stage. For the same reason, the Division has been reluctant to resolve criminal investigations with NPAs or DPAs that do not result in a criminal charge and liability.[11]

Simply put, the Division was concerned that these non-plea outcomes would narrow the treatment delta between receiving and not receiving leniency and thereby undermine the incentive to seek leniency. While a company would be highly motivated to seek leniency if a guilty plea was the only alternative, it might take a "wait and see" approach, rather than seek leniency, if having a compliance program could lead to a declination of prosecution, NPA, or DPA if the Division later detected the conduct.

Accordingly, the Division's message regarding antitrust compliance programs was simple: a compliance program that did not prevent the criminal antitrust violation or lead to early detection and leniency was ineffective and deserving of no credit.[12] As such, the compliance program would not be considered by the Division in deciding whether to criminally charge a company or in deciding the recommended sentence (i.e. criminal fine).[13] This unforgiving approach to antitrust compliance programs-- especially the Division's refusal to seek sentencing credit for compliance programs under the United States Sentencing Guidelines[14]-- was criticized as a perceived disincentive to invest in antitrust compliance.[15]

7 See, e.g. Richard Powers, Acting Assistant Att'y Gen., U.S. Dept. of Justice, Antitrust Division, Remarks at Organisation for Economic Co-operation and Development (OECD) (June 5, 2018), https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-richard-powers-delivers-remarks-organisation (describing leniency as the Division's "most effective investigative tool against cartels") https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-richard-powers-delivers-remarks-organisation; Scott Hammond, Dir. of Crim. Enf., U.S. Dep't of Justice, Antitrust Division, Detecting and Deterring Cartel Activity Through an Effective Leniency Program (Nov. 21, 2000), https://www.justice.gov/atr/speech/detecting-and-deterring-cartel-activity-through-effective-leniency-program (stating that leniency is "the single greatest investigative tool available to anti-cartel enforcers"). The tremendous and enduring success of the Division's leniency policy has led to the widespread adoption of similar leniency policies by competition enforcement agencies around the world. See Organisation for Economic Co-operation and Development (OECD), Challenges and Co-ordination of Leniency Programmes – Background Note by the Secretariat (June 5, 2018) (stating that more than 60 jurisdictions, including all OECD member countries, have leniency programs).

8 See, e.g. Scott Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Division, Cornerstones of an Effective Leniency Program (Nov. 22, 2004), https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program; Scott Hammond, Dir. of Crim. Enf., U.S. Dep't of Justice, Antitrust Division, Detecting and Deterring Cartel Activity Through an Effective Leniency Program (Nov. 21, 2000), https://www.justice.gov/atr/speech/detecting-and-deterring-cartel-activity-through-effective-leniency-program; Organisation for Economic Co-operation and Development (OECD), Fighting Hard-core Cartels: Harm, Effective Sanctions and Leniency Programmes (2002) at 9.

9 Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Division, Individual Accountability for Antitrust Crimes (Feb. 19, 2016), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust.

10 See Scott Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Global Competition Roundtable (Feb. 2012), https://globalcompetitionreview.com/the-gcr-cartel-roundtable-0 (stating that the Division has a policy that disfavors NPAs and DPAs for antitrust crimes).
It is worth noting that numerous jurisdictions, including the European Union and Japan, have adopted leniency programs that allow multiple leniency applicants. Although only the first leniency applicant will receive complete immunity from monetary penalties, subsequent applicants who satisfy the conditions of the program are entitled to defined reductions (whether by set percentage (i.e. 50 percent) or within range bands (i.e. 30-50 percent)) in their monetary penalty.

11 See Richard Powers, Acting Assistant Att'y Gen., U.S. Dept. of Justice, Antitrust Division, Criminal Antitrust Enforcement: Individualized Justice in Theory and Practice (July 21, 2021), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-richard-powers-delivers-remarks-symposium-corporate (explaining the Division's past view that it "risked weakening [the incentive to seek leniency] if we credited compliance programs when deciding what charges were appropriate for companies that did not qualify for leniency").

12 Richard Powers, Criminal Antitrust Enforcement, supra note 11; Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Compliance is a Culture, Not Just a Policy (September 9, 2014), https://www.justice.gov/atr/speech/compliance-culture-not-just-policy.

13 Brent Snyder, Compliance is a Culture, *supra* note 12.

14 United States Sentencing Guidelines § 8C2.5(f) allows for a reduction in a company's culpability score, which results in a reduction of the applicable Guidelines fine range, if it has an effective compliance program.

15 See, e.g. Washington Legal Foundation, Letter to United States Sentencing Commission re Commission Priorities for the Upcoming Year (June 1, 2012), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20120815/WLF_priorities_comment.pdf (stating that the Division's refusal to credit antitrust compliance programs "function[s] as a disincentive to companies who would otherwise invest precious resources in developing a strong compliance program").

In 2015, the Division took initial steps toward crediting antitrust compliance programs in its sentencing recommendations. Specifically, the Division announced its willingness to consider "forward looking" compliance efforts in "reaching a fine recommendation [to the court] in cases where a company makes extraordinary efforts not just to put a compliance program in place but to change the corporate culture that allowed a cartel offense [to] occur."[16]

Notably, however, the Division did not change its position that preexisting compliance efforts that failed to prevent or detect a cartel would not be eligible for charging or sentencing credit. As such, this slight shift in the treatment of antitrust compliance programs at sentencing did nothing to undermine the incentive of a company with a preexisting compliance program to seek leniency upon detection of a cartel. The leniency promise of immunity for the company and its executives was strongly preferable to mere reduction of a criminal fine in connection with a corporate guilty plea for post hoc improvements to an antitrust compliance program. Nonetheless, this policy change by the Division cracked the door for the first time to crediting antitrust compliance programs.

With its subsequent 2019 policy revision, the Division pushed the door wide open. Going forward, the Division committed to take pre-existing compliance programs into account in making both charging and sentencing decisions.[17] In doing so, it acknowledged that the prior "all-or-nothing philosophy was born of our efforts to highlight the value of winning the race for leniency at a time when the modern leniency program was establishing itself as the Division's most important investigative tool."[18]

The Division's 2019 policy shift on crediting compliance programs may represent a sea change in approach, but it remains to be seen whether it will lead to significantly different outcomes, either for leniency or for companies with compliance programs. Chances are, it will not -- at least in the short-term.

II. POST-2019 APPROACH TO ANTITRUST COMPLIANCE PROGRAMS: LENIENCY INCENTIVES REMAIN

Contrary to the Division's historic thinking, the prospect of receiving either charging or sentencing credit for an antitrust compliance program should not change the incentive of a company to seek leniency. This is so for at least two reasons. First, the benefits of leniency remain far superior to any charging or sentencing credit that a company is likely to receive for its antitrust compliance program. Second, and more importantly, a company will likely be disqualified from receiving any charging or sentencing credit for its compliance program if it makes a knowing decision not to self-report a criminal antitrust violation that it detects.

III. LENIENCY REMAINS THE SUPERIOR OUTCOME

Even if the Division's 2019 policy change potentially allows a company with an antitrust compliance program to obtain an NPA or a DPA if it does not obtain leniency, that potential should not undermine the incentive to seek leniency. Neither an NPA nor a DPA is sufficiently likely or attractive to forgo leniency.

A company will almost certainly be sorely disappointed if it forgoes the opportunity for leniency in the hope that it will later receive an NPA if the Division detects the conduct. In announcing its policy change on compliance programs, the Division made clear that only a leniency applicant will be able to avoid all prosecutorial consequences from its conduct:

We will, however, continue to disfavor non-prosecution agreements ("NPAs") with companies that do not receive leniency because complete protection from prosecution for antitrust crimes is available only to the first company to self-report and meet the Corporate Leniency Policy's requirements.[19]

16 Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing? (June 8, 2015), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

17 Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

18 *Id.*

19 *Id.* If an NPA – which carries considerable monetary and oversight consequences for a company – remains disfavored, then it is safe to assume that a company that is not a leniency applicant has little chance of receiving a complete declination of prosecution due to its antitrust compliance program.

Instead, the Division made clear that a DPA "would occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation."[20] As a "middle ground," however, the consequences of a DPA (and even an NPA) are "much closer to a guilty plea than leniency" and should not undermine a company's incentive to seek leniency if it is available.[21] In fact, NPAs and DPAs may not be a preferable outcome *even to a guilty plea* in many cases, let alone an attractive alternative to leniency.

NPAs and DPAs include virtually the same punitive features as a corporate plea agreement: significant monetary penalties and exposure of the company's directors, officers, and employees to individual criminal prosecution. In other respects, such as the imposition of reporting obligations,[22] the heightened likelihood of appointment of a corporate compliance monitor,[23] and the requirement of a significantly more detailed statement of supporting facts than is found in most plea agreements (with attendant civil liability implications), those enforcement outcomes may be considerably more onerous than a corporate guilty plea in important respects. Additionally, if the United States decides in its "sole discretion" that the company has breached its obligations, it can pursue a prosecution against the company based on the information provided by the company.[24] They certainly are not a "slap on the wrist" outcome for a company.

That is not to say that NPAs and DPAs do not have some significant advantages over a guilty plea. NPAs and DPAs can potentially allow some companies – such as regulated companies that could lose licenses or companies that would be excluded from participating in government programs – to avoid the severe collateral consequences of a guilty plea. Additionally, NPAs and DPAs are perceived by many as resulting in less reputational harm than a guilty plea.

Nonetheless, it will be a difficult decision for a well-counseled company to pass up an opportunity to obtain leniency in favor of taking a "wait and see" approach in the hope of obtaining an NPA or DPA if the conduct is subsequently detected by the Division. Only leniency would allow a company to avoid altogether a monetary penalty, the criminal prosecution of its employees, reputational harm, a publicly-available factual admission, the risk of probation, a reporting obligation, or the appointment of a compliance monitor that accompanies any guilty plea, NPA or DPA. Moreover, as noted above, a corporate leniency applicant receives a benefit in civil litigation (detrebling) that is not available to companies that enter into plea agreements, NPAs, and DPAs.

For all of these reasons, the likelihood that traditional leniency incentives will be meaningfully altered or undermined by the Division's 2019 policy change is low.[25]

IV. NOT SEEKING LENIENCY IS A LIKELY DISQUALIFIER FOR COMPLIANCE CREDIT

A company would be well-advised against holding out for a "middle ground" enforcement outcome in lieu of leniency not only because those options are far less attractive, but also because they are very unlikely to be available to a company that makes a knowing decision to forgo leniency. That is because a company that makes a knowing decision to forgo leniency (i.e. to self-report) will likely disqualify itself from obtaining any credit at all – at charging or at sentencing – for its preexisting antitrust compliance. Indeed, the Division explicitly links

20 *Id.* (quoting Justice Manual). See also Richard Powers, Criminal Antitrust Enforcement, *supra* note 10 (stating that a company "with a robust compliance program" "might still qualify for a deferred prosecution agreement rather than a guilty plea" even if it does not obtain leniency).

21 See Richard Powers, Criminal Antitrust Enforcement, *supra* note 11. Even in the unlikely event that a company could obtain an outright declination of criminal charges for having a robust compliance program, the resulting benefit would still fall short of obtaining leniency in important respects. In particular, a declination of charges would protect only the company and, unlike leniency, would leave a company's directors, officers, and employees subject to prosecution. A declination also would provide no protection against joint and several liability and treble damages in civil lawsuits, while the leniency applicant is not subject to contribution claims and is exposed only to single damages liability. See Antitrust Criminal Penalty Enhancement & Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 at § 213 (2004).

22 Although the Division does not ordinarily seek terms of probation for companies that plead guilty, it has usually put companies receiving either an NPA or DPA on a form of probation to the Division by including a requirement that the company "promptly report" "credible evidence or allegations of criminal violations of United States." See, e.g. *United States v. Heritage Pharmaceuticals*, Deferred Prosecution Agreement at ¶ 8, https://www.justice.gov/opa/press-release/file/1174111/download; *United States v. Florida Cancer Specialists & Research Institute LLC*, Deferred Prosecution Agreement at ¶ 7, https://www.justice.gov/atr/case-document/file/1281681/download; *United States v. Apotex Corp.*, Deferred Prosecution Agreement at ¶ 8, https://www.justice.gov/opa/press-release/file/1274706/download.

23 To date, the Division has not sought the appointment of a corporate compliance monitor in connection with a corporate guilty plea, but it has required their appointment in connection with some DPAs. See e.g. *United States v. Deutsche Bank A.G.*, Deferred Prosecution Agreement at ¶¶ 11-13, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/23/db_dpa.pdf.

24 See, e.g. *United States v. Heritage Pharmaceuticals*, Deferred Prosecution Agreement at ¶ 17, https://www.justice.gov/opa/press-release/file/1174111/download; *United States v. Florida Cancer Specialists & Research Institute LLC*, Deferred Prosecution Agreement at ¶ 17, https://www.justice.gov/atr/case-document/file/1281681/download.

25 It goes almost without saying that if the prospect of "charging credit" in the form of an NPA or DPA is unlikely to change a company's leniency analysis, then the prospect of "sentencing credit" in the form of a reduced criminal fine in connection with a guilty plea to a criminal charge also is not likely to undermine the incentive to seek leniency.

the efficacy of a compliance program with self-reporting in assessing whether a company is entitled to credit at either the charging or the sentencing stage:

> Good corporate citizens: (1) implement robust and effective compliance programs, and when wrongdoing occurs, they (2) promptly self-report, (3) cooperate in the Division's investigation, and (4) take remedial action. These factors go hand in hand. . . . The Principles of Federal Prosecution of Business Organizations counsel against crediting compliance programs when the other three hallmarks of good corporate citizenship are absent.[26]

Moreover, simultaneous with the announcement of its new policy on compliance program, the Division issued public guidance regarding how it will evaluate antitrust compliance programs in deciding both whether to credit them and whether there is a need for corporate probation. Whether a company's antitrust compliance program facilitated prompt self-reporting is a preliminary question prosecutors are to ask "[a]t the outset of any inquiry into the efficacy of an antitrust compliance program" as well as in connection with specifically considering appropriate charging and sentencing credit.[27]

Given the focus on detection and self-reporting in evaluating compliance programs, companies should expect the Division to pay heightened scrutiny to the timing and circumstances of discovery and self-reporting of the conduct. The Division has made clear that a decision not to seek leniency will likely foreclose a company from receiving charging or sentencing credit for a preexisting compliance program, no matter how effective it is at deterring or detecting such conduct:

> Companies should understand that there's no tactical advantage in deciding not to apply for leniency and instead holding out for a DPA; a company that makes that choice will almost certainly not be eligible for anything short of a criminal conviction.[28]

If a company with a rigorous antitrust compliance program detects, but consciously decides not to self-report potential criminal conduct, it may even place itself in jeopardy that the Division will seek an *enhanced* sentence against it.[29]

For these reasons, a company takes a significant risk by forgoing the opportunity for leniency in the hope that its preexisting compliance program would result in charging or sentencing credit if the conduct is subsequently detected by the Division. In such circumstances, its compliance efforts would not only come to naught but potentially place it in as bad or a worse position than having no compliance program at all.

V. LOOKING FORWARD

Having concluded that the Division's policy shift is unlikely to negatively impact its leniency program, it remains to be considered whether the policy shift will lead to significantly better or different outcomes for companies with compliance programs that do not obtain leniency. For the following reasons, it probably will not, at least in the short-term.

Most cartels prosecuted by the Division are measured in years, rather than days, weeks, or months, and include what the Division considers to be senior management personnel.[30] Under such circumstances, it is unlikely that the Division would conclude that an antitrust compliance program was sufficiently effective to warrant charging credit.

Indeed, it does not appear that any company has yet received charging credit for its antitrust compliance program. Although the Division has entered into several DPAs to resolve criminal Title 15 charges since 2019, almost all of them were due expressly to severe collateral con-

26 Makan Delrahim, Wind of Change, *supra* note 17.

27 U.S. Dept. of Justice, Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019) at 3, 14, https://www.justice.gov/atr/page/file/1182001/download.

28 Richard Powers, Criminal Antitrust Enforcement, *supra* note 11.

29 U.S.S.G. § 8C2.7(a)(11) specifies that whether a company failed to have an effective compliance program at the time of the offense is a factor to be considered in deciding the appropriate fine within the Guidelines range.

30 For instance, since January 1, 2020, thirty-four entities have been charged with or pleaded guilty to a criminal Title 15 violation. Of those thirty-four cases, more than ninety-one percent (thirty-one out of thirty-four cases) involved cartels lasting longer than a year. Moreover, many of the charging documents, on their face, indicated the participation of senior-level personnel for those entities.

sequences that would have resulted from a criminal charge.[31] Had any company received charging credit for its compliance program, the DPA, which is publicly filed, likely would have expressly said so.[32] To date, none have.

It is thus perhaps premature to predict that any form of charging credit for antitrust compliance programs will become commonplace in criminal Title 15 matters. Over time, however, the 2019 policy change should incentivize investment in antitrust compliance efforts that, even if not entirely successful in preventing cartels, hopefully will result in fewer long-term cartels involving senior level management. In such circumstances, charging credit for an antitrust compliance program will perhaps become more likely.

For companies with antitrust compliance programs that do not receive charging credit, there is still the possibility of receiving sentencing credit. The primary sentencing credit for an antitrust compliance program would result in a reduction in the company's criminal fine, but an antitrust compliance program may also affect the need for corporate probation.[33]

Realistically, however, sentencing credit for antitrust compliance programs is not likely to be more frequent than in the past because the 2019 policy change does nothing to enhance its availability. Two forms of sentencing credit for a compliance program – a three-point culpability score reduction and credit for "forward looking" improvements – were available prior to the 2019 policy revision and remain the same after the policy revision.

As mentioned above, the Division has historically refused to credit compliance programs with a three-point culpability score reduction under U.S.S.G § 8C2.5(f). In announcing its 2019 policy change, the Division did not raise false hopes that its position on culpability score reductions would change:

> The Division has yet to recommend credit for a defendant's "pre-existing" antitrust compliance program under the Guidelines' three-point reduction provision. Delay in reporting and the involvement of "high-level" or "substantial authority" personnel, as defined by the Guidelines, often weigh against application of this provision.[34]

Although the Division stated that it has "credited a company's extraordinary 'prospective' compliance efforts in certain cases" and advocated for a reduction in its criminal fine on that basis[35], the fact remains that even this form of sentencing credit has only been awarded on a handful of occasions to date.[36] In sum, the path to sentencing credit for an antitrust compliance program remains the same; it is a path that few companies have successfully navigated in the past and that may continue to elude many in the future.

VI. CONCLUSIONS

The Division's 2019 policy shift was a bold departure from its prior unwillingness to credit compliance programs. Although it seems unlikely that the Division's new approach on antitrust compliance programs will undermine its corporate leniency policy, it also does not seem likely to lead to meaningfully better charging and sentencing outcomes for companies moving forward, at least in the near term. Over time, however, it is certainly possible that companies will be incentivized to adopt and/or improve antitrust compliance programs, thereby altering the scenarios (such as long-term cartels involving senior management) that have usually prevented any sentencing credit in the past.

More importantly, the middling near-term predictions for compliance credit are not intended to suggest that the Division's policy shift

31 While the Division has entered into several DPAs since 2019, most were in healthcare-related investigations in which the companies likely faced mandatory exclusion from federal health care programs in the event of a guilty plea. See e.g. *United States v. Heritage Pharmaceuticals*, Deferred Prosecution Agreement, https://www.justice.gov/opa/press-release/file/1174111/download; *United States v. Florida Cancer Specialists & Research Institute LLC*, Deferred Prosecution Agreement, https://www.justice.gov/atr/case-document/file/1281681/download; *United States v. Sandoz, Inc.*, Deferred Prosecution Agreement, https://www.justice.gov/atr/case-document/file/1256306/download; *United States v. Apotex Corp.*, Deferred Prosecution Agreement, https://www.justice.gov/opa/press-release/file/1274706/download.

32 The Division has stated that "[a]s part of our commitment to transparency, when the Principles lead us to resolve a charge by DPA, the publicly filed agreement includes a section identifying the factors that weighed most heavily in our decision, given the individual facts and circumstances of that particular case." Richard Powers, Criminal Antitrust Enforcement, *supra* note11.

33 Makan Delrahim, Wind of Change, *supra* note 16.

34 *Id.*

35 *Id.*

36 To date, only two companies have been acknowledged to have received "forward looking" compliance credit since 2015, when the Division announced its willingness to give antitrust compliance sentencing credit on that basis.

was hollow or that investments in antitrust compliance are not worthwhile. A company's primary incentive for implementing a robust compliance program should, first and foremost, be prevention. Compared to any alternatives – including leniency – this should be incentive enough to adopt an effective antitrust compliance program.

While it may be difficult to empirically measure prevention that will occur from the Division's heightened emphasis on compliance programs, it is not unreasonable to assume it will occur and companies, their employees, and consumers will all benefit from it. In the event prevention is not perfect, the next best outcome is early detection, which allows a leniency application. Effective antitrust compliance programs facilitate both outcomes and should warrant investment in them, even without further incentives and likely near-term benefits.

Finally, it will be in the Division's interest to look for opportunities to publicly acknowledge and credit compliance programs. Even if it is not reasonable to expect that the Division's new approach to compliance programs is "an automatic pass for corporate misconduct,"[37] it is reasonable to expect that the Division will want to look for opportunities to reinforce its policy, demonstrate positive outcomes for companies with antitrust compliance programs, and incentivize continued investment in such programs.

37 Makan Delrahim, Wind of Change, *supra* note 17.

INTEGRATING COMPETITION COMPLIANCE INTO THE BUSINESS

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I. INTRODUCTION

Corporate compliance programs are increasingly the norm. We take it as a given that a company will have *something* in place. And, so, the typical conversation around such programs starts with less on why a company should adopt a compliance regime, and more on what they need to be effective.

Government enforcers certainly have a view on the characteristics of an effective policy. They bring, however, an enforcement perspective, which does not necessarily inform what is needed for any individual business organization. Corporate compliance officers must still navigate what their organizations should implement. So, when planning a compliance program, it is important to start with an answer to the why: Why implement a compliance program in the first place? Put differently, what are the business goals to be achieved with a compliance program?

A compliance policy is never going to completely eliminate antitrust violations as a business risk. Even the U.S. DOJ Antitrust Division sometimes recognizes this. Instead, to be effective, enforcers say very generally that compliance programs should be designed so as "to detect and address potential antitrust violations."[2] This guidance is a good start, but it comes from an enforcement mindset.

A better approach is one that integrates compliance with the business goals. Doing so is likely to be more effective in changing how executives and employees think about the relationship between business and compliance.

In this article, I encourage a focus on answering the "why" as a business organization and, after having first answered that, then build a compliance program that serves the business. Obviously, if such a program is to be compliance-oriented, then it also has to align with the laws that govern the business. Otherwise, it will not be very effective in preventing or detecting antitrust violations. Additionally, there are a number of factors that enforcers around the world tend to think of when benchmarking efficacy. But, there is wide latitude in communicating what it means to be compliant and how to organize business processes toward compliance. Integrating compliance with the broader goals and processes of the business is only likely to increase efficacy by treating compliance as a business goal, as opposed to a legal obligation.

II. DETERMINING THE WHY

There are many reasons to adopt competition compliance policies and systems. Increasingly, it feels like companies are embracing the idea of a civic culture. While the bottom line is ultimately to make money for stakeholders, many companies are embracing the view that ethics are not only consistent with, but an important part of their business. Customers are more likely now than decades before to prioritize ethical corporate behavior, as reflected in the steady stream of research on customer preferences. Likewise, when employees have a choice in where they work, they may demand it of their employers.

There may also be strategic reasons. The Japan Fair Trade Commission Chairman, for example, recently encouraged companies to target anticompetitive practices with private antitrust litigation, pointing to the uptick in strategic litigation against various tech companies.[3] At a more fundamental level, when businesspeople know the rules for competition, it can give them an extra negotiating point. A purchasing team may be more alert to anticompetitive practices by its suppliers. A business development team may feel pressured to enter into an unwanted non-solicit or exclusive with a partner, and the ability to point to a competition policy for the organization may provide added justification for pushing back on the ask.

A more prosaic reason is to simply mitigate risk. The cost in defending an antitrust investigation and litigation is easily millions of dollars. Fines and damages claims can easily reach hundreds of millions in one jurisdiction alone. That can multiply when considering all the jurisdictions where a business operates. A related business risk is getting disqualified or debarred from procurement opportunities as a further consequence. Or maybe, having been caught violating the antitrust laws, a compliance policy may be adopted after the fact, whether as a belated effort to mitigate future risk or as a part of one's sentencing or settlement.

2 U.S. DOJ Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), available at https://www.justice.gov/atr/page/file/1182001/download.

3 Mlex, *Japanese companies should better use antirust rules for their benefit, competition chief says* (Oct. 28, 2021), available at https://content.mlex.com/#/content/1332874.

Another reason is the typical enforcer rationale: that it is insurance in the event a company is caught in a violation. The U.S. Antitrust Division's message, for example, is simple: "we will ensure the absence of such programs inevitably proves a costly omission for companies who end up the focus of department investigations."[4]

In the U.S. and certain other countries, demonstrating the existence of an effective compliance program may enable a reduced fine under the jurisdiction's leniency program. (The Europe Commission is a notable exception.) To that end, Government enforcers are likely to ask what compliance systems were in place when deciding to prosecute and make sentencing recommendations. Increasingly, countries are willing to consider the implementation of a compliance program as a mitigating factor when determining fines. Germany recently became one of the latest to incentivize compliance programs in this way. In January 2021, Germany amended its competition law to enable prosecutors to weigh the implementation of a competition program when considering a fine for a violation.[5]

Whatever the reasons, the goals for the compliance program should be discussed with the business leadership. At a minimum, enforcers will expect this, as discussed below. Independent of the enforcer expectations, there is business value in having executives discuss compliance. When done right, it can set the tone for the organization and help to socialize legal compliance in a way that aligns with how business is conducted.

This is because compliance requires active effort on the part of the businesspeople. Competition compliance means negotiating agreements that comply with the law. It means listening to requests made by partners, suppliers and customers — not just competitors — and deciding whether the request is inappropriate or not, and if it is not appropriate then deciding how to respond. It means seeking legal guidance to navigate grey areas. If businesspeople feel like a compliance program is forced on them by legal, it will be more challenging to ask business teams to spend the effort to adopt or modify processes to turn a compliance policy into an effective compliance program.

III. THE ENFORCER VIEW

Anyone can pull a compliance policy off the internet these days. An off-the-shelf policy, without more, is just a bunch of words that — hopefully — reflect the laws of the jurisdictions where a company operates. It is a passive approach, however, and so not necessarily an effective approach. If the business goals for compliance includes insurance mitigation against future fines or other penalties, then simply publishing a policy may not be enough for those enforcers that are likely to demand more of companies that are seeking sentencing mitigation.

This raises a question: what do enforcers say they are looking for? Fortunately, there is a common baseline that different agencies identify as necessary to an efficacy finding. While the relevant elements may vary by jurisdiction, they largely reflect these factors articulated by the U.S. Antitrust Division:

(1) the design and comprehensiveness of the program;

(2) the culture of compliance within the company, i.e. whether there is business support for the compliance function throughout the organization;

(3) responsibility for, and resources dedicated to, antitrust compliance;

(4) ongoing antitrust risk assessment to ensure the compliance program is working;

(5) compliance training and communication to employees;

(6) regular monitoring and auditing of actual compliance efforts;

(7) reporting mechanisms; and

(8) compliance incentives and discipline.[6]

4 U.S. DOJ Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), available at https://www.justice.gov/atr/page/file/1182001/download.

5 German Competition Act, Section 81d (1). Likewise, in 2016, Brazil's enforcer adopted its *Guidelines for Cease and Desist Agreements for Cartel* Cases, available at https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guidelines_tcc1.pdf. Again, in the U.S., the federal Sentencing Guidelines provide that an organization may be eligible for a reduced sentence following a criminal conviction. That is in contrast with the position of the European Commission, which does not reward companies with reduced fines where they have adopted compliance programs.

6 U.S. DOJ Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), available at https://www.justice.gov/atr/page/file/1182001/download.

While the need for training and reporting mechanisms should be self-explanatory, the other factors here are worth calling further attention to. Many overlap. In concept they are easy to understand, even if the effort called for may be substantial and a challenge to implement.

The first factor asks whether the policy was *designed and implemented* in a manner that is likely to be effective for the organization. I address this in greater depth in the section that follows.

Often referred to as top-down compliance, creating a *culture of accountability* overlaps with responsibility and discipline (discussed below). This factor largely concerns the role of senior leadership. Whether there is executive, and even Board level, buy-in is a fundamental component of many an enforcer's assessment in deciding whether to give a company credit for a compliance.[7] For example, in the U.S., "Division prosecutors should examine the extent to which corporate management has clearly articulated — and conducted themselves in accordance with — the company's commitment to good corporate citizenship."[8] This may be a negative factor to the extent there is evidence that management has turned a blind eye or rewarded team members who have engaged violated the antitrust laws.

The issue of *responsibility* is similar to the question of the culture, but is often discussed separately. The focus here is on management accountability for compliance. It asks not only whether an organization has a specific person who is accountable for the policy, but also whether compliance personnel have business independence, authority, resources, and access to the business to be effective.[9]

A company should consider the role of the Board of Directors in holding management accountable. Maybe an audit committee is tasked with compliance generally. Whether or not such a committee exists, enforcers are likely to explore the circumstances in which management briefs the Board.

The *risk assessment and reevaluation factor* calls both for a tailoring of the program to the unique risk and a continuing evaluation to account for changes in the business, including changes in the methods of communication.[10] Canada Competition Bureau succinctly summarizes this as an ongoing obligation to identify areas of risk, employees exposed to risk, and changes that may increase risk.[11] Interestingly, the Canadian Competition Bureau has identified algorithmic pricing as a new area of antitrust risk, and is encouraging businesses "to train new categories of employees" — e.g. software engineers involved in developing or using algorithmic pricing models — in competition law.[12]

Whereas, the *monitoring factor* is typically focused on the procedures and efforts to test for compliance. Like any other audit, these test for actual compliance. This might include conducting real world interviews, surveys, or even targeted sampling of documents.

The U.S. is not alone in combining compliance *"incentives and discipline."* Defining the "discipline" here isn't easy, and again it goes to the business objectives in adopting a compliance program. What are the consequences? Demotion, lost compensation, or even potential termination? Harder still is how to respond to enforcers' increasing recognition that it may not be enough to just threaten consequences for violating a compliance policy. This is born of the recognition that people are motivated by different considerations. Businesses will often reward their employees when they achieve their business goals. Why shouldn't compliance be any different? How to do so takes creativity and alignment with the organization's broader business goals.

IV. THE PANDORA'S BOX OF REMEDIATION

Additionally, the U.S. Antitrust Division would include a factor not necessarily required by other jurisdictions. This is an expectation that a company also has undertaken remediation when it discovers an antitrust violation.[13] Remediation raises knotty issues for counsel to resolve when advising

7 See, e.g. Note from the Government of Korea, https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)12/en/pdf.

8 U.S. DOJ Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), available at https://www.justice.gov/atr/page/file/1182001/download.

9 See, e.g. Note from the Government of Korea, https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)12/en/pdf.

10 See, e.g. Canada Competition Bureau, *Bulletin — Corporate Compliance Programs* (September 27, 2010), available at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html#s4_0.

11 See, e.g. Canada Competition Bureau, *Bulletin — Corporate Compliance Programs* (September 27, 2010), available at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html#s4_0.

12 Note from the Government of Canada, https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)5/en/pdf.

13 U.S. DOJ Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), available at https://www.justice.gov/atr/page/file/1182001/download.

on how a compliance program should deal with violations when they are internally discovered. This factor is worth even more attention now in light of a major change in prosecutorial policy under the Biden Administration.

On October 28, 2021, the U.S. Attorney General's Office announced a major change in what U.S. law enforcement *must* consider when weighing the prosecution of alleged corporate crimes. "Going forward, prosecutors will be directed to consider the full criminal, civil and regulatory record of any company when deciding what resolution is appropriate for a company that is the subject or target of a criminal investigation."[14] The scope here is extraordinary — it directs prosecutors to consider the history of possible violations of any kind, and not even limited to the U.S. borders!

> *A prosecutor in the FCPA unit needs to take a department-wide view of misconduct: Has this company run afoul of the Tax Division, the Environment and Natural Resources Division, the money laundering sections, the U.S. Attorney's Offices, and so on? He or she also needs to weigh what has happened outside the department — whether this company was prosecuted by another country or state, or whether this company has a history of running afoul of regulators. Some prior instances of misconduct may ultimately prove to have less significance, but prosecutors need to start by assuming all prior misconduct is potentially relevant.*

This directive applies to the entire Justice Department — not just the FCPA unit, but to the Antitrust Division, fraud, etc.

This is truly a Pandora's box that the DOJ is unleashing. And, it requires some pause to digest its potential. What does it mean to "run afoul" of one or another division, or of another regulator outside the DOJ? When a prosecutor is directed to "assum[e] all prior misconduct is potentially relevant," how to decide when to draw the line and what is "less significant"? Can they look back to violations that have passed the statute of limitations? Just how far back are prosecutors allowed to go? What about double-jeopardy? What is the remedy for businesses and individuals who are forced to answer to the DOJ after having already answered to another agency for a potential past violation? Can the DOJ reasonably consider purported violations of Chinese, European, or Mexican law when weighing corporate culpability under U.S. law?

One can easily imagine an agency run amok conducting endless fishing into areas wholly inappropriate for a U.S. prosecutor to explore.

This brings us to remediation. Already a tricky issue to address, it takes on added significance when considering this Biden Administration change.

First, the Antitrust Division states that "early detection and self-policing are hallmarks of an effective compliance program."[15] On its face, one would expect that this would include steps to identify and take actions to correct for a possible violation. Second, the Antitrust Division takes this a step further and encourages not only internal reporting, but also "voluntary disclosures to the government of any problems that a corporation discovers on its own."

Deciding to report a violation to an enforcer — in essence, admitting to criminal liability for a hard-core violation — is a truly significant ask of a company and should not be the "hallmark" of an effective policy that the Antitrust Division says it is. Indeed, the U.S. government's calling for this may be counterproductive, as some companies will deem the business risks in voluntary disclosure too great. A company may be first into the enforcer with a leniency application, but much uncertainty surrounds this decision. Did the company identify and report everything? Even if it did, will it expose itself to sanctions in other jurisdictions? Also, under U.S. law, amnesty does not extend to private civil damages — at most, there may be a de-trebling of antitrust damages.

V. INTEGRATING COMPLIANCE WITHIN THE BUSINESS

By its nature, compliance is not passive. It involves designing and implementing steps that increase the likelihood that the company will act consistent with the antitrust laws. The more challenging task is adopting a policy and creating processes that are a part of the business.

Below, I identify several considerations when building a compliance program around a business.

14 Deputy Attorney General Lisa O. Monaco, Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021), available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

15 U.S. DOJ Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), available at https://www.justice.gov/atr/page/file/1182001/download.

A. What is the Scope?

This question has at least two components. The first is geographic; the second is substantive.

- *Geographic scope*. Whether a company has people outside its home jurisdiction or not, we are all operating in a global economy. Supply chains are global. A good compliance program should also be global. The DOJ certainly agrees.

  For companies operating in more than one jurisdiction, how is the business to approach its obligations in each? Some companies will adopt localized policies. But, the risk here is that employees in Jurisdiction A will engage in conduct having effects in Jurisdiction B, subjecting the business to risk notwithstanding the effort to have rules for employees in Jurisdiction B. It may make more sense to work with counsel on the fundamental rules common to all the relevant jurisdictions, and then layer in additional guidance reflecting important differences in the jurisdictions touched by an organization's supply chain.

- *Substantive scope*. If the goal is to focus on mitigating the greatest risk, then a good competition program can focus on training and procedures to reduce the risk of price fixing, bid-rigging, and other per se violations. A better competition compliance program, however, should aim to do more than merely prevent hard-core violations. It should also seek to create a mindset and mechanism for identifying other potential violations, i.e. those that create significant business risk short of criminal prosecution.

B. Is Competition Compliance Integrated with the Business's Other Legal Obligations?

A related characteristic is the degree to which competition compliance is integrated with compliance and business ethics more generally. Competition compliance programs do not operate in a vacuum. There are anti-bribery, sourcing, sanctions and other areas that entail significant risk and also significant opportunity for a company to stand out as an ethical business. This brings competition compliance — and compliance programs more generally — back to the question of the goals of the organization in adopting and implementing an effective policy for the business.

This may be summed up by business ethics. The organization that embeds ethics into its business is not only more likely to achieve antitrust compliance, but legal compliance generally. As Brazil's CADE has argued, "competition compliance programmes are more effective if they are elaborated and implemented as part of comprehensive programmes focused on corporate integrity and ethics, without losing sight of the specific requirements of each law. The truth is that the term "compliance" nowadays is associated not only to compliance programmes but to a whole business model that deals with integrity in all activities carried out by a firm."[16]

C. Is Compliance Integrated with Business Processes?

An off-the-shelf compliance policy is only intended to state the rules. A compliance program that seeks to influence day-to-day behavior involves tailoring the policy to the business, and then tailoring business processes to make it easy for people up and down the business hierarchy to conduct business consistent with antitrust and other laws. This admittedly takes effort.

Each business is unique. Tailoring a policy and procedures so that they are an integrated part of the business entails spending time to understand where there is antitrust risk and how to mitigate that risk, both as a matter of policy and in the practices adopted to reduce risk and hold the organization accountable. It means understanding first what the business goals are and what is expected of the businesspeople in achieving those goals. It also means understanding the areas of risk. Competition law is a law that governs how companies engage with other businesses, consumers and even their employees. So, it means understanding these relationships and the practices, communications, and agreements that bind (or lock out) each.

A policy will be more effective when it anticipates the situations in which antitrust risk is created in the day-to-day business. This step involves discussing how the business team crafts business strategy; how different teams build, market and sell the company's products; and how they interact with partners, suppliers, customers, and — of course — competitors. For example, if the business engages resellers, then the policy should anticipate resale price-fixing across the jurisdictions where resellers are used.

Are salespeople expected to sell both their organization's product and the product of another? What do partners expect in the way of exclusivity, or preferences? Where are the parts of the business where leverage can be applied to lock-in or lock-out another participant in the marketplace? Questions like these take time to answer, and more importantly require discussion with the businesspeople. In answering them, a compliance program is more likely to enable the business and legal teams to work collaboratively to identify areas of risk, and plan a compliance program that is tuned to the business.

16 Note from the Government of Brazil, https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)18/en/pdf.

Tailoring business processes can be more daunting. But it is an important consideration. For example, if competitor collaborations are the norm, are there processes in place to structure discussions and decision-making to prevent spill-over discussions and agreements outside the lawful scope of the collaboration? If the business uses dual-distribution where it is competing with its customers, has the compliance team considered how the business organizes its sales teams or what firewalls are in place to mitigate risk of improper pricing or other go-to-market communications?

VI. TAKING STOCK AND ASSESSING EFFICACY

A recent OECD discussion on the subject of competition compliance programs offers a reminder that it is difficult to measure effectiveness. In the summer of 2021, enforcers from around the world came together to discuss the role of compliance in reducing competition law violations. In doing so, they asked an important question: do government agencies have empirical evidence that compliance programs are effective? Sadly, but not surprisingly, the empirical evidence coming out of the discussion was inconclusively "thin."[17] They observed a trend toward fewer and fewer leniency applications. Was this as a result of effective compliance programs? They couldn't say. Interestingly, government enforcers acknowledged that the reduction in leniency cases was just as likely the result of reticence in coming clean for fear of follow-on civil damages claims arising from a violation.

It is not enough to simply articulate a compliance objective and build a program around that. It is also important to know whether the processes adopted are effective. Enforcers stress this. Aside from the enforcement consideration, its good business to evaluate if its compliance program is effective. If it isn't effective, then it's natural to ask why continue and what needs to change? Measuring for efficacy can tell you if an organization is working toward and achieving its goals or if it needs to adjust and improve the program. Measuring efficacy again comes back to first having an answer to the why. If the business is to meaningfully measure effectiveness, it must know what goals it is measuring for.

Notwithstanding the want for empirical evidence considered by the OECD, it is possible for a business organization to measure efficacy. Anecdotally, in counseling companies on compliance, I am firmly of the view that compliance training and integrating compliance into business process can indeed work. Salespeople are more likely to ask for legal advice about their pricing discussions or a customer ask if antitrust is integrated with a business' go-to-market discussions and strategies. Similarly, procurement is more likely to flag issues when they have thought about how companies may be acting anticompetitively. The more that antitrust norms become a part of the conversation in different business functions, the more likely it is going to reflect a business with a "culture of compliance."

By contrast, companies lacking a good compliance program are less likely to see business questions elevated when they might implicate the antitrust laws. They are more likely to be reactive and at risk of being the victim of a violation, whether within their own organization or from outside the business.

VII. CONCLUSION

In this essay, I have focused on what I have observed to result in a more effective business approach to compliance. The risks to a business of a competition law violation are only increasing. The DOJ's recent policy change is an example of how enforcement risks can be amplified, with antitrust violations in and outside the U.S. now factoring into DOJ prosecutions more generally.

17 https://www.oecd.org/daf/competition/competition-compliance-programmes.htm.

DESIGNING A COMPLIANCE POLICY, THE FRENCH APPROACH

BY MARIANNE FAESSEL & HENRI PIFFAUT[1]

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What is the purpose of competition policy? An oft misconception is to confuse the end with the means. To find an infringement of competition rules and impose fines is not an end in itself, although it has a clear impact. In Europe at least, fines do not bring reparation. They are set in such a way that any company about to adopt a possibly illegal behavior would internalize the risk of being fined and rationally opt for a non-infringing behavior (i.e. deterrence). The potential decision and fine are the means to adjust the incentives of companies when they decide on their behavior on the market. To put it differently they aim at ensuring compliance with competition law. The end is a functioning of the market that maximizes consumer welfare.[2]

Most agencies have developed compliance policies. By so doing they use various tools to create incentives for firms to comply with the rules: when deciding on adopting a given behaviour, based on the information available, a firm balances the expected benefits with the expected costs. In turn, many firms have, as part of wider compliance programs, developed one dedicated to competition rules.[3] Compliance has a meaning in various fields such as medicine, psychology, physics or law. In general legal terms, compliance means conforming to a rule, such as a specification, policy, standard or law. Regulatory compliance describes the goal that organizations aspire to achieve in their efforts to ensure that they are aware of and take steps to comply with relevant laws, policies, and regulations. Hence compliance has two dimensions: how competition agencies seek to influence the incentives for firms to enter into anticompetitive conducts and how firms internalize these incentives. As in medicine, compliance is not just a policy objective for a competition agency or just an internal effort by firms, it relies on interactions between agency and firms.

The need for competition policy to address compliance is exemplified by two challenges that competition agencies currently face. First, they are criticized for having failed to develop a system that would tame the digital giants: they seem immune to existing instruments. Second, there appears to be an information gap where categories of companies do not seem to be sufficiently aware of competition law and possible liabilities, for instance SMEs and professions. That raises the question of how to best design competition instruments to ensure compliance, communicate about them and how to help firms and industries to develop their own compliance programs.

I. DESIGNING A COMPLIANCE POLICY AT THE LEVEL OF A COMPETITION AUTHORITY

Designing a proper regulatory setting to address a given issue depends on the decision making of a company before it adopts a given behavior, the credibility and ability (in terms of resources and powers) of a regulator to identify, investigate and sanction that behavior, and the ability and incentives of third parties to provide information to the regulator.

To internalize the costs and benefits of a given behavior under a principle-based regime, a firm must (i) be aware that it might undertake the conduct (i.e. to have in place some control mechanism, systems and data flows, over agents decisions); (ii) understand what rules may be infringed; (iii) evaluate the likelihood that an infringement may be found by a competition authority; and (iv) anticipate the consequences (cost, changes to behavior) it may incur as a result of the finding of an infringement. Such a finding has a probabilistic nature and its realization depends on the instruments that a competition authority has developed. A competition authority has to be able to (v) provide and inform on rules and actions; (vi) identify the behaviors and focus on the most harmful; and (vii) prove that a given behavior infringes rules and adopt a finding with sanctions (fines and/or remedies) which may or may not be sustained if appealed. Finally, there must be some (viii) redress mechanism so that harm that has been inflicted be corrected.

To influence companies' incentives, competition policy relies on information, rules and procedures, and enforcement powers. Competition authorities need to develop instruments that impact all of these eight steps.

When designing a compliance policy, a competition authority faces three obstacles: a double information asymmetry (how clear are rules to firms? And how detectable are bad behaviors?), a credibility issue (how to ensure that firms perceive a high enough probability for the authority to identify and sanction without support from market participants?), and how to balance obligations and principles to comply with and how to set the possible rewards and sanctions so that possible agency issues are minimized.

The information asymmetry aspects underline the importance for competition authorities to communicate on their instruments and actions. Often this may require that communication is adapted to the various targets: large firms and small firms do not have the same access

2 One may object that European competition law is not just about consumer welfare and concerns the competitive process and market integration as well. That does not change the argument even though the rules to internalize for companies may be slightly more complex.

3 OECD (2021), Competition Compliance Programmes, OECD Competition Committee Discussion Paper.

to information and internal skills to anticipate issues. For instance, the Autorité has developed dedicated tools to inform SMEs and professions of their obligations under competition rules. The other type of information asymmetry touches upon the ability to gather information for competition authorities. That requires investigative powers, resources and incentives for economic agents to come up with information.

II. CREDIBILITY OF ENFORCEMENT

Competition authorities must have and show an ability to uncover and sanction bad behaviors *ex officio*. However, many cases would come too late to their attention, after damages have been done. They have therefore developed policies that provide incentives for individuals, parties or third parties to come up with information on potentially unlawful conducts. In order to obtain information on potentially unlawful conducts, competition agencies typically aim at providing gains to informants that go beyond their potential costs. This is the reasoning behind leniency policies. Also, some agencies have started programs where they pay individual informants. For instance, in the U.S., the Commodity Futures Trading Commission has awarded almost $200m to a former Deutsche Bank employee who raised concerns about the manipulation of the Libor interest rate benchmark.[4] In France, the Autorité has developed such leniency program,[5] and updated its fining policy.[6] As for third parties, tools include the possibility to claim damages but often protection against retaliation is key. Ensuring confidentiality is a prerequisite. In other instances, authorities rely on an obligation to inform. For instance, mergers have to be notified with extensive information on the markets concerned or in France, supermarket chains have to inform on joint purchasing structures.[7]

But that relies on the authority credibility in detecting, on its own, possible infringements and enforcing its rules. The credibility of competition authorities depends on various parameters. That means having investigative powers that allow to gather information. That means using these powers and in particular, developing an ability to make *ex officio* cases so that there is an incentive for firms to provide initial intelligence and later to cooperate with the authority. And that requires resources to analyze and draw findings out of the information gathered: competition agencies must have the infrastructure and staff necessary to implement their policies. Finally, that means communicating on their rules and actions. In that regard, the Autorité is pursuing efforts to develop tools to detect on its own possible infringements.

III. TAILORING COMPETITION INSTRUMENTS

Although they bind the agency, competition policy instruments range from soft (not binding) to hard (binding) with many steps in between them. Guidelines bind the competition authority, regulations bind both agencies and companies, commitment decisions bind both the agency and the parties; and infringement decisions, which may include some forward-looking obligations, bind the parties. Regulations, however, apply to a set of companies, targeted by the regulation that matches its scope and detail behavior that would raise concerns as opposed to those that would not and those where further investigation would be required.

The timing aspect of competition instruments is much more complex than an *ex ante – ex post* dichotomy. Think of cartels. The rule is clear, competitors shall not agree on prices or on quantities. It has been confirmed in numerous infringement decisions and court rulings. The rule acts as an *ex ante* principle, and the infringement procedure is no different to what would happen were a rule included in an *ex ante* regulation be alleged to be infringed. A firm can internalize competition rules in its decision making only if rules, procedures and sanctions are known in advance. It is perhaps more relevant to think of the timing of setting out the rules and possible sanctions when the rules are infringed, so that companies can decide on their future behavior. All instruments are by nature forward looking (or in the case of infringement decisions have a forward-looking component by setting precedent) since they (also) aim at influencing future behavior of companies. A block exemption sets out for the future which behaviors are permissible, should be avoided or are in a grey zone that would require a case specific investigation. It brings some level of legal certainty prior to adoption of a behavior but there is always the possibility of a finding of infringement *ex post facto*. Although the regulator has no *ex ante* knowledge of the behavior. Similarly, guidelines set out principles in advance, notably on how an assessment may be conducted and with them some legal certainty without limiting the possibility of finding infringements. Even an infringement decision provides an assessment mostly based on the facts existing at the time of the action that is being under review, not at the time of the adoption of the decision. This is because the aim is really to have competition enforcement risk internalized *ex ante* by companies. Clearly an infringement decision will also aim at remedying the specific competitive harm caused by the behavior at stake. So, this second parameter should be seen in terms of degree of guidance.

4 Financial Times, October 21, 2021.

5 Its latest communication on leniency dates back to April 3, 2015.

6 It adopted a new procedural notice on the method for determining fines on July 30, 2021.

7 Law of August 6, 2015 pour la croissance, l'activité et l'égalité des chances économiques.

Lastly, the possible costs of finding an infringement matter for firms. They include possible remedies, fines and damage actions. Competition authorities aim at making them predictable for firms.

In general principle-based regulation (such as the principles set out in Articles 101 and 102 accompanied by Regulation 1/2003) is preferred over ones with some *ex ante* obligations. This is because the costs of *ex ante* obligations are much higher. They require some standardization of the behavior of companies and their interactions with the regulator. In order to regulate specific business decisions, regulators generally require information in a pre-set format and regular interactions with the company's staff. That may create barriers for smaller companies and regulatory capture. They may decrease the incentives to innovate because of the cost of the regulatory review, the lower competition threat, and a reluctance for the standard that governs the interactions to have to change. These drawbacks do not exhibit the same intensity for all regulations. They are probably the most intense for industry specific regulation (like for telecoms) and less so for regulation that applies to some infrequent business decisions, such as control over foreign investment for instance.

However, in some instances, relying only on principle-based regulation is inefficient. Merger control is a good example. Absent an authorization-based merger control regime, mergers with harmful effects may still, after their implementation, be found to harm competition. However, there are two structural issues that may make such a system suboptimal. First, competition agencies may have an identification problem: how do they know that a merger took place and, in addition, may have caused competition harm? Second, even assuming that a competition agency was aware of the merger and has found competition harm but post completion of the transaction, how can it remedy it? That is the famous problem of "unscrambling the eggs" and more generally how to bring an industry to reach another equilibrium. That led to a notification and authorization-based regime where mergers cannot be implemented before a green light has been granted. Obviously, that relies on the pre-selection of mergers that are the best candidates for such a regime and let the other ones go through. In some jurisdictions there is still a possibility to challenge mergers after they have been consummated. Experience has shown that some mergers not caught by turnover thresholds, notably involving digital platforms, could raise significant competition issues that would be hard to remedy ex post. This has led to the revival of Article 22 of the merger regulation, championed by the Autorité, and information provisions on acquisitions in the Commission's draft Digital Markets Act. Ultimately, this should lead firms, including the tech giants, to internalize possible merger control over such transactions.

Another example relates to the telecom markets where sector specific regulation has been put in place that relies on information provided by telecom operators and imposes numerous conditions on access and pricing. Such sector specific regulation addresses the inability of generic competition rules to design and monitor access markets that allow competition to develop. This is in part due to identification problems mentioned above but also to the working of such industries that are affected by network effects (how to undo competition harm). That is also part of the challenge that large digital platforms raise: their complexity raise identification issues and the working of network effects may make undoing the harm of a past behavior nearly impossible. The current discussions on a Digital Markets Act try to address these points.

Regulations however generate costs. Enforcement requires resources and manpower both by companies and enforcers. In addition, they have distortive effects: they increase the cost of doing business, distort the incentives to invest and innovate and create uncertainty. Regulation does not operate under perfect information with infinite resources either from the standpoint of regulators of that of companies. That leads to error costs issues. Companies may adopt over-cautious or over-risky conducts. Regulators may produce badly designed rules that create false positive and false negative situations. These costs are particularly relevant for platforms as they may lead, through the working of network effects, to unfairly either strengthening or weakening platforms. For that reason, authorities try to make information gathering, rules and procedures as proportionate as possible to the objective of maintaining competition.

IV. COMPLIANCE POLICY FACES AGENCY ISSUES.

On the one hand competition authorities cannot directly measure the success of their policies: they can measure their enforcement success but it does not necessarily reflect their success in altering firms' incentives. The number of adopted decisions or the amount of fines imposed are not necessarily informative on the effectiveness of competition policy. In a way one could even argue that the more there are infringements the more it would show that they failed in changing compliance incentives. The reasons for that can vary: lack of clarity of when infringement can occur, too low level of sanctions, lack of market monitoring, inefficient procedural rules, etc. Competition agencies such as the Autorité constantly work on improving these aspects, stating policy objectives, trying to develop *ex post* assessment tools, and other actions either through their own efforts or thanks to feedback from stakeholders.

On the other hand, firms themselves face significant agency issues. To engage into potentially anticompetitive conduct or infringe procedural rules is rarely the outcome of corporate level decisions. Most often such actions result from manager decisions. Managers may see benefits

from higher profits from anticompetitive conducts (higher bonuses) but not necessarily the costs. Firms may not be able to identify anticompetitive conducts implemented by their managers and would have to bear the consequences of possible sanctions. They are perhaps most vivid with digital platforms where their business relies on regulating environments for users to interact while at the same time maximizing profits through their own interactions with users. That is a general challenge for firms and that has led to governance and compliance policies that try to minimize the extent of the agency issue. Their objective is twofold: to change managers' incentive to enter into anticompetitive conducts and to identify and report ongoing anticompetitive conducts. Many leniency applications have been triggered by due diligence reviews at times of changes in internal governance either because of merger and acquisitions, governance demands from shareholders or simply changes in personnel.

Competition authorities try to solve this firm's agency issue by creating incentives for firms to adopt and implement compliance policies and by directly altering managers' incentives. The following describes the Autorité approach in that regard.

V. INSTRUMENTS DEDICATED TO COMPLIANCE IN FRANCE

Some competition agencies have chosen to create a link between the existence of a compliance policy and possible fines: either such policy would lead to lower fines or the absence of such policy would increase possible fines. In France, the Autorité adopted back in 2012 a policy[8] of reducing penalties for companies that set up competition compliance programs. The objective of that policy was to encourage companies to put in place structural and sustainable tools at a time when compliance programs were not widely deployed. The Autorité issued its 2012 so-called "Framework Document on competition compliance programs" after a broad public consultation. It not only gave guidance on key points for an effective compliance program. It also provided that a company could obtain an up to 10 percent reduction in their fine if it did not challenge the objections raised against it and committed to implement a compliance program for the future.

When the Autorité adopted a new settlement procedure in 2017, it decided to revise its policy regarding compliance programs by withdrawing the 2012 Framework Document.[9] This policy had drawbacks. It created an incentive not to implement a compliance policy before a finding of infringement. Firms with a compliance program would be fined more than those without, *ceteris paribus*. There was therefore a perverse effect in rewarding companies that had not made an effort in this area. In the press release that was then published to inform the public of this change, the Autorité emphasized the fact that companies have had time, over the last years, to internalize competition law and implement compliance programs. It therefore decided that commitments offered by companies to set up such compliance programs could no longer justify a reduction in the penalties incurred for competition law infringements.

From that time on, the Autorité implemented a new approach to compliance by actively disseminating practical tools and guidance for stakeholders such as papers, in-depth studies and guides that explain the Autorité's decision-making practice in a detailed and pedagogical manner. These resources, available on the Autorité's website, cover a large range of topics, including: gun jumping (2018), loyalty rebates (2018), algorithms and competition (2019), competition for SMEs (2020), competition policy and the digital economy (2020), behavioural commitments (2020), online commerce and competition (2020), and professional bodies (2021). The Autorité also completed a major overhaul of its mergers guidelines in 2020. These contributions show significant efforts to reach out to firms of all kinds.

In an effort to further respond to the needs of stakeholders, the Autorité decided to join a working group, formed in 2020 at the initiative of in-house counsels, attorneys, and members of trade associations with a view to discuss and identify good compliance practices. One important finding of the group was that companies felt the need to have further guidance on how to implement compliance programs. This led the Autorité to draft a new Framework Document on competition compliance programs. It launched a public consultation for a two-month period on October 11, 2021. The final text of the new guidance is expected to be published early 2022.

With this document, the Autorité wishes to contribute even more to developing a culture of compliance among all firms, whatever their size and industries. The new document points out that there is no one size fits all program and that a successful program must be based on five elements: (i) a public commitment of the company to support the compliance program; (ii) the appointment of persons responsible for implementing the compliance program; (iii) ensuring information, training and awareness at all levels of the company; (iv) the implementation of monitoring and warning mechanisms; and (v) the implementation of a system to monitor the treatment of alerts.

In parallel to this new guidance, and the continuing development of soft law via the release of regular publications, the Autorité is also keen to promote compliance at a larger level through a more and more interactive communication notably via using new tools on its website.

8 Framework Document of February 10, 2012 on Competition Compliance Programmes.

9 Communiqué of October 19, 2017 on the settlement procedure and compliance programmes.

These tools are very effective to help disseminate a culture of compliance in a world where most people run after time. The Autorité also continually seeks to improve its traditional means of communication. For instance, its press releases now often include compliance text boxes that summarize lessons learned from the case at stake.

Designing compliance policy instruments requires understanding the origins of harmful conduct so that incentives could be changed. This includes addressing agency issues and adapting to the economic context. The aim is to dynamically adjust such instruments to ensure maximum compliance at minimum costs.

COMPETITION COMPLIANCE: THE PATH TRAVELLED AND THE WAY TO GO…THE CNMC'S EXPERIENCE

BY CANI FERNÁNDEZ VICIÉN[1]

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I. INTRODUCTION

The CNMC[2] seeks to promote and advocate for effective competition between economic operators for the proper functioning of markets, but these objectives cannot be reached through enforcement alone. Ultimately, decision-making and business culture within companies should comprise antitrust compliance as an integral part. Consumers, companies, markets and society as a whole will benefit from a business environment where antitrust compliance is a must.

The CNMC has been developing several initiatives in this direction. One of them focuses on incentivizing the implementation of compliance programs. Indeed, good and effective compliance programs can contribute to the big objectives as they provide tools that enable companies not only to prevent, detect and react promptly to unlawful conduct, including anticompetitive practices, but also to raise overall awareness regarding antitrust laws, its objectives and benefits. In addition, compliance programs may also strengthen companies' collaboration with the CNMC within the framework of the leniency programme. Other initiatives are focused on advocacy tools (guides and studies, training public officials, etc.) and communication tools (social media, training videos, etc.) which aim to raise awareness among stakeholders and provide the adequate tools to help understand, follow and enforce competition laws. Some of these initiatives are put forward below.

II. COMPLIANCE PROGRAMS AND COMPETITION ENFORCEMENT

The CNMC issued its Compliance Guidelines in June 2020, with the aim of promoting the observance of competition rules by economic agents as a tool to strengthen its own enforcement activity and overall awareness with competition laws and its benefits.[3]

This is the first document designed by the CNMC that specifically concerns compliance programs related to competition law infringements. Some analyses and references had been included in previous decisions, following some pleas made in this regard by the parties, but there was no methodological document with all the relevant criteria.[4] A major drive behind compliance policies within the CNMC arose from the possible imposition of debarment measures in public tenders following serious infringements of competition law, after the entry into force of Article 71.1.b) of the Public Procurement Act (Ley 9/2017 de Contratos del Sector Público [LCSP]); and the possibility of avoiding any such debarment following the self-cleaning measures envisaged in Article 72, paragraph 5, of the LCSP.[5]

In this context, in May 2019 the CNMC set up an internal multidisciplinary working group, led by the Competition Directorate, to research, discuss and design some guidance regarding the "effectiveness" of the increasing number of compliance programs exposed by the parties during infringement proceedings. The first draft was disclosed for public consultation in February 2020. Following extensive participation by the relevant stakeholders, the definitive text was published in June 2020.

The CNMC Compliance Guidelines are structured in two parts. The first part details a non-exhaustive list of criteria that the CNMC considers appropriate for designing and implementing an "effective" compliance program (Sections 1 to 3). The second part (Section 4) establishes the consequences within the framework of an infringement proceeding deriving from the existence or the future implementation of such an "effective" compliance program.

As regards the first part, the following criteria are described:

2 This contribution has been prepared in September 2021 by the staff of the CNMC and should not be regarded as the official position of the CNMC unless it refers to CNMC-approved documents.

3 Compliance Programs experimented a major boost in Spain primarily in the sphere of criminal law due the introduction of criminal liability of legal persons and its elusion through compliance programs in 2015. Companies started to recognise the value of compliance programs to ensure compliance in other areas, particularly in the sphere of administrative infringements, including antitrust wrongs. Similarly, since 2016 the CNMC has been exploring these matters through its "Compliance Spaces," which consist of regular open-house debates hosted by the CNMC on a wide set of compliance-related issues.

4 See cases S/0482/13 Fabricante de automóviles ; S/DC/0544/14 Mudanzas internacionales ; S/DC/0557/15 Nokia ; S/DC/0565/15 Licitaciones aplicaciones informáticas ; S/DC/0612/17 Montaje y mantenimiento industrial. In all these cases, the alleged compliance programs were not considered eligible as a mitigating circumstance. The only case where the compliance instrument had some effect on the amount of the fine was *Mudanzas internacionales*, where the fine was reduced following the promise to implement a certain compliance program. In another case (*Montaje y mantenimiento industrial*), the CNMC expressly recognised the possibility of avoiding debarment from public procurement following an antitrust infringement if an effective compliance program was implemented.

5 The first case in which the CNMC stated this debarment provision was in its Decision of 14 March 2019 (Case S/DC/0598/16 *Electrificación y Electromecánica Ferroviarias*) available at https://www.cnmc.es/expedientes/sdc059816.

- **Tone from the top**: an effective compliance program must show the true commitment of the company's management bodies and/or top executives to promote compliance within the organization.

- **Compliance Officer**: normally, effective compliance programs include the appointment of a fully independent compliance officer, who is responsible for the design and oversight of compliance policies.

- **Risk map and control matrix**: risks should be identified, and protocols or control mechanisms designed to avoid and detect them.

- **Training**: specific antitrust training is regarded as one of the basic pillars of an effective compliance program according to the CNMC's Guide. Effective training should be duly adapted to the area of activity and duties and to changing circumstances of employees.

- **Internal reporting channel**: its existence enables employees to raise concerns or report potentially unlawful conduct.

- **Predictable and transparent internal procedures**: It is important for there to be an agile and accessible internal procedure for managing reports and detecting violations.

- **Disciplinary Regime**: an effective compliance program should generally include a transparent and effective disciplinary regime, including disciplinary measures in cases of deviations from the program or violation of the rules, as well as potential rewards for compliance and collaboration.

The second part of the CNMC Compliance Guidelines (Section 4) constitutes its most innovative feature, since it envisages the reactive measures expected from committed compliance following a given infringement, and the incentives arising therefrom. It includes an explicit recognition of the incentives deriving from compliance commitments, which is unusual among legal systems that are not based on common law. Such incentives are based in Article 64, paragraph 3, of the Spanish Competition Act (*Ley 15/2007, de Defensa de la Competencia*, hereinafter, LDC) concerning mitigating circumstances following active collaboration and termination of the infringement.

Incentives vary between *ex ante* compliance programs (those in place before infringement proceedings are opened) and ex post (those promised to be implemented thereafter). Furthermore, a distinction is drawn between cartel cases and non-cartel cases since, in the latter case, companies cannot file for leniency.

Usually, larger benefits are inferred from ex ante than from ex post compliance programs. Likewise, whenever there is self-reporting (leniency or other), true compliance commitment is assumed. In the absence of self-reporting, compliance culture and commitment deriving from an effective CP should normally entail full collaboration from the infringing company with the CNMC.

Incentives encompass a reduction of the fines, acknowledgement of the compliance efforts in the final decision, and avoiding the eventual debarment from public tenders in eligible cases.

The Guide does not establish an automatic reduction of the fine, nor a specific percentage of reduction. Every case will be analyzed individually. However, the Guide refers to previous decisions of the CNMC in relation to self-reporting in a non-cartel case, which together with full collaboration amounted to a non-fine decision (S/DC/0596, *Estibadores de Vigo*), and cases where prompt and full collaboration, voluntary acknowledgment of the facts and remediation prompted a significantly reduced fine (S/DC/0629/18, *Asistencia Técnica Vaillant*).

III. EXPERIENCE IN COMPETITION ENFORCEMENT

The CNMC applied the Compliance Guidelines for the first time in its Decision of May 11, 2021 (case S/DC/0627/18 *CONSULTORAS*).[6] In this case, three of the fined companies pleaded for the consideration of their compliance programs, in the light of the CNMC Guidelines, as an eventual mitigating circumstance.

The CNMC concluded that the (*ex ante*) compliance programs of two of the companies were ineligible as a mitigating circumstance since they had been manifestly ineffective in preventing the anticompetitive behavior. Indeed, they were too vague and did not include any mention about the observance of competition rules and ex post commitments did not guarantee future observance of competition rules.

6 https://www.cnmc.es/expedientes/sdc062718.

Only in the case of one company did the CNMC accept the compliance program as a reason to reduce the amount of the fine by 10 percent and protect the company from eventual debarment measures. The CNMC found that the pre-existing competition-related commitments and internal procedures had been appropriate. Most importantly, it valued the proactive attitude of the company following the initiation of the infringement proceedings, which measures included internal audits and the dismissal of the employees involved in the infringement who had been found to act against the company's instructions.

More recently, on the contrary, in case S/0013/19 *CONSERVACIÓN CARRETERAS*),[7] the CNMC concluded that none of the alleged compliance programs fulfilled the criteria for an eventual reduction of the fine or the avoidance of debarment measures in public tenders.

IV. ADVOCACY TO PROMOTE A CULTURE OF COMPETITION AND COMPLIANCE

In addition to promoting the adoption of compliance programs through enforcement measures, there are other maybe more significant strategies lead by the CNMC to promote compliance and antitrust compliance culture in Spain.

A. Communication Strategy

On the one hand, communication. Effective communication is crucial to create a culture of compliance and competition throughout society. Communication increases agents' awareness and knowledge of competition law and conveys the vital role that competition authorities have in safeguarding social welfare.

Communication strategy usually relies on press releases which ensure impacts in the traditional media like newspapers (appearances on radio or TV programs are left to significant matters). However, more targeted strategies, such as flagship cases or reports, briefings with journalists or seminars, also play a crucial role.

Digitization calls for a greater innovative approach in communication. The CNMC is particularly active in social media (such as Twitter[8] or LinkedIn[9]) and regularly uses other useful digital tools, such as the institutional blog.[10] For example, this blog keeps a specific section on compliance[11] which provides a good platform to explain the CNMC's compliance guidelines and related work) and contributions from independent guest authors on topics relevant to competition and compliance. The CNMC's YouTube[12] channel also includes short explanatory videos and infographics about elements of competition law such as the leniency policy and the new tool for making encrypted complaints. Videos of past events (which are also livestreamed) and a series of podcasts[13] (CNMC Tips) are also available.

The combination of traditional and innovative communication tools has two advantages. Firstly, it allows the agency to adapt the message to the audience (which varies substantially from LinkedIn or the specialist press to mass social media or YouTube). Secondly, it facilitates the deployment of a battery of instruments (press releases, campaigns in social media, infographics, short videos, etc.) to ensure that a flagship case/report/initiative is well-known by the relevant stakeholders (who tend to consume different media and thus have to be reached through different channels).

B. Advocacy Policy

Apart from communication, a culture of compliance benefits hugely from an ambitious policy of competition advocacy.

7 https://www.cnmc.es/expedientes/s001319.

8 See https://twitter.com/cnmc_es and https://twitter.com/CNMCcompetencia.

9 See https://es.linkedin.com/company/cnmc-comision-nacional-de-los-mercados-y-la-competencia.

10 See https://blog.cnmc.es/.

11 See https://blog.cnmc.es/dialogos-compliance/.

12 See https://www.youtube.com/user/CNMCes.

13 See https://open.spotify.com/show/33lft7P7LT90x9KPMKkkNf?si=w_djo8DlQsKmlP9rSKSzDA or https://podcasts.apple.com/es/podcast/cnmc-tips/id1336002563.

Relying on the CNMC's experience, advocacy initiatives to promote compliance follow three streams: general dissemination of competition policy, efforts to target specific areas or conduct, and actions directed at certain sectors.

Regarding the first stream of work, competition advocacy can be critical to make sure that the different stakeholders understand the advantages of competition and the role of the authorities.

If the culture of competition is disseminated, authorities can benefit from an environment where more firms comply with competition law and agents generally cooperate more (reporting their awareness of unlawful conduct). This eases the work of Competition Agencies, which can devote fewer resources to investigating different types of misbehavior and can focus on priority areas or cases.

Authorities must convey the message that compliance with competition law is profitable for the firm. It is not just a matter of avoiding sanctions or reputational costs. A belief that anticompetitive conduct maximizes profits is short-sighted. Getting used to the "quiet life" of a monopolist/cartelist makes the firm less dynamic to adapt to changing circumstances. A market that seems stable today can be altered by a regulatory change or technological disruptions that turn potential competition into actual competition. Firms that have been used to competing on their merits will be better prepared to thrive in this dynamic environment than companies that have been "dozing" in situations of limited competition.

Therefore, an advocacy policy can do two things to ensure awareness of competition law and of its benefits (for competitive firms, consumers and the general welfare). On the one hand, guides targeting specific stakeholders such as consumers,[14] firms,[15] or other agents.[16] On the other, a far-reaching advocacy policy to ensure that the public sector promotes good, pro-competitive regulation (whereby anti-competitive conduct does not pay off because business entry, growth and innovation increase market contestability) through market studies and regulatory reports (and challenging administrative acts in courts if needed[17]).

The second stream of work in advocacy deals with specific efforts targeting priority areas (because of their relevance or risks). One of these is public procurement, which is paramount to competition due to its size (around 10-20 percent of GDP[18]) and the potential for bid rigging.[19] We have estimated that increasing competition in the tendering process can yield cost reductions of at least a 10 percent.[20] Therefore, it is evident how the whole society can benefit from a more competitive environment in the form of higher value for money in public procurement and better management and optimization of government budgets. However, progress in this area requires decisive steps in advocacy (setting aside the above-mentioned incentives introduced through enforcement: sanctions and the debarment provisions and the lift of that debarment if credit is given to a solid compliance program).

Training procurement officials and entities is of the utmost importance. The CNMC has a Guide on Public Procurement and Competition,[21] which provides a reference to improve the design of public tenders following competition-friendly principles and to identify possible contexts of bid-rigging and collusion. However, it was originally published in 2011, so it needs to be updated to reflect new economic and legal

14 See CNMC (2021): G-2019-01 "Benefits of competition for consumers." This guide explains competition for consumers but also includes a specific section for firms. A communication campaign (including videos, infographics and a blog post) was launched.
See https://www.cnmc.es/expedientes/g-2019-01 and https://www.cnmc.es/guia-competencia-para-consumidores.

15 See CNC (2009): "Guide for Business Associations," G-2009-01 (analysed below)
https://www.cnmc.es/expedientes/g-2009-01.

16 The CNMC is also preparing a guide for estimating the damages associated with competition law violations, whose objective is to assist judges and courts (and also expert witnesses and lawyers). To the extent that it can have a deterrent effect (through a better private application of competition law) it can incentivize compliance.
https://www.cnmc.es/ambitos-de-actuacion/promocion-de-la-competencia/mejora-regulatoria/consultas-publicas/consulta-cuantificacion-de-danos.

17 The Law on the creation of the CNMC (in Article 5.4) endows it with the power to challenge anticompetitive administrative acts before Courts. See
https://www.cnmc.es/file/64267/download.

18 CNMC (2020): "Public procurement planning as a tool to promote competition and efficiency," G-2019-02
https://www.cnmc.es/expedientes/g-2019-02.

19 CNMC (2015): "Analysis of Public Procurement in Spain: Opportunities for improvement from the perspective of Competition" PRO/CNMC/001/15
https://www.cnmc.es/expedientes/procnmc00115.

20 CNMC (2019): "Overview of public procurement procedures in Spain" E/CNMC/004/18
https://www.cnmc.es/expedientes/ecnmc00418.

21 CNMC (2011): "Guide on Public Procurement and Competition" G-2009-02
https://www.cnmc.es/expedientes/g-2009-02.

contexts.[22] This process is being carried out in phases which reproduce the cycle of public procurement: planning,[23] evaluation of alternatives,[24] preparation, tender, award, execution and ex post evaluation. But this process cannot be carried out from an ivory tower: each of the phases is materializing in the form of a document of conclusions following a process of public consultations, organization of events, workshops, requests for information, etc.

Furthermore, the CNMC has developed a training program for public officials responsible for public procurement at all levels of public administration in Spain. Under this program, it has provided training to more than 40 institutions and around 2,500 officials since 2014.[25] The program seeks to improve public officials' capacity to detect bid-riggings and use best practices in the design of the tendering process.

The Compliance Guide of June 2020 should be encompassed in this same strategy. The company's training efforts specific on antitrust issues within their compliance program contribute effectively to this overall antitrust awareness in the business community.

All these initiatives have further advantages. Better understanding of contracting authorities and officials can result in the increased detection of potentially unlawful conduct and a more agile collaboration with the competition authority. And these fora (training sessions, workshops, etc.) lay the groundwork for opening, developing and strengthening formal and informal channels of communication between contracting entities and competition authorities.[26] This results in a deterrent effect on firms and incentivizes compliance.

All these efforts complement other advocacy initiatives in the area of public procurement,[27] such as the analysis of draft regulations or tender documents (challenging them before courts if needed[28]).

Apart from public procurement, there are other actions taking place in this second stream of work consisting of advocacy products that target relevant or troublesome areas. Another example is the field of business associations, which can give rise to concerns in relation to enforcement. This is why the CNMC also issued a Guide for Business Associations,[29] which analyzed the main risks for competition (recommendations on pricing, market sharing, exchange of information, etc.) so that business associations could self-assess their behavior and improve compliance.

Finally, the last stream of work in advocacy consists of focusing on sectors which may lead to competition concerns. In addition to issuing recommendations, market studies and regulatory reports can analyze certain contexts or conduct in specific activities. Even if the conclusions and recommendations are not binding[30] and are without prejudice to any action on the enforcement front,[31] these advocacy products can flag up certain conduct or dynamics giving rise to competition concerns. Companies can take these warnings into account and adapt their behavior to more competitive patterns. In some of the examples mentioned below, undertakings have actually modified their course of action, meaning that advocacy (despite not having binding implications) has been effective in promoting compliance with competition law and principles.

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22 In Spain, the legal framework of public procurement has changed substantially with the transposition of EU Directives https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL_2014_094_R_0001_01 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024.

23 Already finished. See CNMC (2020): "Public procurement planning as a tool to promote competition and efficiency," G-2019-02 https://www.cnmc.es/expedientes/g-2019-02.

24 In progress. See the public consultation and the event https://www.cnmc.es/ambitos-de-actuacion/promocion-de-la-competencia/mejora-regulatoria/consultas-publicas/consulta-convenios-encargos-propios https://www.youtube.com/watch?v=TVAratPjEwk.

25 This process is not slowing down despite the pandemic (in 2020, six training events were organized with around 300 officials).

26 One example of how these channels are working in practice is the fact that, in the last three years, contracting authorities have actually reported 16 cases of suspicious behavior to the CNMC.

27 See https://www.cnmc.es/en/ambitos-de-actuacion/promocion-de-la-competencia/contratacion-publica.

28 As mentioned above, the Law on the creation of the CNMC (in Article 5.4) endows it with the power to challenge anticompetitive administrative acts before the Courts. Therefore, this includes the possibility of appealing a procurement process if it is not deemed sufficiently competitive. See https://www.cnmc.es/file/64267/download.

29 CNC (2009): "Guide for Business Associations," G-2009-01 https://www.cnmc.es/expedientes/g-2009-01.

30 As would be the case in a market investigation, which is not strictly an advocacy product as such but an *ex ante* competition tool which can include binding remedies.

31 They do not necessarily lead to any specific enforcement action or investigation.

Regulated industries are a frequent target of reports. The CNMC has recently analyzed railway services, both passenger[32] and freight,[33] following their liberalization. The studies included the assessment of conduct by the incumbent company (RENFE) that might imply risks: restrictions on access to inputs, cross-subsidization of services, etc.[34]

The CNMC has also studied air traffic services in Spain,[35] including an analysis of a protocol regarding the hiring of air traffic controllers. The protocol was rendered void at the time the study was published, but the fact that the CNMC was carrying out the study was perhaps relevant for agents to understand the risks of such a conduct.

As for the wholesale automotive fuel market,[36] the CNMC found in a study that operators with refining capacity (Repsol, Cepsa and British Petroleum) might be able to influence the company (CLH) owning the pipeline network and the majority of storage facilities (assets which are essential for the distribution of automotive fuels). Therefore, the study proposed limiting the influence of these companies on CLH. After the approval of the report, the companies actually decided to sell their stakes in CLH, proving again how advocacy products can have a certain effect, promoting a higher degree of compliance.

The CNMC has also issued many studies and reports[37] on Professional Bodies (or Associations) that are authorized by Spanish law to regulate certain services (similar to occupational licensing). Some of the recommendations of these studies include actions to minimize the risk of violating competition law, such as through coordination of supply (with indicative fees, information exchanges, restrictions on advertising, etc.) or through disproportionate or discriminatory conditions.

And, finally, apart from "traditional" industries, the CNMC has also analyzed sectors disrupted by the wave of digitization where competition issues may arise, such as Fintech[38] (especially in the area of payments) and online advertising.[39]

V. CONCLUSION

CNMC's efforts to promote a culture of competition compliance are multifaceted but they are all consistent with the principle that the best competition policy is the one that is successful in preventing and deterring anticompetitive conduct.

In line with this, a wide range of tools is needed to tackle the complexity of this challenge. These tools include vigorous competition enforcement, guidance on compliance programs, and effective communication and competition advocacy.

These efforts are already having the sought impact in media and business strategies in Spain. Although much can be done and resources are limited, we trust to be on the right path.

32 CNMC (2019): "Market study on the liberalization of railway passenger transport services," E/CNMC/004/19 https://www.cnmc.es/expedientes/ecnmc00419-0.

33 CNC (2013): "Report on competition in railway freight transport in Spain. E-2010-02 https://www.cnmc.es/expedientes/e-2010-02.

34 In fact, some years after the conclusion of the market study on freight services, an investigation was opened ending in fines for anticompetitive conduct to the incumbent and other company because of discriminatory treatment of other undertakings. See case S/DC/0511/14: RENFE OPERADORA https://www.cnmc.es/expedientes/sdc051114.

35 CNMC (2018): "Market Study on Air Traffic Services in Spain," E/CNMC/002/2018 https://www.cnmc.es/expedientes/ecnmc00218.

36 CNMC (2015): "Study on the wholesale automotive fuel market in Spain" E/CNMC/002/15 https://www.cnmc.es/expedientes/ecnmc00215.

37 CNC (2012): "Report on professional colleges after the transposition of the Services Directive" E-2011-04 https://www.cnmc.es/expedientes/e-2011-04.

38 CNMC (2018): "Fintech market study" E/CNMC/001/18 https://www.cnmc.es/expedientes/ecnmc00118.

39 CNMC (2021): "Study on the competition conditions in the online advertising sector in Spain" E/CNMC/002/19 https://www.cnmc.es/expedientes/ecnmc00219.

ANTITRUST COMPLIANCE IN BRAZIL

BY ALEXANDRE CORDEIRO MACEDO & ALDÉN CARIBÉ DE SOUSA[1]

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I. INTRODUCTION

The Brazilian Competition Law does not require private companies to adopt compliance programs. However, the law provides for liability regardless of fault, which to some extent encourages companies to implement these programs.

Imposing a penalty when there is liability regardless of fault only requires the antitrust authority to identify the wrongdoing and its causal link, connecting the violation to the violator. As the authority does not examine whether there was intention or negligence, in order to avoid sanctions, the best path is to avoid taking risks – and compliance programs serve exactly this purpose.

Conversely, the Brazilian Competition Law (Law 12529/2011) does not make explicit mention of compliance programs as remedies for merger proceedings nor does it reckon them as mitigating factors for antitrust violations. However, CADE has intensified its efforts to promote and develop such programs, bringing them into the authority's merger control agreements ("ACC") and cease and desist agreements ("TCC"). This way, the signatories undertake to implement or improve their compliance programs to have a merger cleared or a sanction mitigated. In the case of anticompetitive conduct, a precedent (Application 08700.001429/2015-23) established that if a company's compliance program is combined with an open-door policy, the company can have up to 5 percent of discount on its expected fine (which usually ranges from 12 to 18 percent of its gross revenue for cartel conduct). The open-door policy is a policy that facilitates the authority's investigations, giving CADE the possibility to enter a firm's headquarters at any moment.

It is worth mentioning the authority has no precedents establishing it can unilaterally impose a compliance program, as CADE understands that an applicant's decision to implement the program is important for its effectiveness. As to the cases in which CADE levies financial contributions on agreement signatories, it determined the value to be repaid for failure to comply with the terms of the agreement should be twice the amount of the granted discount.[2]

Finally, the authority is interested in investing resources to promote antitrust compliance in its advocacy actions, with initiatives designed to foster a free market.

As the adoption or improvement of compliance programs are not mandatory, one may wonder why CADE is engaged in promoting them in several ways, or even ponder on the advantages of compliance for bidders in procurement processes.

II. WHY COMPLIANCE? CADE'S PERSPECTIVE

From CADE's perspective, compliance programs boost regulatory scale. The expression regulatory scale refers to the reach for maximum effectiveness with public resource allocation to the antitrust policy, especially as private agents adhere to regulatory objectives.

A significant part of antitrust effectiveness happens via command and control actions, with agencies disseminating their standards and the laws defined by the Legislative Branch, besides reviewing any violations to the regulations on their own. As to the review, intelligence activities and ex officio investigations stand out.

Along with public efforts, the government can encourage private efforts concerning observance and diligence with the law. Such measure is significant since private companies' knowledge of regulations and their compliance with them also reflect on the effectiveness of antitrust standards. Effectiveness here means the adhesion of private agents to regulations aimed at better market functioning.

The diligence of private agents with competition compliance is the result of successful public command and control efforts. Extensive and agile investigations, robustly launched proceedings within the due legal proceeding, and severe fines can result in stakeholders realizing that compliance is the path that best safeguards firms against allegations and possible penalties. The phenomenon described here suggests an interdependence between public and private enforcement, with the former playing a significant role in driving the latter.

Thus, promoting efficient integrity programs is a systemic effort. The first measure in making the private sector heed integrity, and hence promote successful programs, is to develop ex officio investigations that impose relevant fines – that is, to educate openly about the disadvantages of breaching the law. Against this backdrop, between 2012 and 2020, the authority levied fines amounting to over BRL 6 billion, received

2 Applications 08700.004337/2016-86; 08700.004341/2016-44; 08700.008159/2016-62; 08700.007077/2016-09; 08700.008158/2016-18; 08700.005078/2016-19; 08700.004137/2017-12.

financial contributions deriving from signed agreements that reached over BRL 4 billion, and imposed sanctions that prohibited on contracting with the government, on receiving government loans, and even on selling assets – all done according to law.

Despite the interdependence of efficient private actions and the success of command and control actions, it is clear that the adoption of compliance efforts by private organizations has a reinforcing effect on CADE's work: an example of the regulatory scale that can be most useful to the mission of antitrust agencies of rendering vigorously competitive markets.

Compliance programs can be authentic autoregulation policies when they suggest that organizations strengthen their compliance systems by adhering to competition principles. Therefore, antitrust authorities and private agents should operate consonant with the guiding principles for the best functioning of economic activities.

III. WHY COMPLIANCE? MARKET PLAYERS' PERSPECTIVE

From the perspective of companies, compliance programs ensure their sustainability, i.e. their long-term viability, and provide clear reputational gains, which increase companies' capacity for influence and power. Moreover, it may reduce pressure on the regulatory agenda. Unintentional non-compliance with the regulation, on the other hand, can result in involuntarily assuming unexpected obligations and costs, which can affect the performance or even the maintenance of activities over time.

In the case of companies – organizations intended to obtain a profit – they can face a reduction of the surplus distribution, the jeopardizing of investments, the limitation or closure of establishments, among others. Regarding non-profit organizations – such as foundations and associations – the efforts to meet their social purpose can be unfruitful, much more costly or limited in scope in case of serious misconduct.

To prevent unforeseen events resulting from regulatory disagreement, exemplary compliance programs must be designed to provide clear communication and sufficient reinforcement and monitoring actions for ethical standards to be followed by all members operating on behalf of the organization.

There is no simple solution to the issue. Individuals of diverse backgrounds and qualifications form organizations, which implies a personal scale of values. Such characteristics and how individuals interact usually can bring agent-principal conflict situations.

Under the Agent-Principal Theory, the economic literature studies the dissonance among the interests of agents and the roles expected from them by the principal. The theory considers that a person acting on behalf of another person is invariably more aware of the circumstances involved in fulfilling their responsibilities than the other person. Thus, it can lead to misconduct by the agent unbeknownst to the organization (principal).

Actions dissonant with the mandate and carried out by several organization members may constitute a distorted organizational culture, often opposed to the culture expected by law or other members.

The actions taken to ensure the agent optimize their performance for the actual benefit of the principal, without conflict of interests, is subject to great administrative and economic concern. The purpose of said actions is to align agent and principal interests. As to systemic issues, revising the organizational culture is a possibility, to bring new values or impede the recurrence of distorted values in an organization. To the extent that alignment objectives are precisely the objectives aimed by compliance programs, they are attractive to organizations deeply engaged in integrity cultures.

Although compliance programs are well structured, their outcomes are more probabilistic than determining, i.e. the risks of deviation are mitigated, but hardly ever eliminated. Besides, economic resources are limited by their very nature – and the resources used for compliance are no exception. Therefore, it is advisable to set priorities when designing compliance actions and start with measures with better strategic effects.

Risk maps are fundamental to identify routines and structures more likely to lead to deviation. Individuals in high-ranking positions who deal with the sales and marketing policy of companies, for instance, are more susceptible to engage in cartel practices such as price setting, prioritizing areas of activity or defining new lines or products to be offered.

After identifying the riskier positions and routines, the next step is to plan measures to mitigate these risks, that is, measures that will ensure company representatives comply with competition laws and standards, thus ensuring the maintenance of the company. The following are a few examples of such measures:

1. Adopting a clear Code of Conduct and offering regular training for positions more likely to commit antitrust violations to raise awareness on organizational ethics.

2. Enhancing oversight, which reduces the asymmetry of information between the organization and its representatives. Recording and knowing the details of their agents' actions, to take steps if any misconduct is detected. Simple but effective monitoring is enough to inhibit misconduct since, if representatives do not know whether there is information asymmetry, they will likely forgo getting involved in a conflict of interest.

3. Giving high compensation. Well-paid workers usually avoid opportunistic behavior as, if caught, they may not find such a high-compensating job again.

4. Giving late compensation. Especially by postponing the performance-related pay given to upper management employees, the organization can reset the terms for performance and include long-term sustainability. It induces compliance with rules that, if breached in the short term, may severely compromise the solvency and performance of the organization later.

5. Finally, the costs of an antitrust compliance program may be more easily borne when the topic is part of the organization's actions for ensuring global integrity instead of being restricted to a part of the organization. This generates economies of scale and scope and, thus, saves resources.

CADE and the National School of Public Administration structured an online course on competition compliance to disseminate information on topics of interest and general guidelines to the general public, different government bodies, and small and medium-sized enterprises.[3]

IV. CONVERGENCE OF COMPLIANCE AND LENIENCY PROGRAMS

CADE's experience has shown that good integrity programs give rise to better leniency agreements. That is because a good integrity program has mechanisms to detect and address misconduct, allowing for identifying red flags more swiftly, therefore leading to faster internal investigations, as they start at an earlier stage.

Moreover, successful compliance programs usually draw risk maps to predict where a violation is more likely to occur; thus, if it comes to pass despite the program's control and mitigation tools, the investigations can be carried out faster and more effectively. On the one hand, a successful leniency application offers the government the opportunity to detect violations it was completely unaware of or that lacked evidence. On the other hand, the signatory organization and representatives who helped disclose the violation are entitled to great legal benefits, which can go as far as total immunity from administrative prosecution.

From its launch in 2000 to October 2021, CADE's leniency program examined 394 applications. Out of these, 106 became agreements. The remaining applications were not approved because the immunity marker was granted to an earlier applicant (121) or due to relinquishment or insufficient evidence (167). Nonetheless, regardless of an application rejection, an organization can still join a compliance program in the future, after due preparation. Through earlier detections, one is more likely to receive the immunity marker; by documenting risk-prone routines, one ensures the application has sufficient evidence.

Finally, it should be noted some monitoring actions can be especially useful in applying for a program promptly and with all necessary evidence:

1. In meetings with competitors, financial advisers, and unions, have at least two agency employees and routinely document all proceedings. Record and minute every meeting and prepare its agenda in advance. In communications with competitors, financial advisers, or unions, log the use of work equipment (such as smartphones, tablets, laptops, and personal computers). Keep a list with the time and name of those who call through secretaries. Etc.

2. Adopt channels to receive questions and complaints.

3. Regularly audit risky areas.

4. Regularly review and assess the efficiency of risk maps and the actions to address these risks. To prevent violations, detect them,

3 See https://www.escolavirtual.gov.br/curso/513 (in Portuguese).

and align corporate policies with the legislation in force, it is useful to have at least one monitoring action for each objective. For instance, if the goal is having hotline detections, one could perform anonymous testing, measure the number of complaints against the number of employees, categories the complaints, log the investigation period and response time, make a survey on the dissemination of the investigation results, etc.

5. Have consistent and documented accountability for violations of internal rules (even if not illegal), with consequences for the supervisors in charge. Consistent accountability means that managing positions should be as accountable for infractions of the same kind as every other employee.

6. From time to time, publish reports with statistics of the violations committed and the actions the organization took in response (e.g. every year).

7. Document the justifications given for joint bids in tenders.

8. To make leniency applications more predictable and effective, CADE has recently released guidelines that detail the types of evidence to be used in these applications.[4] The guidelines include a list with the evidence CADE considered sufficient and insufficient over time, which can serve as a basis for improving documentation processes; this has the twofold effect of preventing violations and facilitating their detection and assisting in the collection of evidence for disciplinary actions or cooperation with government authorities.

4 The document is based on precedents of CADE's Tribunal, and is available in Portuguese at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guia-recomendacoes-probatorias-para-proposta-de-acordo-de-leniencia-com-o-Cade.pdf.

COMPETITION COMPLIANCE IN BRAZIL: RETROSPECTIVE AND PERSPECTIVE

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I. INTRODUCTION

Most compliance-related efforts by Brazilian authorities in the spotlight today are related to anticorruption enforcement, as a result of the legal framework in place since 2014, which introduced investigative tools that enforce corruption and promote the adoption of corporate compliance programs, and of the overall attention received by the *Car Wash Investigation*, in Brazil and abroad. Interestingly though, anticorruption compliance was the not the first area - and most certainly is not the only one - where compliance initiatives have prospered in Brazil.

Over twenty years ago, the National Monetary Council issued Resolution No. 2,554/1998 promoting the adoption of compliance programs to prevent money laundering, terrorism financing and systemic and prudential risks. And only a few years later in 2004, the competition authority in charge of investigations at the time (Secretariat of Economic Law or "SDE") issued Ordinance No. 14/2004 that for the first time set forth guidelines for competition compliance programs in Brazil.[2]

Twelve years later in January 2016, the Council for Economic Defense ("CADE") issued its "Guidelines on the Structuring and Benefits of Adopting Competition Compliance Programs" ("2016 Guidelines")[3] further detailing the requirements for a corporate compliance program to be viewed as effective and with that enhancing legal certainty and transparency in this area.

This article discusses CADE's efforts to promote competition compliance programs and considers the impact of its 2016 Guidelines to business activities during the past five years, as well as points to potential areas of improvement.

II. BRAZIL'S COMPETITION COMPLIANCE LEGAL FRAMEWORK AND INITIATIVES

Article 36 of Law No.12,529/11[4] (Brazil's Competition Law) sets forth the basic framework for anticompetitive conduct in Brazil. It addresses all types of anticompetitive conduct other than mergers. The law prohibits acts *"that have as purpose or effect to"* (i) limit, restrain or, in any way, adversely affect open competition or free enterprise; (ii) control a relevant market of a certain good or service; (iii) increase profits on a discretionary basis; or (iv) engage in abuse of monopoly power.

The law was broadly drafted to apply to all forms of agreements and exchange of sensitive commercial information, formal and informal, tacit or implied. Cartels, as an administrative offense, may be sanctioned with CADE-imposed fines[5] against the companies that may range from 0.1 to 20 percent of the company's or group of companies' pre-tax turnover in the economic sector affected by the conduct, in the year prior to the beginning of the investigation.

Officers and directors[6] liable for unlawful corporate conduct may be fined an amount ranging from 1 to 20 percent of corporate fines; unlike the previous law, CADE must currently determine fault or negligence by the directors and executives in order to find a violation. Other individuals (i.e. employees with no decision-making authority), business associations and other entities that do not engage in commercial activities may be fined from approximately BRL 50,000.00 to BRL 2 billion.[7]

2 Prior to Law No. 12,529/11, there were three competition agencies in Brazil: the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE) and the Council for Economic Defense (CADE). SDE was the chief investigative body in matters related to anticompetitive practices and issued non-binding opinions in connection with merger cases. SEAE also issued non-binding opinions related to merger cases and issued opinions in connection with anticompetitive investigations. CADE was structured only as an administrative tribunal, responsible for final rulings in connection with both merger and anticompetitive conduct cases. The current competition law consolidated the investigative, prosecutorial and adjudicative functions into one independent agency: the Council for Economic Defense (CADE).

3 English version available at https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/compliance-guidelines-final-version.pdf.

4 Under Article 2 of the Competition Law, conducts that take place outside the Brazilian territory are subject to CADE's jurisdiction provided they produce actual or potential effects in Brazil.

5 Individuals and companies may also be fined (a) for refusing or delaying the provision of information, or for providing misleading information; (b) for obstructing an on-site inspection; or (c) for failing to appear or failing to cooperate when summoned to provide oral clarification.

6 Under Article 32 of the law, directors and officers may be held jointly and severally liable with the company for anticompetitive practices perpetrated by the company. Considering the strict sanctions that have been imposed to legal entities by CADE to date, this provision has nearly been forgotten as virtually no individual would be in a position to be held liable for the sanctions imposed against the company.

7 Approximately USD 9,067.83 to USD 362,713,093.94 (exchange rate of USD 1.00 = BRL 5.51).

Under Article 45 of the Competition Law, the following shall be taken into account by CADE when setting fines: (i) level of seriousness of the infringement; (ii) good faith of the defendant; (iii) gain obtained or aimed by the defendant; (iv) whether the conduct has been consummated or not; (v) level of actual or potential harm to competition, Brazilian economy, consumers or third parties in general; (vi) detrimental economic effects caused by the conduct in the market; (vii) economic situation of the defendant; and (viii) recidivism.[8]

Apart from being an administrative offense, cartel is a crime in Brazil, punishable by criminal fine and imprisonment from two (2) to five (5) years. According to the Economic Crimes Law (Law No. 8,137/90), this penalty may be increased by one-third to one-half if the crime causes serious damage to consumers, is committed by a public servant or relates to a market essential to life or health. Also, the Public Procurement Law (Law No. 8,666/93) specifically targets fraudulent bidding practices, punishable by criminal fine and imprisonment from two (2) to four (4) years. There is no criminal corporate liability for cartel crimes in Brazil.[9]

The first initiative targeting competition compliance dates to 2004. Pursuant to Ordinance No. 14/2004, public and private legal entities were encouraged to adopt compliance programs and to submit such programs for review by the competition authority.[10] In return, companies with compliance programs that met certain requirements would be granted a certificate and became eligible for fine reductions in case of an investigation.

In May 2012, the Competition Law entered into force and introduced key legal changes, including revised administrative and criminal sanctions to cartel conduct. Over the past 9 years, important enforcement policies were set, and others revised. Price-fixing, bid-rigging and other conducts also treated as hard-core in other jurisdictions remain a priority. During this time, CADE has turned its attention also to exchange of information cases, which in Brazil are not so clearly distinguished from cartels and may also be subject to criminal enforcement. Increasingly so, to unilateral conduct cases as well, particularly in the digital and the payment sector markets.

Since 2018, CADE opened over 100 cartel investigations, most initiated through leniency agreements and over 300 executives currently face criminal proceedings in Brazil. Criminal courts of first instance have decided at least 20 cases so far, and all criminal cases are pending appeal in court.[11] The investigative timeline in criminal cases tends to be longer and less predictable than investigations conducted by CADE.[12]

In the midst of its enforcement activity, in January 2016 CADE invigorated its approach to promoting effective corporate compliance programs and published the 2016 Guidelines reflecting the view shared by agencies worldwide that effective compliance and prevention generally are more important than ever.[13] The 2016 Guidelines provisions set forth the following pillars for an effective compliance program: (i) tone from the top, (ii) training, (iii) oversight, (iv) sanctions for non-compliance and (v) tailoring the program to the specific business. Essentially, a program will be considered effective by CADE if it enables the company to detect conduct, cease it, and self-report.

According to the 2016 Guidelines, effective compliance programs with *"damage control measures"* that meet the five requirements mentioned above may be considered evidence of companies' good faith and of reduction of negative economic effects arising from the investigated conduct (Article 45, II of the Competition Law). Under such circumstances, CADE's Tribunal may consider its existence as a mitigating factor when calculating fines or as a criterion in the calculation of pecuniary contributions in the context of settlements, resulting in discounted fines.

8 Apart from fines, CADE may also: (i) order the publication of the decision in a major newspaper, at the wrongdoer's expense; (ii) debar wrongdoers from participating in public procurement procedures and obtaining funds from public financial institutions for up to five (5) years; (iii) include the wrongdoer's name in the Brazilian Consumer Protection List; (iv) recommend tax authorities to block the wrongdoer from obtaining tax benefits; (v) recommend the intellectual property authorities to grant compulsory licenses on patents held by the wrongdoer; and (vi) prohibit individuals from exercising market activities on his/her behalf or representing companies for five (5) years. The law also includes a broad provision allowing CADE to impose any "*sanctions necessary to terminate harmful anticompetitive effects,*" whereby CADE may prohibit or require a specific conduct from the wrongdoer. Because of the quasi-criminal nature of the sanctions available to the antitrust authorities, CADE's wide-ranging enforcement of such provision may prompt judicial appeals. Finally, in case of recidivism fines will be doubled.

9 Brazilian Federal and State Prosecutors are in charge of criminal enforcement in Brazil, and act independently from the administrative authorities. Also, the Police (local or the Federal Police) may start investigations of cartel conduct and report the results of their investigation to the prosecutors, who may or may not file criminal charges against the reported individuals. The administrative authorities (former SDE and current General Superintendence) set a framework for the relationship with the criminal authorities, which reduces legal uncertainty and creates a healthy competition among the different criminal enforcement authorities.

10 Companies should submit, for instance, evidence regarding compliance with competition law, mechanisms that allowed them to identify and apply disciplinary measures to individuals in violation with such law, monitoring systems and due diligences carried out by independent third parties. (Art. 4 of Ordinance 14/2004).

11 The data does not include cases related to the *Car Wash Investigation* that focus on bribery and money laundering practices.

12 As a result of the use of more aggressive investigative tools, CADE has been imposing extremely high fines on both companies and individuals found liable for hardcore cartel conduct. The record fine imposed by CADE in connection with a cartel case was of roughly BRL 3.1 billion, approximately USD 778.9 million, in 2014. The level of fines imposed is considerably higher when the case is supported by direct evidence (average of 15 percent of the annual gross sales of the defendant in cases with direct evidence, as opposed to an average of 1 percent of the annual gross sales of the defendant in cases without direct evidence).

13 English version available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/compliance-guidelines-final-version.pdf.

The burden of proof regarding the effectiveness of a program lies exclusively upon the company under investigation, which must keep up-to-date paper trails regarding compliance measures to be in a position to meet the standard.

In September 2017, CADE revised its "Guidelines for Settlement in Cartel Cases" ("Settlement Guidelines") to include a detailed chart ranking the specific weight that will be granted to each aspect of cooperation.[14] The chart comprises a non-binding method for discount calculation, based on a point-system that further details weight of each aspect of the cooperation requirement (e.g. documents and information that are evidence of the reported misconduct and cover additional aspects of the conduct reported by leniency applicants are considered more valuable and will lead to greater discount).[15] A scale of discounts is applicable to the settling sum defendants who wish to settle and pay.[16]

The Settlement Guidelines sets forth that the *"existence of compliance programs that relate directly to the decision to propose a TCC [settlement agreement] and/or result from cooperation presented within the scope of the TCC"* is a mitigating circumstance, but it did not introduce specific rules on the calculation of such discounts.

More recently, in July 2020, CADE put out for public consultation draft "Guidelines for Cartel Penalties" on the methodology followed to calculate such fines, reflecting once again the agency's efforts to enhance transparency on the matter. The draft was published the same month CADE's Working Paper No. 004/2020 on International Benchmarking on Antitrust Sanctions,[17] which outlines experience from relevant authorities and includes references to discounts granted to defendants that are able to show that they have effective compliance programs in place. Interestingly, though, CADE's draft Guidelines for Cartel Penalties does not introduce similar provisions. The final version of the Guidelines for Cartel Penalties is still to be published and may ultimately include details on the assessment criteria and levels of discount a company may be eligible to due to the existence or further adoption of an effective compliance program.

In 2021, CADE remained active in the dissemination of compliance, having promoted webinars with panels on competition compliance, especially focusing on prevention of cartel and bid rigging practices.[18]

III. ENFORCEMENT TRENDS OVER THE PAST FIVE YEARS

The OECD[19] lists as key pillars of a corporate compliance program: (i) risk assessment, prioritization and abatement, (ii) strong leadership and management commitment, (iii) transparency, communications and documentation, (iv) auditing, monitoring, evaluation, (v) training, (vi) reporting, and (vii) *ex post* review. All such pillars have been included in the 2016 Guidelines and have been the focus of CADE's review when assessing corporate compliance programs.

The 2016 Guidelines were an additional sign that CADE acknowledges companies' efforts to implement compliance programs but materially did not go beyond the rules already in place. There is no data available on the impact Ordinance No. 14/2004 (or the 2016 Guidelines) had in the dissemination of compliance programs, but its existence combined with the outreach initiatives carried out by the Brazilian authorities

14 Cooperation may include submitting documents and information in the possession, custody or control of the settling party; using the settling party's best efforts to secure the cooperation of current and former employees; and appearing for interviews, court appearances and trials.

15 The English version of the Guidelines for Settlement in Cartel Cases is available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf.

16 Reductions may vary between (i) 30 percent and 50 percent for the first party to propose the settlement; (i) 25 percent to 40 percent for the second in; and (iii) up to 25 percent to the other parties that follow. For settlement proposals submitted after the GS has concluded the investigation, reductions are limited to 15 percent. Theoretically based on the fine that would apply to the parties under investigation for cartel, such discounts are supposed to vary according to (i) the order in which the parties come forward; and (ii) the extent and usefulness of what the parties provide in cooperation with the authorities.

17 Portuguese version available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2020/documento-de-trabalho-n04-2020-benchmarking-internacional-sobre-dosimetria-de-penalidades-antitruste.pdf.

18 For instance, in September CADE issued Guidelines on Evidentiary Recommendations for Leniency Agreements Proposals and even though it does not address compliance-related matters directly, when announcing such Guidelines in CADE's LinkedIn account, CADE explained that the Guidelines would be helpful for parties initiating internal investigations or adopting compliance programs; and Luiz Hoffman, CADE's Commissioner's took part in CADE's podcast in which he shared his view on CADE's fight against cartels and important tools such as compliance programs and CADE's Leniency Program. Also, in October, CADE promoted the "National Cartel Prosecution Week" which had a panel on competition compliance to prevent bid rigging. Available at: https://www.linkedin.com/posts/cadegovbr_cade-lan%C3%A7a-guia-sobre-recomenda%C3%A7%C3%B5es-probat%C3%B3rias-activity-6845725922809655296-jM6X, https://www.linkedin.com/posts/cadegovbr_sncc2021-podcast-combateacartaezisempauta-activity-6846468781976502272-tMYy and https://www.linkedin.com/posts/cadegovbr_semana-nacional-de-combate-a-cart%C3%A9is-2021-activity-6846814976317915137-dQMx.

19 Available at: https://www.oecd.org/daf/competition/competition-compliance-programmes-2021.pdf.

at the time presumably encouraged Brazilian companies in general to adopt such programs. The rules set forth under Ordinance No. 14/2004 are similar to the ones established in the 2016 Guidelines and already determined that companies with effective programs were eligible for discounts over applicable sanctions.[20]

In fact, only a few years later CADE began recommending the adoption of compliance programs to companies convicted for anticompetitive conducts and providing for such obligations under settlement agreements.[21] This happened for instance in 2007 to defendants found guilty of entering into agreements to fix commercial conditions and of unilateral conducts in the medical segment.[22] One of the defendants then filed a motion requesting CADE to clarify which companies should adopt such programs, since such defendant already had a compliance program in place. CADE ruled that the recommendation applied to all defendants and that each could decide whether to follow it or not since it *"was not an order to the defendants, […] but was rather a recommendation."*

Similarly, in a 2007 settlement agreement executed in connection with a cartel investigation in the cattle industry, the defendant was required to adopt a corporate compliance program. Such program should have the goal to prevent its employees and related third parties to enter into anticompetitive conducts. It was the first time that CADE made clear its expectation that compliance obligations should also extend to related third parties. [23]

An important change regarding CADE's enforcement practice took place after 2016 Guidelines were introduced, when it effectively began rewarding companies that commit to implement robust compliance programs, following a trend introduced by Brazil's Clean Companies Law (Law No. 12,846/13) and consistently with other jurisdictions. For instance, in at least 10 (ten) cases over the past five years, CADE granted 2 percent to 4 percent discounts to defendants active in the construction, healthcare, mail and real estate brokerage sectors for committing to implement robust compliance programs under settlement agreements.[24] Pursuant to publicly available information, all such discounts were granted to defendants due to obligations of future adoption or enhancement of compliance programs rather than in view of existing effective compliance programs. CADE's ruling reflects the understanding that as soon as effective compliance programs are put in place, the likelihood of recidivism would be reduced and, therefore, such compliance programs would assist the parties in complying with the obligations set under the settlements.

CADE has also been more active in monitoring such obligations including by requiring that settling parties retain external monitors to assist in this role, by submitting periodic status reports and expert opinions.[25] CADE has mostly focused its review on the scope of compliance manuals, and on whether defendants have published such manuals online, provided training sessions, lectures to employees from external consultants, and put in place internal and external hotlines.

Based on publicly available information, differently than what has been its approach in the context of settlements, CADE has never granted discounts over fines imposed to defendants convicted for anticompetitive conducts, which reported having compliance programs at the time of conviction (i.e. *ex ante* compliance programs). In its guilty verdicts, the sanctions imposed have been a combination of fines and the obligation to introduce a corporate compliance program (e.g. the *Liquefied Petroleum Gas - LPG and type C pasteurized milk*, cartel cases).[26] Specifically, in the type C pasteurized milk cartel case, the determination consisted in the adoption of a corporate compliance program covering competition and antibribery policies, going therefore beyond its statutory authority.

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20 The fact that companies with programs did not file for certification under Ordinance No. 14/2004 was ultimately viewed by the agency at the time as positive, because it would have lacked necessary resources to receive, review and certify programs and, in parallel, carry on with all its enforcement work.

21 For instance, Administrative Proceeding No. 08012.009088/1999-48; and Settlement Cases No. 08700.002906/2007-68, 08700.004221/2007-56, 08700.003240/2009-27).

22 Administrative Proceeding No. 08012.009088/1999-48.

23 Settlement Case No. 08700.002906/2007-68.

24 Settlement Cases No. 08700.002176/2020-72, 08700.004137/2017-12, 08700.001200/2016-70, 08700.003188/2018-08, 08700.004337/2016-86, 08700.007077/2016-09, 08700.008159/2016-62, 08700.004341/2016-44, 08700.005078/2016-19 and 08700.008158/2016-18. Obligations set forth in these agreements included, for example, the adoption of compliance programs that adequately addressed competitive concerns by the parties, their affiliates and subsidiaries within ninety (90) days of the homologation of the agreements matters, periodic revisions of such programs until the pecuniary contribution obligation is not met, submission of monitoring reports to CADE regarding the adoption of such programs.

25 For instance, Settlement Case No. 08700.003188/2018-08.

26 Respectively Administrative Proceedings No. 08012.002568/2005-51 and 08012.010744/2008- 71.

Finally, CADE has also set obligations to adopt compliance programs in unilateral conduct investigations,[27] and under merger settlements in at least four (4) cases, two of which after the 2016 Guidelines were introduced.[28] In June 2021, in a merger case involving the cattle industry,[29] Commissioner Paula Farani emphasized the importance of having compliance programs and that its positive effects were expected to extend beyond the term of the agreement entered into between CADE and the parties. She also expressed the view that the corporate governance and compliance mechanisms set under the agreement would assist the parties in mitigating family influence in the business. [30]

In parallel to CADE's initiatives on compliance, the Federal Comptroller's Office ("CGU"), Brazilian anticorruption agency responsible for the prosecution of corruption cases, has similarly encouraged the adoption of competition compliance policies. In at least fourteen (14) out of fifteen (15) leniency agreements entered into by CGU,[31] the parties agreed upon specific obligations towards the enhancement of their respective compliance programs, covering anticorruption and competition compliance issues (e.g. specifically inquiring whether the parties have competition compliance policies, requiring that they conduct training sessions and adopt other means to ensure compliance with antitrust and public biddings laws, such as having employees issue compliance representations).

Also, a new public bidding law entered into force in April 2021 (Law No. 14.133/21), which provides that defendants may be eligible to discounted fines in case they agree upon adopting or enhancing current compliance programs (Article 156, paragraph 1, V). This law also provides that (i) winners of public bids concerning large scale public works must adopt robust compliance programs within six (6) months of the agreement's execution date and would be subject to penalties if they do not comply with such deadline (Article 25); and (ii) having an effective compliance program is a criterion in case of a tie break (Article 60). Such criteria underscore the need to comply with competition requirements as well.

IV. CONCLUDING REMARKS

CADE has been one of the lead authorities in Brazil to disseminate a compliance culture through its rules, guidance and case law, which evolved considerably since 2004 and in particular over the past five years. Its enforcement policies and procedures made public in guidelines and proposed regulations confirm that the agency is aware that ensuring legal certainly and transparency is a work in progress. Its approach to competition compliance over the years does as well.

As always, there is still room for improvement. Firstly, it seems important that CADE's Commissioners show a united front with respect to its compliance-related policies.[32] CADE would also be taking a step ahead if it were to further clarify the methodology and ranges applicable to discounts on sanctions and settlement sums for companies that adopt or enhance effective compliance programs, including on whether such criteria take into consideration companies' size and business model.

Additional clarity on how CADE assesses the moment companies structure their compliance programs (i.e. *ex ante* or *ex post*), what is viewed as a "paper compliance program," other compliance-related obligations, and monitoring requirements would also be an improvement to the status quo. Finally, companies would also benefit from greater transparency regarding the criteria as to which settlement applicants must undertake compliance obligations.

27 For instance, Settlement Cases No. 08700.002176/2020-72, 08700.003188/2018-08 and 08700.005133/2017-43.

28 For instance, see Merger Cases No. 08700.007553/2016-83, 08700.001642/2017-05, 08700.010790/2015-41 and 08700.008607/2014-66.

29 Merger Case No. 08700.007553/2016-83.

30 Merger Case No. 08700.007553/2016-83. The settlement terms are confidential.

31 Available at: https://www.gov.br/cgu/pt-br/assuntos/responsabilizacao-de-empresas/lei-anticorrupcao/acordo-leniencia. The most recent leniency agreement entered into with CGU is not public yet.

32 See, for instance, Settlement Cases No. 08700.004337/2016-86, 08700.004341/2016-44, 085700.008159/2016-62, 08700.007077/2016-09, 08700.008158/2016-18 and 08700.005078/2016-19, related to alleged cartel conducts in the context of *Car Wash Investigation* which were subject to joint confirmation in November 2018. Some Commissioners disagreed with the discounts applied to the settlement applicants having understood that such discounts could encourage the adoption of "paper compliance programs"; and that CADE should only require the adoption of compliance programs as a sanction, and not give credit to companies found to have violated the law for their efforts to "clean their house."

WHAT CAN MAKE COMPETITION COMPLIANCE PROGRAMMES REALLY EFFECTIVE?

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I. INTRODUCTION

There is widespread unanimity about what should constitute the main elements of a competition compliance programme. The criteria established by recent United States DOJ guidance[2] can serve as a good starting point since many other agency guidelines use similar criteria. Rather than focussing on those widely known and accepted elements, we will focus on a select few that we believe are particularly relevant for the effectiveness of compliance policies: detection and prompt reporting; senior management involvement; monitoring and auditing; compliance incentives; and third-party compliance. We assert that these elements, in particular, could merit more attention by competition agencies wanting to promote compliance more effectively and by the business community aiming to implement more effective programmes. Jurisdictions take different approaches on them, or they are not routinely included in agency guidance documents. However, these elements could make the difference between an effective and a pro-forma programme. Our decision to focus on these five does not imply that other elements are less relevant or important

II. DETECTION AND REPORTING

There seems to be a widespread consensus that an effective compliance programme should, next to prevention, lead to the early detection of competition law violations within a company. Views diverge when it comes to the reporting of such violations to the competition authorities. For the time being, only Germany and Peru seem to require reporting as a prerequisite for accepting a compliance programme as a mitigating factor.[3] The European Commission considers leniency and immunity as the ultimate reward for an effective compliance programme, both of which can only be obtained through reporting to and co-operation with the agency. Other jurisdictions, such as the Australia, Canada, Italy, Romania, Spain, or United States also consider reporting to the competition agency as an important element of an effective programme, albeit not an essential pre-condition.[4] Further support for a reporting requirement can be found in the EU procurement directive,[5] which makes damage mitigation and collaboration with the investigating authorities pre-conditions for an early release from debarment through self-cleaning.

These agency perspectives stand in stark contrast to the views expressed by businesses. Their message seems far from simple. Businesses will weigh costs and benefits before applying for leniency when a violation is detected internally. The increased risks posed by private damages actions and of managers being held personally liable have a strong and dissuasive impact on the decision to report.[6] However, absent from these cost/benefit calculations are the repercussions on the internal and external credibility of a company's compliance message and policy of such a seemingly rational balancing strategy.

There is no legal obligation to report a competition law violation to a competition agency. However, we argue that from the compliance perspective, reporting is the real test case for the credibility of corporate ethics claims and leadership's commitment to these ethics. How can the compliance message be given life within a company when internal detection does not lead to meaningful consequences? These consequences should be twofold: clearly visible internal sanctions on the staff involved in and responsible for the violations; and putting an end to the competition law violation, including through the compensation of the victims. In cartel cases, none of these is, in the last consequence, possible without external reporting. Without reporting, internal sanctions will most likely be neither meaningful nor widely communicated to warn other employees, as this would entail the risk that an employee would blow the whistle – contrary to the intention of the company. In the case of collusive practices, the infringement will also not necessarily end with the withdrawal of one company from the cartel. The harm to markets and consumers may well continue. Even if a cartel was ended for good, the absence of reporting would imply that the parties to the cartel pocket the illicit gains with no intention of compensating the harmed customers. It is hard to see how such a message to staff can demonstrate a credible commitment to competition law compliance and will help to prevent future wrongdoing.

2 US Department of Justice 2019, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*.

3 Indecopi 2020, *Guidelines on Competition Compliance Programs*, p 38; Recommendation and report of the economics and energy committee of the German parliament, *Doc 19/25868*, January 13, 2021, p 122.

4 U.S. DoJ asks whether the program detected the violation and facilitated prompt reporting as one of the basic, preliminary questions when assessing the effectiveness of a program, although a failure to do so is not dispositive. Canada will consider reporting as a factor when considering consent agreements. In Italy, the maximum fine reduction of 15% in cases that are eligible for leniency is only available to companies, which reported and applied for leniency upon the internal detection of an infringement. Spain considers reporting and applying for leniency as evidence for a commitment to compliance, though it is not a mandatory or exclusive requirement for considering fine mitigation. The ACCC foresees reporting of material failures to comply as an important element for an effective compliance program. Romania will take into account active reporting when assessing the effectiveness of a compliance program.

5 Art. 57 VI Directive 2014/24/EU on public procurement.

6 See for example PARR, 24 March 2021, Increasing damages, compliance programmes slow EC cartel enforcement – Analytics, https://app.parr-global.com/intelligence/view/intelcms-qbwbrb; Ysewyn and Kahmann, 2018, p. 44, 58; Stephan and Nikpay, 2014.

For competition authorities for whom leniency is one of the most important detection tools, conditioning the effectiveness of compliance programmes on a pro-active decision of the company to self-report a detected (cartel) infringement could contribute to curtailing the decline in applications and reverse the current trend.[7] Such an approach can also be incorporated in agency policies that grant credit for prospective or improved existing programmes. A commitment to report could become an express requirement of future compliance obligations. For businesses, a self-imposed obligation to report would underline a no tolerance policy and would certainly serve to garner the necessary attention of all staff and companies' top management.

III. MANAGEMENT INVOLVEMENT

One of the most frequently cited mantras in compliance literature is the famous "tone from the top": the quintessential requirement for an effective compliance culture. Consequently, senior management involvement in the competition law violation, promotion of, or alternately, ignoring anti-competitive conduct are considered as very strong indicators of an ineffective compliance programme and culture.[8] At the same time, jurisdictions willing to accept an effective, pre-existing compliance programme as a mitigating factor acknowledge that even the best compliance programme cannot completely prevent anti-competitive action by an employee set to engage in it, the famous "rogue employee."

However, senior management involvement in cartel conduct seems to be more the rule than the exception,[9] and this is also supported by OECD foreign bribery data. Senior management is most frequently involved in bribery committed by a company, namely in 75% of the cases being subject of a recent study.[10] Such findings signal obvious shortcomings in corporate compliance programmes, and in competition agencies' compliance advocacy efforts as well.

There are a number of measures that businesses and competition agencies could implement and that agencies could require when reviewing the effectiveness of compliance programmes, to ensure that senior management pays sufficient attention to competition rules:

- The commitment to report any competition law violation and to bear the consequences of past wrongdoing as mentioned above;
- Targeted compliance training for senior management;
- Third party monitoring and internal audit must include top level management files and communication;
- Peer learning through promotion of third-party compliance measures (see below) and/or public events where convicted offenders report their experience to other executives;
- Internal and external reporting and whistle-blowing channels that allow the implication of senior management and reporting to authorities without getting the senior management involved and alerted, and preventing retaliation risks;
- Public naming and shaming of responsible managers to increase the reputational risk of competition law violations;
- Basic competition law training in business schools; and
- Improving the gender balance in companies' senior management.[11]

7 OECD 2021, Competition Compliance Programmes, p 26.

8 For example, US Sentencing Guidelines, U.S.S.G. § 8C2.5(f)(3)(A)–(C) and 2019 US guidance, p 14; 2020 guidance by the Spanish CNMC, p 8; 2015 guidance by Canada, p 8.

9 For background and references, see OECD 2021, Competition Compliance Programmes, pp 34-36.

10 Based on 115 foreign bribery resolutions against companies concluded between January 2014 and June 2018, OECD 2020, Foreign Bribery and the Role of Intermediaries, Managers and Gender.

11 Recent studies suggest that gender balance could contribute to compliance, see https://www.oecd.org/competition/gender-inclusive-competition-policy.htm, papers 3 and 5.

IV. COMPLIANCE INCENTIVES

Agency compliance guidance often includes references to and requirements for adequate compliance incentives and discipline. These are are mostly directly related to rewarding and incentivising compliant or punishing deviant behaviour. Rarely considered are the indirect (dis)incentives to comply, created by ambitious performance goals and performance-based salary schemes.[12] In other words: even the best corporate compliance programme will not be worth the paper it is written on, when employees cannot reach their performance targets without being at least seriously tempted to resorting to illegal, including anti-competitive, means.

Performance based salaries and incentive schemes should not be discouraged as they can greatly increase staff and company performance. However, such schemes, at the same time, should not encourage nor create a need or strong temptation for anti-competitive conduct to make them attainable. The G20/OECD Principles of Corporate Governance foresee that key executive and board remuneration should be aligned with the longer-term interests of the company and its shareholders, including sanction and clawback provisions for cases of serious misconduct.[13] This emphasis on longer term interest can inform competition compliance considerations. There are various ways in which salaries can reflect shorter- or longer-term performance indicators, which are more or less prone to anti-competitive conduct.[14]

The creation of compliance compatible remuneration schemes is certainly best placed in the hands of the businesses themselves. It is outside of the remit of competition agencies to create operational criteria for firms that manage to balance the performance enhancing benefits of incentive-based salaries and their compliance risks. It is, however, conceivable for competition agencies to identify blatantly inappropriate schemes when examining pre-existing compliance programmes in ongoing or previous collusion cases and to oblige companies to consider such remuneration schemes as part of their compliance policies. The failure to do so could again signal a lack of management engagement and support for the corporate compliance policy. In any case, it would seem that competition agencies could put more of an emphasis on businesses' salary schemes when assessing or advising on compliance programmes to ensure that the incentives of all relevant employees are aligned with proclaimed compliance policies.

V. AUDITING AND MONITORING OF BUSINESS PROCESSES

When auditing and monitoring requirements are included in competition agency compliance guidelines, they mostly relate to the implementation of the compliance programme as such, its review and the confirmation that adequate processes are in place or trainings are conducted. However, monitoring and auditing requirements can go further. They can be applied directly and proactively to business transactions and processes that are identified as a competition compliance risk, or to communications monitoring. The European Commission asks for auditing and monitoring as prevention and detection tools, in particular when a firm is active in tendering markets,[15] similarly to the US, which asks for the use of screens and communication monitoring tools.[16] Chile and Peru also refer to screening and use of software to, for example, monitor conversations with competitors.[17]

In this regard, compliance guidance by agencies and compliance efforts by businesses could consider making active use of software tools and algorithms as a tool for more effective compliance. Algorithms can support businesses in their monitoring, prevention and detection efforts, which can benefit from widely available know-how on screening for anti-competitive behaviours. Particularly for cartels, there is rich literature and agency experience on screening for markets susceptible to collusion as well as for behaviours and market outcomes that could indicate collusive market behaviour.[18] Provided sufficient data is available, such screens can be applied by businesses internally. In addition to structural screens, price or performance-based screens, companies can use Artificial Intelligence (AI) to monitor company communication for suspicious signs. When risks for algorithmic collusion exist, the detection methods within a company must address such specific compliance

12 Examples are the 2019 US guidance, p 11; 2012 guidance by Chile, Fiscalia Nacional Economica, Competition Compliance Programs, p 11.

13 2015 OECD, G20/OECD Principles of Corporate Governance, p 50.

14 For background and references, see OECD 2021, Competition Compliance Programmes, p 38.

15 European Commission 2013, Compliance Matters, p 18.

16 2019 US guidance, p 10.

17 See Fiscalia Nacional Economica, Competition Compliance Programs, p 17; Indecopi 2020, Guidelines on Competition Compliance Programs, p 28.

18 See for example, 2013 OECD Roundtable on Ex-officio cartel investigations and the use of screens to detect cartels; 2018 OECD workshop on cartel screening in the digital era; and more background and sources in OECD 2021, Competition Compliance Programmes, pp 39 – 41.

risks as well.[19] As expressed by US Department of Justice Deputy Assistant Attorney General Matthew S. Miner in relation to fraud investigations, *"… companies have better and more immediate access to their own data. For that reason, if misconduct does occur, our prosecutors are going to inquire about what the company has done to analyze or track its own data resources – both at the time of the misconduct, as well as at the time we are considering a potential resolution."*[20]

There is room for competition agencies to take a more pro-active approach to corporate screening and monitoring efforts: to encourage or require them in their compliance related enforcement and other activities. Businesses should embrace such approaches. The benefits of an active, company-internal search for suspicious signs for compliance breaches are twofold: it enables early detection and reporting of harmful practices to competition authorities; and it has a deterrent effect on employees who know that it will be more difficult to hide illegal behaviour. For these reasons, the absence of the implementation of such tools, in particular in high-risk activities such as tendering, could imply insufficient effectiveness of a compliance programme. This component will increase in relevance with ongoing digitalisation of businesses processes and markets.

VI. THIRD-PARTY COMPLIANCE

A yet underdeveloped field of competition agencies' compliance guidance are provisions on third-party compliance. Third-party compliance relates to any efforts of a company to promote compliant behaviour in its business partners, for example sub-contractors, suppliers, joint venture partners, or consultants. It is a well-established principle in the anti-corruption sphere, in particular due to liability risks for corruption acts committed by business partners.[21] The US DoJ criminal division's guidance on the evaluation of corporate compliance programmes addresses this point.[22] While designed primarily to address corruption concerns, the suggested steps and measures, such as risk assessments, trainings, audits and red flags for third-party compliance risks can be useful in the competition context as well.

The World Bank's Integrity Compliance Guidelines,[23] which provide practical guidance to entities debarred through the World Bank's sanctions system, dedicate a full section to business partner due diligence. The text covers misconduct of all types, including collusive practices. Companies aiming to implement a compliance system are asked to encourage their business partners to prevent, detect, investigate and remediate misconduct. The Siemens Collective Action initiative is a prominent example of a very far-reaching compliance initiative imposed on an undertaking for corruption offences.[24] Many companies already practice voluntarily such third-party competition compliance measures. They differ in scope and range from information or trainings to contractual obligations and auditing rights.[25]

Agencies, when imposing compliance policy obligations on companies, could consider including obligations to promote business partner competition compliance. Depending on the size of the company, the requirements can vary from simple information to in-depth training or auditing. This could help disseminate the knowledge of antitrust requirements since businesses may have better and more credible ways of communicating antitrust requirements to other businesses compared to competition agencies. Peer learning and pressure can have high impact. For businesses, implementing such third-party compliance measures can well pay off, as they can lead to the disclosure of yet hidden cartels in the supply chain for example.

In addition, agencies and businesses could consider merger due diligence when assessing the effectiveness of existing programmes as well as in the design of compliance programmes.[26] Mergers pose a special challenge to any existing corporate compliance regime and culture.

19 See also Ai Deng 2019, From the Dark Side to the Bright Side: Exploring Algorithmic Antitrust Compliance, p 4; Johnson and Sokol 2020, Understanding AI Collusion and Compliance.

20 Deputy Assistant Attorney General Matthew S. Miner, Remarks at the 6th Annual Government Enforcement Institute, 12 September 2019, https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-delivers-remarks-6th-annual-government.

21 See 2010 OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance; and OECD 2020 Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change, p 42.

22 See US Department of Justice, 2020, Evaluation of Corporate Compliance Programmes, p 7; this is a different guidance than the one on antitrust compliance, for DoJ prosecutors to assess the effectiveness of firms' compliance programs in a wider criminal prosecution context.

23 World Bank Group, Integrity Compliance Guidelines.

24 See https://new.siemens.com/global/en/company/sustainability/compliance/collective-action.html.

25 Examples: Deutsche Bahn, requiring contractors to implement anti-trust compliance programs, including monitoring by Deutsche Bahn; Valeo, with code of conduct which include a business partner code of conduct and anti-trust training resources; Roche; Siemens; Oracle; or LafargeHolcim.

26 This is also included in the DoJ criminal division's guidance, p 9.

Another company's compliance culture, or the lack thereof, need to be assessed and aligned. Existing compliance risks and ongoing or past violations of the laws need to be identified and addressed. Such assessments present a unique chance to systematically review business processes and documents with fresh, outside eyes, and to apply appropriate antitrust screens. Cartels have been discovered and reported to competition agencies through merger due diligence processes.

When competition agencies request businesses to include merger due diligence provisions targeting antitrust violations as part of their competition compliance policies, such requirements could include a commitment to report any suspicions to the relevant competition agencies. Inaction would indicate that a compliance policy was not effective.

VII. CONCLUSIONS AND OUTLOOK

The main elements of an accepted competition compliance programme are well established. However, it is worthwhile for businesses and competition agencies to consider additional elements that could reinforce compliance efforts. Ongoing cartel activity, a steady decline in leniency applications in most mature jurisdictions across the world,[27] and the persistent involvement of top management in uncovered collusion schemes, are all indicative of the need to work harder to make competition compliance part of business DNA. Using approaches that are already taken by some competition agencies, and adopting practices used in other areas of compliance, we have tried to show that there is potential for improvement. Businesses and their management can enhance their internal ethics and incentive systems by committing to preventive detection and monitoring, targeted training including top management levels, reporting, incentive aligned salary systems, and transferring their knowledge and ethics to their business partners. Competition agencies could include these more rigorous requirements when considering business compliance programmes in their prevention or enforcement work. In the end, functioning competition compliance is a win-win-situation for all involved. Being more ambitious will pay off.

27 See OECD 2021, Competition Compliance Programmes, pp 25-27.

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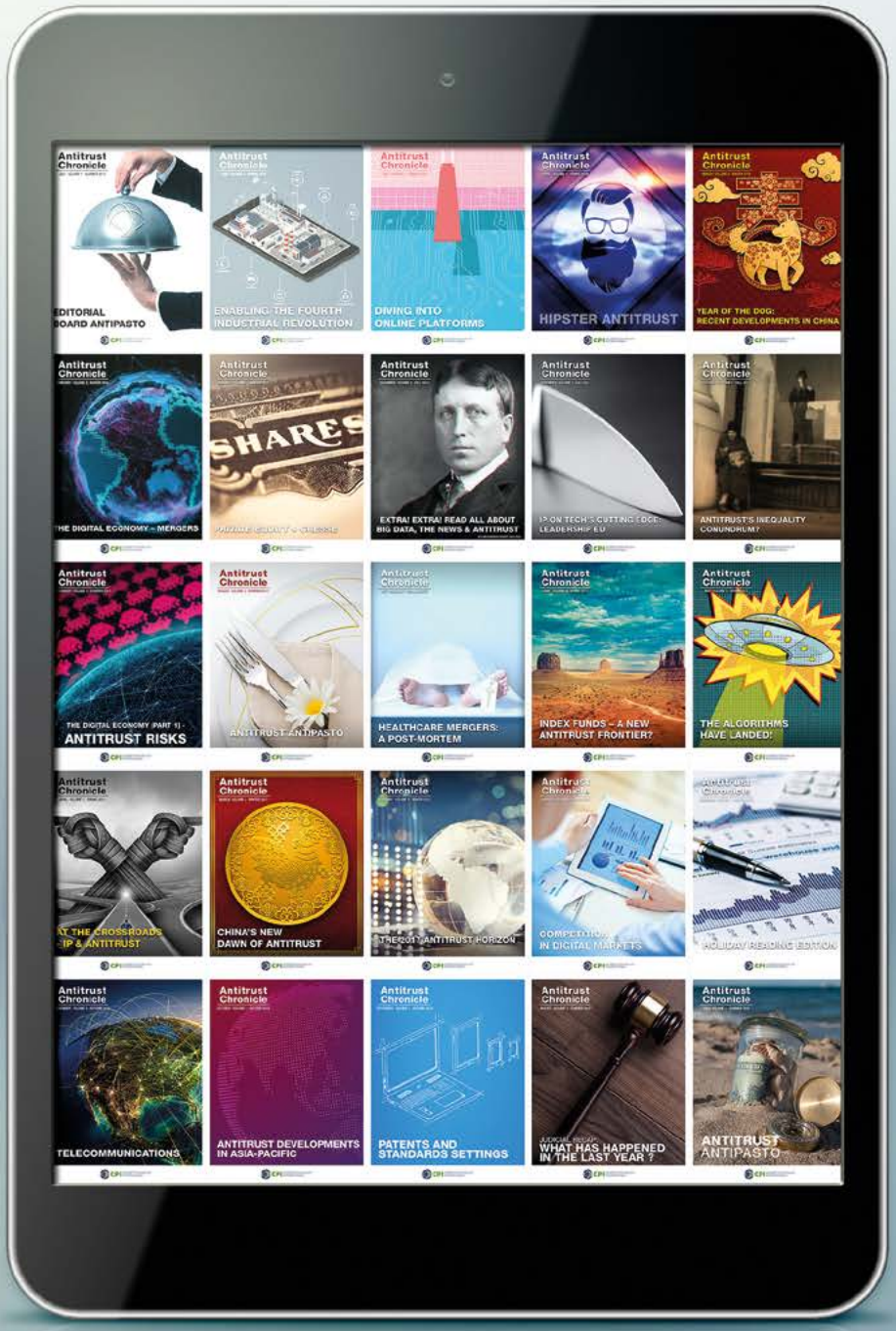


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