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Leniency, Collusion, Corruption, and Whistleblowing

Reinaldo Diogo Luz[*], Giancarlo Spagnolo[†]

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Leniency policies offering immunity to the first cartel member that blows the whistle and self-reports to the antitrust authority have become the main instrument in the fight against price-fixing conspiracies around the world. In public procurement markets, however, bid-rigging schemes are often accompanied by corruption of public officials.

In the absence of coordinated forms of leniency (or rewards) for unveiling corruption, a policy offering immunity from antitrust sanctions may not be sufficient to encourage wrongdoers to blow the whistle, as the leniency recipient will then be exposed to the risk of conviction for corruption.

This paper assesses the extent of this problem by describing and discussing the antitrust and anti-corruption provisions present in a few selected countries, from both common law and civil law regimes. For each of these countries, we try to evaluate whether the legal system presents any solution to limiting the risk that legal provisions against corruption undermine the effectiveness of leniency programs against bid rigging in public procurement.

Legal harmonization, coordination and co-operation on procedural and substantive issues, and inter and intra jurisdictions, seem essential to solve this problem. Given the size of public procurement markets and their propensity for cartelization, specific improvements in legislation appear necessary in all the countries considered.

Explicitly introducing leniency policies for corruption, as has been recently done in Brazil and Mexico, is only a first step. The antitrust experience has taught us these policies

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must be carefully designed and sufficiently generous, they should not be discretional, and they must be consistently implemented to achieve their goals of inducing whistleblowing. Hence, the road ahead appears a long one.

To increase the effectiveness of leniency in multiple offense cases, we suggest, besides extending automatic leniency to individual criminal sanctions, the creation of a 'one-stop-point' enabling firms and individuals to report different crimes simultaneously and receive leniency for all of them at once if they are entitled to it.

As long as individual criminal charges are not covered by a coordinated and non-discretional leniency program, there is little hope that these provision will induce any improvement in the fight against corrupting cartels. A more effective way to fight such cartels may then be offering Qui Tam rewards to non-accomplice whistleblowers, as is already done with apparent success by several law enforcement agencies in the US.

JEL Classification: K21, K42

Keywords: Antitrust; Bribery; Cartels; Collusion; Corruption; Competition policy; Immunity; Leniency; Public Procurement; Whistleblowers.

CONTENTS

INTRODUCTION

Leniency programs offer immunity from antitrust sanctions to the first cartel member that blows the whistle by reporting the cartel to the antitrust authority, and are widely considered the most important tool currently available in the fight against all forms of collusion.[1] These policies were first introduced, in 1978, by the U.S. Department of Justice's Antitrust Division. After their 1993 revision[2] and the resulting impressive increases in the number of applications to the program, the number of successfully prosecuted cartels, and the number and size of imposed sanctions,[3] analogous antitrust leniency programs have been adopted by most antitrust jurisdictions worldwide, with varying degrees of success.[4]

Frequently, however, a cartel infringement is connected to other offenses. For instance, cartel members may disregard environmental regulation as part of their profit-maximizing strategy, or they may bribe public officials to facilitate collusion or avoid the detection of the bidding ring. A member of a multiple offending cartel that blows the whistle on the cartel and is applying for leniency to the antitrust authority will likely have to disclose information on the other infringements. Such information may then be used by the relevant law enforcement authority to prosecute and punish the applicant. Similar to the possible conflict between public and private enforcement against cartels, where it has been argued that private action for damages may jeopardize leniency programs through increased risk of a successful damage claim by the cartel's victims against the leniency recipient,[5] the risk of prosecution for other cartel-connected offenses may reduce the attractiveness of reporting the cartel.[6]

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[1] For a survey on the economics of leniency in antitrust see Giancarlo Spagnolo, *Leniency and Whistleblowers in Antitrust*, *in* Handbook of Antitrust Economics (Paolo Buccirossi ed., 2008). For a more recent assessment of their potential and real effects mostly from the legal point of view see Catarina Marvão & Giancarlo Spagnolo, *What do we really know about the effectiveness of the current Leniency Policies? – A survey of the Empirical and Experimental evidence*, *in* The Leniency Religion: Anti-Cartel Enforcement in a Contemporary Age, (Caron Beaton-Wells & Christopher Tran eds., 2015).

[2] The original program resulted in only one application per year, most likely because leniency was not automatic but was highly dependent on discretion by prosecutors. In addition, the 1978 policy allowed only parties that reported prior to the opening of an investigation to be awarded immunity. The number of applications and the magnitude of the penalties imposed increased dramatically after the program's revision in 1993, which introduced automatically granted immunity from all antitrust sanctions to the first firm that reports the illegal activity and fully cooperates before an investigation is under way, as well as making it possible to offer amnesty even after an investigation has been opened. *See* Spagnolo, *supra* note 1, at 266.

[3] It is worth noting that the effectiveness of leniency programs is controversial. Several authors have pointed out that, since there is no information on undetected cartels, it is hard to assess empirically whether the increase in fines and convictions after the introduction of a leniency program is unequivocally due to its effectiveness in deterring cartels *ex ante*, since it can actually represent the opposite: more cartels are detected and prosecuted because the number of cartels is growing. *See* Joseph E. Harrington Jr. & Myong-Hun Chang, *When Can We Expect a Corporate Leniency Program to Result in Fewer Cartels?*, 2 (August 11, 2014), available at: http://ssrn.com/abstract=2530545; Spagnolo, *supra* note 1, at 264; Catarina Marvão & Giancarlo Spagnolo, *Pros and Cons of Leniency, Damages and Screens*, 1 CLPD, 47, 52 (2015); and Marvão & Spagnolo, *supra* note 1, at 57-59.

[4] *See* Harrington Jr. & Chan, *supra* note 3, at 2.

[5] Private litigation may reduce the attractiveness of leniency programs if the applicant is not sufficiently protected against civil claims from cartel's victims. There is a current debate on this issue, since different jurisdictions have addressed it by enacting different provisions (*e.g.* the 2004 Antitrust Criminal Penalty

In these scenarios, the legal incentives are not aligned: the incentive created by the antitrust leniency policy to blow the whistle and collaborate may be neutralized, at least to some extent, by the disincentive of the risk of being sentenced to imprisonment or fined in the same or in other jurisdiction. This kind of uncertainty might work against the leniency policy's deterrence goals and may even stabilize the cartel by providing its members with a credible threat to be used to prevent betrayal among them.

Of course, for offenses not covered by antitrust law, relevant authorities may have their own ways of granting leniency and incentivize whistleblowing, such as plea bargaining,[7] *Qui Tam* rewards, and deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), typical in – but not exclusive to – common law countries.[8] And some countries have recently introduced explicit leniency programs for corruption (for example, Brazil[9] and Mexico, more on this below). Yet, those instruments do not always cover all type of sanctions, are seldom integrated with antitrust leniency, and are often under the responsibility of different law enforcement agencies. To avoid the threat of prosecution on other, connected infringements undermining the effects of a leniency policy addressing a first type of infringement, it is imperative that each jurisdiction sets an appropriate legal framework to

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Enhancement and Reform Act ACPERA, in the United States, and the 2014 Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union, in the European Union, among others). Such provisions may differ in effectiveness to prevent a negative impact on leniency programs, but most of them are only a partial solution to this problem. In fact, recent research has shown that the alleged conflict between private and public antitrust enforcement is generated by poor legislation. In a well-designed legal framework, the conflict vanishes altogether and private and public antitrust enforcement are perfectly complementary. *See* Paolo Buccirossi et al., *Leniency and Damages* (February 13, 2015), available at: http://ssrn.com/abstract=2566774.

[6] *See* Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. Corp. L. 453, 458-459 (2006), pointing out that a significant disincentive 'for firms to expose their participation in a price-fixing cartel' in the United States would be the fact that 'a confession of price-fixing implicates more than just antitrust laws', since the firm 'may simultaneously be admitting to securities laws violations', as well as mail fraud (id. at footnote 12). The problem might be even worse depending on the applicable legal framework. Liability for each of the concurrent offenses may apply to both companies and individuals (directors, managers or employees), at the criminal and administrative levels, and even in different countries (or at State and Federal levels, as occurs in the U.S.). Since our focus is on multi-infringement cartels and leniency, we will not focus on the international dimension of antitrust enforcement, which is a well-known issue and is already dealt with quite efficiently by informal cooperation between competition authorities.

[7] *See* Spagnolo, *supra* note 1, at 262.

[8] It should be noted, however, that while *Qui Tam* rewards and formal leniency programs can directly contribute to general crime deterrence by allowing to detect offenses that would remain undetected otherwise, the other instruments mentioned contribute to deterrence more indirectly, as they mainly aim at facilitating prosecution of already detected offenses (*see* Spagnolo, *supra* note 1, at 263). Still, the latter instruments may also be useful to allow authorities to extend leniency treatment to other offenses committed in conjunction with antitrust violations (covered by formal leniency programs), which is the focus of the present article.

[9] The Petrobras case, involving Brazil's biggest semi-public company, will be the first high profile case to be analyzed under the Brazilian Anti-corruption Law. This case, originated from a federal police operation ("Car Wash Operation"), involves both cartel- and corruption-related offenses whereby a group of the biggest construction companies in Brazil colluded to get Petrobras' projects, bribing company personnel as well as politicians with influence over the company.

prevent the conflict of incentives and to promote a high degree of coordination among the different agencies involved.

In this paper, we examine this problem in detail with respect to a particularly frequent and deleterious example of a multiple offense situation: the simultaneous occurrence of *collusion* (bid rigging) and *corruption*[10] in *public procurement* (i.e. the purchase of goods and services by governments and state-owned enterprises).

Public procurement is important due to its sheer size – it amounts to 15-20% of GDP in developed countries.[11] Collusion and corruption are both fundamental problems of public procurement.

Cartels in public procurement are estimated to raise prices by 20% or more above competitive levels.[12] The greater prices[13] that result from existing collusion schemes represent a serious waste of public funds, with a direct negative impact on the quality of public infrastructure and services that a state can provide to its citizens.[14]

On the other hand, public procurement is highly regulated precisely because of the risk of corruption.[15] A recent European Commission anti-corruption report estimates that corruption

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[10] Since in this paper we are concerned with corruption in the public sector, we adopt its most common and widely used definition as 'the abuse of public power for private gain'. *See* Johann G. Lambsdorff, *The Institutional Economics of Corruption and Reform*, 16 (2007); Jakob Svensson, *Eight Questions about Corruption*, 19 J. ECON. PERSPECT., 19 (2005), and Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, 45 IMF Staff Papers. 559, 564 (1998). This position of power can be created by either market imperfections or an institutional position that grants discretionary authority (Susan Rose-Ackerman, *The Economics of Corruption*, J PUBLIC ECON 4, 187, 187 (1975)).

[11] According to the OECD, the value of public procurement is between 13% and 20% of world GDP. *See* OECD, *Public Procurement for Sustainable and Inclusive Growth – Enabling reform through evidence and peer reviews*, 5 (2011), available at: http://www.oecd.org/gov/ethics/PublicProcurementRev9.pdf.

[12] *See* Luke M. Froeb et al., *What is the effect of bid rigging on prices?*, 42 ECON. LETT., 419, 422 (1993).

[13] For recent surveys on cartel overcharges, see John M. Connor, *Cartel overcharges*, *in* The Law and Economics of Class Actions (James Langenfeld ed., 2014), Marcel Boyer & Rachidi Kotchoni, *How Much Do Cartels Overcharge?*, Toulouse School of Economics Working Papers 14-462 (January 31st, 2014), available at http://www.tse-fr.eu/sites/default/files/medias/doc/wp/etrie/wp_tse_462_v2.pdf, and Florian Smuda, *Cartel Overcharges and the Deterrent Effect of EU Competition Law*, 10 J. COMPETITION L. & ECON., 63, 85 (2014).

[14] *See* OECD, *Global Forum on Competition Roundtable on Collusion and Corruption in Public Procurement DAF/COMP/GF(2010)6*), 10 (October 15th, 2010), available at http://www.oecd.org/competition/cartels/46235884.pdf.

[15] *See id.*, at 10; and Gustavo Piga, *A fighting chance against corruption in public procurement?*, 141, *in* International Handbook on the Economics of Corruption (Susan Rose-Ackerman & Tina Søreide eds., 2011). The frequent occurrence of corruption in public procurement is corroborated by a recent survey, which considered all foreign bribery enforcement actions that have been completed from the entry into force of the OECD Anti-Bribery Convention until 2014, and found that 57% of foreign bribery cases were related to public procurement. *See* OECD, *OECD Foreign Bribery Report: An analysis of the crime of bribery of foreign public officials*, 32 (2014), available at http://www.oecd-ilibrary.org/governance/oecd-foreign-bribery-report_9789264226616-en.

may be adding 20-25% to the cost of public procurement in Europe.[16] Similarly, the OECD suggests that bribes may add 5-25% to total contract values.[17]

Besides increasing the cost of public services, corruption distorts incentives and causes misallocation of resources, reducing the quality of public services and possibly affecting growth.[18] Corruption also undermines public trust in the government and the rule of law, threatening democratic values and the state's legitimacy.[19] For these reasons, in the last two decades corruption has become a major concern in international policy-making circles, and several international conventions have been pushing countries to develop or enhance legislation and implement rigorous anti-corruption enforcement.[20]

It has been noted that leniency policies and other schemes that encourage whistleblowing – such as reward[21] and protection policies – should work in the fight against corruption as well as in the fight against collusion.[22] Cartels, corruption, and many other types of multi-agent offenses depend on a certain level of trust among wrongdoers, which is precisely what leniency programs aim to undermine by offering incentives for criminals to betray their partners and cooperate with the authorities.[23] Instead, most anti-corruption regulations in

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[16] EU, *EU Anti-corruption Report*, 21 (February 3rd, 2014), available at http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf.

[17] OECD, *Bribery in Public Procurement: Methods, Actors and Counter-measures*, 47 (2007), available at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/44956834.pdf. In the same manner, a recent OECD survey found that, although they vary across sectors, on average bribes equaled 10.9% of the transaction value and 34.5% of the profits (OECD, *supra* note 15, at 26-27).

[18] *See generally* Benjamin A. Olken & Rohini Pande, *Corruption in Developing Countries*, 4 ANNU. REV. ECONOM., 479 (2012); Abhijit Banerjee et al., *Corruption*, *in* The Handbook of Organizational Economics (Sendhil Mullainathan, Robert Gibbons & John Roberts, eds., 2012); and Svensson, *supra* note 10.

[19] *See, e.g.*, OECD, *OECD Principles for Integrity in Public procurement* (2009), available at http://www.oecd.org/gov/ethics/48994520.pdf.

[20] Among the most important international legal instruments addressing the fight against corruption, we cite: the United Nations Convention Against Corruption, adopted by the United Nations General Assembly by Resolution 58/4, as of October 31st, 2003; the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, signed on December 17th, 1997; the Inter-American Convention Against Corruption, adopted on March 29th, 1996; the Criminal Law Convention on Corruption of the Council of Europe, adopted on January 27th, 1999; and the Civil Law Convention on Corruption of the Council of Europe, adopted on November 4th, 1999.

[21] Experimental studies have shown that the introduction of rewards for wrongdoers that blow the whistle, rather than merely exempting them from sanctions, may have a stronger effect on cartel detection (and likely also on the detection of corruption and other forms of multi-agent crimes) by increasing the incentives to self-report, even though apparently reducing deterrence. *See* Maria Bigoni et al., *Fines, Leniency, and Rewards in Antitrust*, 43 RAND. J. ECON., 368 (2012); and Jose Apesteguia et al., *Blowing the whistle*, 31 ECON. THEORY, 143 (2007).

[22] *See* Giancarlo Spagnolo, *Divide et Impera: Optimal Leniency Programs*, CEPR Discussion Paper 4840, 2 (Dec. 2004), available at http://ssrn.com/abstract=716143; Paolo Buccirossi & Giancarlo Spagnolo, *Leniency policies and illegal transactions*, 90 J. PUBLIC ECON., 1281, 1282 (2006); and Spagnolo, *supra* note 1, at 260.

[23] *See* Spagnolo, *supra* note 22, at 3; Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 518 (2004); Maria Bigoni et al., *Trust, Leniency and Deterrence*, 31 J. LAW ECON. ORGAN., 663, 663 (2015).

public procurement try to increase accountability by increasing the transparency. It is well known, however, that regulations increasing the transparency of the procurement process make bid rigging particularly easy to sustain by facilitating the monitoring of possible deviations from cartel agreements.[24]

Indeed, even abstracting from the interaction in the leniency domain at the heart of this paper, corruption and collusion are already acknowledged as 'concomitant threats to the integrity of public procurement',[25] and 'strategic complements'[26] that reinforce and feed off each other.[27] It is already acknowledged that to ensure the effectiveness of public procurement, i.e. best value for money in public purchases, authorities face two distinct, yet inter-related obstacles: 'ensuring integrity in the procurement process (i.e., preventing corruption on the part of public officials); and […] promoting effective competition among suppliers, by preventing collusion among potential bidders'.[28]

Considering that success in deterring cartels depends largely on the incentives provided to infringers to self-report,[29] the interaction between leniency provisions for cartels and the

[24] *See* George Stigler, *A Theory of Oligopoly*, 72 J. POLIT. ECON, 44 (1964).

[25] OECD, *supra* note 14, at 9.

[26] OECD, *13th Global Forum On Competition Discusses The Fight Against Corruption, Executive summary*, DAF/COMP/GF(2014)12/FINAL, 5 (February 27th, 2014), available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2014)12/FINAL&doclanguage=en (concluding that '[c]o-operation between competition authorities and anti-corruption bodies was found to be crucial to the success of the fight against corruption in the context of competition enforcement'). *See also* Ariane Lambert-Mogiliansky & Grigory Kosenok, *Fine-Tailored for the Cartel-Favoritism in Procurement*, 35 REV. IND. ORGAN. 95, 111 (2009) (considering that 'the risks of collusion and favoritism are linked and should be addressed simultaneously', however, since 'the investigation of collusion is often the jurisdiction of Competition Authorities, while that of corruption is the jurisdiction of criminal courts', '[a] first recommendation is to develop cooperation to overcome this institutional separation, so as to improve efficiency in the prosecution of cases that involve both favoritism (corruption) and collusion').

[27] *See* Piga, *supra* note 15, at 143; and OECD, *supra* note 26, at 4. *See also* Ariane Lambert-Mogiliansky & Konstantin Sonin, *Collusive Market Sharing and Corruption in Procurement*, 15 J. ECON. MANAGE. STRAT., 883 (2006), and Tina Søreide, *Beaten by Bribery: Why Not Blow the Whistle?*, 164 J. INST. THEOR. ECON., 407 (2008) (arguing that corruption creates focal equilibria allowing bidders not to compete with each other); and Olivier Compte et al., *Corruption and competition in procurement auctions*, RAND. J. ECON., 1 (2005), (acknowledging that corruption facilitates collusion over price between firms, allowing for an increase in price that goes far beyond the bribe paid to the official).

[28] Robert D. Anderson et al., *Ensuring integrity and competition in public procurement markets: a dual challenge for good governance*, *in* The WTO Regime on Government Procurement: Challenge and Reform (Sue Arrowsmith & Robert D. Anderson eds., 2010), available at: http://www.unescap.org/tid/projects/procure2011-docIII2.pdf. Similarly, the United Nations considers that '[i]f a government's procurement system reflects all three elements [competition, transparency and integrity], the system is much more likely to achieve best value in procurement and to maintain political legitimacy', and that '[t]hese central goals, moreover, complement one another' (UN, *UNODC Guidebook on anti-corruption in public procurement and the management of public finances: Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, 2 (2013), available at http://www.unodc.org/unodc/en/corruption/publications.html).

[29] Incentives to self-report are indeed crucial to the fight against corruption, given its similar characteristics to collusion in terms of secrecy, as previously mentioned. The OECD found that 'defendants self-reported or voluntarily disclosed their involvement in' 31% of foreign bribery cases (comprising 427 enforcement actions, from 1999 to 2014), which was considered as 'an indication of willingness on the part of companies to self-

legal treatment of corruption adds a powerful new channel to the above-noted interdependence and thus should be – and already is[30] – a concern to antitrust and anti-corruption authorities.

This paper aims at assessing how the crucial role played by leniency programs in antitrust enforcement and the absence of – or lack of coordination with – similar programs for corruption in different countries increases the complementarity between corruption and bid rigging in public procurement by substantially reducing wrongdoers' incentives to blow the whistle. We describe and discuss the antitrust and anti-corruption leniency provisions in a few selected countries, from both common law and civil law regimes, highlighting whether and when the absence of a formal leniency program for corruption means that cartel members that bribe public officials will be less likely to report the cartel for fear of prosecution for the corruption offense. We focus on whether different countries' legislations present any solution to preventing legal provisions against corruption from undermining the effectiveness of leniency programs in antitrust, and assess the main advantages and drawbacks of the different approaches.

There is, as we have mentioned, an extensive literature that discusses the use and the optimal design of leniency programs in antitrust law.[31] Leniency programs for fighting corruption, on the other hand, are just starting to be studied by the academic community.[32] While these works have discussed leniency, asymmetric sanctions and the role of whistleblowers in the fight against corruption, to the best of our knowledge there has been no discussion of the interaction between different leniency provisions, e.g. for cartels and for corruption.

The analysis proceeds as follows. Part I discusses different legal system provisions regarding leniency for cartels and corruption behavior. Part II discusses the impact of foreign corruption provisions on international cartel enforcement. Part III presents some suggestions on how to improve the current legal frameworks. A short conclusion follows.

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report in countries whose legal systems permit voluntary disclosure, especially when such behaviour leads to mitigated sanctions' (OECD, *supra* note 15, at 16).

[30] *See* OECD, *supra* note 26, at 5 (stating that even though the 'effectiveness of leniency programs was not hampered by the co-operation between competition and anti-corruption agencies', there were reports of tension 'between pursuers of a corruption case who seek punishment for those found guilty of wrong-doing, and the proponents of leniency for whistle-blowers who enable the disclosure of a cartel').

[31] *See, e.g,* Spagnolo, *supra* note 1; and Marvão & Spagnolo, *supra* note 1.

[32] *See, e.g*, Spagnolo, *supra* note 22; Buccirossi & Spagnolo, *supra* note 22; Johann G. Lambsdorff & Mathias Nell, *Fighting corruption with asymmetric penalties and leniency*, CeGE Discussion Paper No. 59 (2007), available at https://www.econstor.eu/dspace/bitstream/10419/32012/1/524498032.pdf; Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANNU. REV. LAW SOC. SCI., 217 (2010); Kaushik Basu, *Why, for a Class of Bribes, the Act of Giving a Bribe Should Be Treated as Legal*, Working Paper 172011 DEA (March, 2011), available at http://www.kaushikbasu.org/Act_Giving_Bribe_Legal.pdf; Martin Dufwenberg & Giancarlo Spagnolo, *Legalizing Bribe Giving*, 53 ECON. INQ., 836 (2015); Klaus Abbink et al., *Letting the briber go free: An experiment on mitigating harassment bribes*, 111 J. PUBLIC ECON., 17 (2014). Karna Basu et al. *Asymmetric Punishment as an Instrument of Corruption Control*. World Bank Policy Research Working Paper No. 6933 (June 1st, 2014), available at http://ssrn.com/abstract=2458219; and Bigoni et al., *supra* note 23.

I. ANTITRUST LENIENCY AND CORRUPTING CARTELS AROUND THE WORLD

A. United States

Under the Unites States' antitrust Corporate Leniency Policy, when a corporation qualifies for leniency, immunity covers all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession.[33] The Individual Leniency Policy applies instead to all individuals who come forward on their own behalf to report an antitrust violation.[34]

Although there is no specific leniency program for corruption[35] in the United States,[36] self-reporting and cooperation are given great importance by both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC)[37] and may lead to leniency and even immunity, through plea agreements, non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs).[38]

If they are committed in connection with an antitrust violation, U.S. antitrust leniency programs can provide protection for non-antitrust violations. However, the leniency agreement will only bind the Antitrust Division and not any other federal or state prosecuting agencies. In other words, leniency agreements will not prevent other prosecuting agencies from prosecuting the applicant for the non-antitrust violation. If the applicant requests it, the Antitrust Division will inform other prosecuting offices or administrative agencies about the agreement.[39]

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[33] USDOJ Corporate Leniency Policy, August 10th, 1993, Part C, available at http://www.justice.gov/atr/public/guidelines/0091.pdf; and Scott D Hammond & Belinda A Barnett, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters* (November 19th, 2008), Question 23, available at www.justice.gov/atr/public/criminal/239583.pdf.

[34] USDOJ Individual Leniency Policy, August 10th, 1994, Part A, available at http://www.justice.gov/atr/public/guidelines/0092.pdf.

[35] The criminal provisions related to domestic and foreign corruption can be found at 18 U.S.C. Section 201(b) and 15 U.S.C. §§ 78dd-1, et seq. (Foreign Corrupt Practices Act – FCPA).

[36] For literature discussing the creation of a leniency program for corruption in the U.S., *see* Stephen A. Fraser, Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty, 90 TEX. L. REV. 1009 (2012); Christopher R. Leslie, Replicating the Success of Antitrust Amnesty, 90 TEX. L. REV. 171 (2012).

[37] *See* Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (November 2012), 54, available at www.justice.gov/criminal/fraud/fcpa/guide.pdf. ('both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters').

[38] Following the principles and procedures presented at the 2015 United States Sentencing Commission Guidelines Manual – USSG, Chapter 6, Part B (available at http://www.ussc.gov/guidelines-manual/2015/2015-ussc-guidelines-manual), and at the United States Attorneys' Manual, Sections 9-27.400 and 9-28.1500 (available at http://www.justice.gov/usam/usam-title-9-criminal). Leniency for cooperation with the authorities is possible under the USSG, Sections 8C4.1 – Substantial Assistance Departure (corporations) and 5K1.1 – Substantial Assistance to Authorities (individuals).

[39] See USDOJ, Model Leniency Letters (November 19th, 2008), available at http://www.justice.gov/atr/public/criminal/leniency.html.

Consequently, in cases involving multiple antitrust and non-antitrust offenses, the infringer will have to seek non-prosecution through two separate agreements. One agreement should be pursued with the Antitrust Division, and the other with the prosecuting agency responsible for the non-antitrust matter, which in the case of corruption is the Criminal Division of the U.S. Department of Justice.

A higher degree of coordination should be achieved if both offenses are under the responsibility of divisions of the U.S. Department of Justice, as opposed to situations where agreements were submitted to different law enforcement agencies.

However, in the case of an individual holding a managerial position in a company participating in a cartel that bribes public officials to win public bids, it is likely that his incentive to self-report would still be significantly lower than in the absence of bribing. Signing a leniency agreement with a prosecutor from the Antitrust Division will not necessarily prevent someone from being criminally prosecuted for corruption by other prosecutors and consequentially ending up in jail. Thus the individual would have to rely on intra-organizational coordination when deciding to come forward, with no *certainty* of his immunity, no matter how probable it seemed.

Moreover, since leniency for the two crimes may not be granted simultaneously, the initial applicant risks one of his fellow infringers noticing or being informed of his approach to the Antitrust Division. This could lead to the fellow infringer quickly reporting the corruption infringement to the Criminal Division and obtaining some form of reduction in his sanction, therefore preventing the first applicant from obtaining leniency for both infringements.

B. United Kingdom

According to the Competition Act 1998[40] and the Enterprise Act 2002,[41] cartel activity in the United Kingdom is sanctioned at both the corporate and individual level, respectively.

In England, Wales and Northern Ireland, criminal prosecution for cartels may only be brought about by the Competition and Markets Authority (CMA), the U.K. Competition Authority, or the Serious Fraud Office (SFO), or with the consent of the CMA. However, prosecutions will generally be undertaken by the CMA. In Scotland, prosecutions can only be brought by the Crown Office and Procurator Fiscal Service (COPFS), the sole prosecution authority in Scotland, which is headed by the Lord Advocate.[42] The CMA and the COPFS have signed agreements to cooperate in the investigation and prosecution of individuals in respect of cartel offenses.[43]

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[40] Competition Act 1998, s.2, available at: http://www.legislation.gov.uk/ukpga/1998/41/section/2 (UK).

[41] Enterprise Act 2002, s.188, available at: http://www.legislation.gov.uk/ukpga/2002/40/section/188 (UK).

[42] CMA, Cartel offense Prosecution Guidance (CMA9), Subsections 1.4 and 1.5 (2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288648/CMA9__Cartel_offense_Prosecution_Guidance.pdf.

[43] Memorandum of Understanding between the Competition and Markets Authority and the Crown Office and Procurator Fiscal Service (July 2014), available at

The U.K. leniency program may offer – along with immunity or reduction in fines for the corporation – "blanket"[44] immunity from criminal prosecution for individual employees or officers, as is the case in the US. Immunity from criminal prosecution is granted in the form of a no-action letter issued by the CMA, which prevents a prosecution from being brought against an individual in England, Wales or Northern Ireland. In relation to Scotland, guarantees of immunity from prosecution cannot be given, but he CMA will report to the Lord Advocate [45] on cooperation being offered or provided by individuals and will recommend that conditional criminal immunity be granted. The Lord Advocate will therefore give the recommendation serious weight when deciding whether to prosecute the individual in question, and may also, whenever possible, give an early indication as to whether criminal immunity is likely to be granted.[46]

No-action letters cannot prevent prosecution for separate and distinct offenses such as bribery, however the offenses may be related to the cartel violation. Moreover, the CMA will only refer the case to another U.K. agency, such as the SFO, if the agency agrees not to frustrate the no-action letter's goal by prosecuting its recipient for the conduct detailed in the letter under another act.[47]

In relation to corruption, the U.K.'s Bribery Act 2010, which came into force in July 1st, 2011, significantly updated the offenses relating to bribery. It created a specific offense of bribery of foreign public officials and also introduced a new form of corporate liability: a relevant commercial organization[48] may be strictly criminally liable if they fail to prevent a person associated[49] with the organization from bribing another person with the intention of obtaining or retaining business, or obtaining or retaining an advantage in the conduct of business, for the benefit of the organization. This is the case unless the organization can

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328403/CMA_and_COPFS_MOU.pdf.

[44] For any current or former employee or director of the undertaking, wherever they are in the world and whatever their precise role was in the cartel activity (Office of Fair Trading – OFT, *Applications for leniency and no-action in cartel cases – OFT's detailed guidance on the principles and process (OFT1495)*, ss. 2.38 (2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf).

[45] *See* OFT, *supra* note 44, ss. 8.21.

[46] Memorandum of Understanding between the Competition and Markets Authority and the Crown Office and Procurator Fiscal Service, *supra* note 43, Paragraphs 14 and 16.

[47] *See* OFT, *supra* note 44, ss. 8.20.

[48] A relevant commercial organization means '(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom' (Bribery Act 2010, s. 7, Paragraph 5).

[49] An 'associated person' means anyone who performs services for the organization or on its behalf, which may include employees, agents and subsidiaries (Bribery Act 2010, s. 8).

demonstrate that adequate procedures designed to prevent persons associated with the organization from undertaking such conduct were in place.[50]

Aside from ordinary individual liability, there is also the possibility that when an organization commits an offense, it is proven that it was committed with the consent or connivance of a senior officer of the organization. In such a case, both the senior officer (or an individual acting in such a capacity) and the organization will be prosecuted for the offense.[51]

Anti-corruption law enforcement in the U.K. involves a range of agencies. These include the National Crime Agency (NCA), which was established in October 2013 and is responsible for leading, coordinating and supporting the operational response to serious and organized crime, including economic crime. The NCA oversees the law enforcement response to bribery and corruption, working closely with other agencies such as the Serious Fraud Office (SFO), which leads on serious or complex and foreign bribery and corruption cases. The Crown Prosecution Service (CPS) advises on investigations and conducts all relevant prosecutions other than those brought by the SFO.[52]

Under the prosecuting guidelines, self-reporting is encouraged as a factor to be considered when deciding whether or not to prosecute a company. There are, however, no guarantees that a prosecution will not follow.[53]

Additionally, deferred prosecution agreements (DPAs) were introduced in England and Wales for corporations accused with corporate economic crimes, including bribery and corruption. A DPA is an agreement between a designated prosecutor and a legal person (a body corporate, a partnership or an unincorporated association, but not an individual) whom the prosecutor is considering prosecuting for an alleged offense, including bribery. Under a DPA, the company agrees to comply with the requirements imposed by the agreement and the prosecutor agrees that, upon approval of the DPA by the court, proceedings will be instituted and suspended until the DPA is breached or reaches its expiry date. A DPA only comes into force, however, when it is approved by the Crown Court, which only occurs if the Court considers that it is in the interests of justice and that its terms are fair, reasonable and proportionate.[54]

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[50] Bribery Act 2010, s. 7.

[51] Bribery Act 2010, s. 14.

[52] UK, *UK Anti-Corruption Plan* (December 2014), s. 5.0, 38, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388894/UKantiCorruptionPlan.pdf.

[53] SFO & CPS, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions*, 5, available at http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf, and CPS, *Joint Guidance on Corporate Prosecutions*, 8, available at: http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf.

[54] Crime and Courts Act 2013, sched. 17, available at http://www.legislation.gov.uk/ukpga/2013/22/pdfs/ukpga_20130022_en.pdf.

In order to coordinate their approach to prosecutions, the SFO and CPS have published jointly agreed guidelines on their approach to prosecuting corruption cases and a joint code of practice for prosecutors on the use of DPAs.

Finally, specified prosecutors can offer immunity from prosecution or a reduction in the sentence to an individual who assists an investigation.[55]

The U.K. has established a set of rules that mitigate the undermining effect of other violations on leniency in antitrust. By developing a coordinated approach among the law enforcement and prosecuting agencies, their individual efforts are prevented from harming each other. Specifically, other prosecuting agencies will have to agree to not prosecute the individuals for other offenses related to cartel infringements, so an individual who works for a company involved in a bribing cartel may be able to report the case to CMA without risking prosecution for bribery. However, it is still possible, at least theoretically, that the agency – the SFO in this case – will not agree to respect the no-action letter and will decide to move forward on prosecuting the offender, perhaps because it was already investigating the case from the bribery side and already had enough evidence to indict the individuals involved, including the individual guaranteed leniency. DPAs for the companies and immunity/leniency provided by the specified prosecutors for the individuals may help circumvent this problem, but they are not guaranteed ex ante. This uncertainty may prevent possible leniency applicants from blowing the whistle by self-reporting to the CMA.

C. Brazil

The Brazilian Antitrust Leniency Programme is available to both individuals and legal entities.[56] If a leniency application is successful, it allows the Brazilian Competition Authority, the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica,* or CADE), to terminate any punitive action by the public administration or reduce the applicable penalty.[57]

In Brazil, cartels are both an administrative offense and a crime, punishable by a criminal fine and imprisonment.[58] Additionally, the Brazilian Public Procurement Law specifically targets bid rigging, providing for imprisonment and a criminal fine.[59]

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[55] Serious Organised Crime and Police Act 2005, s. 71-73, available at: http://www.legislation.gov.uk/ukpga/2005/15/pdfs/ukpga_20050015_en.pdf. Specified prosecutors are the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions, the Director of the Serious Fraud Office, the Director of Public Prosecutions for Northern Ireland, and any prosecutor designated for the specific purposes of these sections by one of the prosecutors mentioned before.

[56] Brazilian Competition Law (Law No. 12,529, as of November 30th, 2011), art. 31, available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/Lei/L12529.htm.

[57] Brazilian Competition Law, Article 86.

[58] Brazilian Economic Crimes Law (Law No. 8,137, as of December 27th, 1990), art. 4, available at: http://www.planalto.gov.br/ccivil_03/leis/l8137.htm.

[59] Brazilian Public Procurement Law (Law No. 8,666, as of June 21st, 1993), art. 90 and 95, available at: http://www.planalto.gov.br/ccivil_03/leis/l8666cons.htm.

In order to prevent these different criminal provisions from interacting negatively and undermining the leniency program, the Competition Law expressly states that the execution of a leniency agreement requires the suspension of the statute of limitations and prevents denunciation of the leniency beneficiary for each of the aforementioned crimes. Once the leniency agreement has been fully complied with by the agent, the punishments for the crimes will automatically cease.[60]

Recently, Brazil has enacted an Anti-corruption Law that determines strict administrative and civil liability of legal entities for detrimental acts against the public administration, either domestic or foreign.[61] These detrimental acts include bribery of public officials and corruption on public procurement, e.g. bid rigging.[62]

The Brazilian Anti-corruption Law allows for formal leniency agreements in corruption cases, which could exempt a legal entity from some of the sanctions provided for in the law and reduce the amount of any fine.[63] These agreements may also cover administrative liability for illegal acts provided for in the Brazilian Public Procurement Law.[64]

The Law gives competence to conclude leniency agreements to the highest authority of each public body or entity of any of the spheres of government (federal, state or municipal). For the Executive Branch of the Federal Government, the Office of the Comptroller General (*Controladoria Geral da União*, or CGU) is responsible for the conclusion of any leniency agreement, including those comprising acts committed against a foreign public administration.

A major drawback of the new Brazilian Anti-corruption Law, however, is that it does not cover individuals and their criminal prosecution for corruption. It applies only to legal entities and Brazil does not accept corporate criminal liability, except for in environmental crimes. Individual criminal prosecution for corruption falls under the Brazilian Penal Code, which provides for the crimes of active and passive corruption.[65] Lenient treatment for individuals under the Brazilian criminal legal system is possible through a reduction in the penalty granted by the judge, under the Brazilian Penal Code,[66] and through a form of plea bargaining,

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[60] Brazilian Competition Law, art. 87. However, it must be noted that these provisions are controversial from a procedural point of view. Since the Public Prosecutors' Office is responsible for public penal actions and is bound by compulsory prosecution (see *infra* note 64), the Competition Law would in principle not be able to prevent it from prosecuting a case, even if the defendant were granted leniency by the antitrust authority. In any case, CADE works closely to the Public Prosecutors' Office, which is involved in the negotiation and conclusion of the leniency agreement, assuring its effects and, more importantly, the effectiveness of the leniency policy.

[61] Brazilian Anti-corruption Law (Law No. 12,846, as of August 1st, 2013), art. 1, available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12846.htm.

[62] Brazilian Anti-corruption Law, art. 5.

[63] Brazilian Anti-corruption Law, art. 16.

[64] Brazilian Anti-corruption Law, art. 17.

[65] Brazilian Penal Code (Decree-Law No. 2,848, as of December 7th, 1940), art. 317, 333 and 337-B, available at www.planalto.gov.br/ccivil_03/decreto-lei/del2848.htm.

[66] Brazilian Penal Code, art. 65, III, d (spontaneous confession by the agent), and art. 66 (any other circumstance, either prior or subsequent to the crime, that is deemed relevant by the judge).

provided for in several other criminal laws.[67] Nevertheless, these provisions are not automatic, as they still require that each case goes to trial – a consequence of the Brazilian inquisitorial system.[68] Therefore, they depend entirely on the judge's discretion, and we know from the antitrust experience that discretional leniency provisions are not able to foster substantial whistleblowing.[69] This problem is therefore likely to completely undermine the impact of the Brazilian Anti-corruption Law on wrongdoers' incentives to blow the whistle, although it may still induce innocent top management to report wrongdoing by other employees (and to provide for scapegoats when the top management was involved). The new Brazilian Law Against Organized Crime may partly help on this front, as it at least relaxes the compulsory prosecution requirement and legally authorizes the public prosecutor to not bring charges against criminals who have confessed to a crime, but to instead grant them a sanction reduction or even absolute immunity based on their cooperation with the investigations and judicial proceedings (so-called 'rewarded collaboration').[70]

When considering cartels in public procurement, Brazilian law does present features that enhance the effectiveness of the antitrust leniency program, provided that the leniency agreement can cover the company and its employees for all the administrative and criminal offenses. However, the scenario is much more problematic when the case also deals with corruption of public officials.

As mentioned earlier, and contrary to the Brazilian Competition Law, the Brazilian Anti-corruption Law does not offer protection to collaborating individuals from criminal prosecution, and it is individuals that are ultimately responsible for the decision to report the illegal act. According to this Law, the liability of the legal person does not prevent the individual accountability of its managers and directors, or of any other natural person that took part in the illegal act.[71] Moreover, under the presently available mechanisms to award leniency under Brazilian criminal law, there is no guarantee for a wrongdoer who blows the whistle that he or she will obtain any reduction after confessing to participation in the offense,

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[67] Heinous Crimes Law (Law No. 8,072, as of July 25th, 1990), Economic Crimes Law (Law No. 8,137, as of December 27th, 1990, as amended by the Law No. 9,080, as of July 19th, 1995), the Law on Crimes against the National Financial System (Law No. 7,492, as of June 16th, 1986, as amended by the Law No. 9,080/1995), the Penal Code (as amended by the Law No. 9,269, as of April 2nd, 1996, for the crime of extortion with kidnapping), the Money-Laundering Law (Law No. 9,613, as of March 3rd, 1998), the Cooperation and Witness Protection Law (Law No. 9,807, as of July 13th, 1999, which extended the possibility of plea bargains to all other crimes) and the Drug Law (Law No. 11,343, as of August 23rd, 2006). The so-called 'rewarded denunciation' ('*delação premiada'* in Portuguese) allows for a reduction of sanctions to criminals given their cooperation in dismantling the criminal group with which they were associated.

[68] In contrast to common law jurisdictions, where there is an adversarial system, in civil law countries there is an inquisitorial system where the 'real' truth cannot be negotiated and compromised. In an inquisitorial system there is ordinarily a requirement of compulsory prosecution and, consequently, prosecutors have limited discretion to decide which cases and charges they want to move forward on (LANGER, 2004, p. 37). Compulsory prosecution in Brazil is derived from art. 5 of the Brazilian Constitution, which states that 'no one shall be deprived of their freedom or their property without the due process of law'.

[69] *See supra* note 2 and accompanying text.

[70] Brazilian Law against Organized Crime (Law No. 12,850, as of August 2nd, 2013), available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12850.htm, Article 4.

[71] Brazilian Anti-corruption Law, art. 3.

which substantially reduces the motivation for exposing corruption and collaborating with the authorities in its prosecution.

Moreover, in a cartel corruption scenario, any person interested in reporting information in exchange for leniency will have to sign agreements with different authorities: CADE for the antitrust infringement; the competent authority[72] (CGU, in the case of the Executive Branch of the Federal Government) for corruption offenses regarding corporate liability; and finally the Public Prosecutor's Office (*Ministério Público*) for individual criminal liability. As mentioned previously, the involvement of multiple authorities in leniency cases makes it difficult to limit disclosures and to preserve privileges, thus reducing the effectiveness of existing leniency provisions in inducing whistleblowing.[73]

D. Mexico

Like Brazil, Mexico also has a new Federal Competition Law that came into force on July 7th, 2014 and applies to both individuals and legal entities in any form of participation in economic activity.[74] Among other changes, the new Competition Law has included in the Mexican Federal Penal Code a provision for imprisonment and fines for individuals that participated in a cartel on behalf of a company.[75] However, criminal prosecution is contingent upon a complaint being filed by the Mexican antitrust authorities: the Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*, *or* COFECE) and the Federal Institute of Telecommunications (*Instituto Federal de Telecomunicaciones*, *or* IFT).[76] This means that criminal prosecution for cartel offenses is dependent on the antitrust authorities' decision, and this is of great importance in incentivizing leniency applications.

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[72] It is worth noting that if the cartel has operated in public procurement procedures in different spheres of government (federal, state or municipal), the highest authority of each public body or entity will have to be approached by the self-reporting offender, which requires even higher coordination and reduces the interest in applying for leniency even further.

[73] In the Petrobras Case (*see supra* note 9), the Federal Public Prosecutors' Office (MPF), which has already signed a considerable number of rewarded collaboration agreements with executives of companies involved in bribery, has complained about CGU's interest in signing leniency agreements to reduce fines for the companies under the Anti-corruption Law. MPF argued that CGU did not have all the information available in the judicial procedure as part of it is under judicial confidentiality, and thus there would be a risk that CGU could sign agreements without obtaining any relevant information, benefitting the companies (http://g1.globo.com/politica/operacao-lava-jato/noticia/2015/02/procuradores-da-lava-jato-tentam-barrar-acordo-de-leniencia-na-cgu.html). Recently, the Judge in charge of the penal action related to Petrobras Case, after sentencing directors to prison, suggested that the company apply for leniency to regain reputation, recommending however that the application was submitted to CADE, CGU and MPF at the same time to ensure 'legal certainty' (http://www1.folha.uol.com.br/poder/2016/03/1747683-ao-banir-cupula-da-odebrecht-dos-negocios-moro-sugere-leniencia-para-limpar-reputacao.shtml). This shows how complex is the Brazilian legal framework for cartel-corruption cases, making self-reporting much less attractive.

[74] Mexican Federal Competition Law (*Ley Federal de Competencia Económica*), as of May 23rd, 2014, art. 127, available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE.pdf.

[75] Mexican Federal Penal Code, art. 254 bis, available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/9_120315.pdf.

[76] Mexican Federal Penal Code, art. 254, Paragraph 1.

The Mexican antitrust leniency program, called the Immunity and Reduced-Sanctions Program,[77] is available to both individuals and legal persons.[78] Once leniency is granted, it extends to the corporations' employees involved in the infringement,[79] also providing for criminal immunity for these individuals whether they applied individually or jointly with their company.[80]

The Mexican Federal Anti-corruption Law in Public Procurement, hereafter the "Mexican Anti-corruption Law", was introduced in 2012 and establishes responsibilities and sanctions (fines) against natural and legal persons for infractions related to federal public procurement and for misconducts committed in international business transactions.[81] Individual criminal sanctions for corruption – both imprisonment and fine – are instead administered under the Mexican Penal Code.[82] As with its Brazilian counterpart, the Mexican Anti-corruption Law considers several entities as competent to enforce it.[83] Similarly to CGU in Brazil, SFP is exclusively responsible for investigating and sanctioning the bribery of foreign officials,[84] while the prosecution of individuals is conducted by the Federal Public Prosecutor's Office.

The Mexican Anti-corruption Law includes a leniency provision to encourage whistleblowing, as it provides for the possibility of reductions in administrative sanctions to any legal or natural person who confesses to having committed any of the offenses under the Law.[85] Again, however, there is no similar instrument in relation to criminal sanctions against individuals.

Therefore, the new Mexican rules are subject to a similar criticism as Brazilian ones in terms of their likely inability to induce wrongdoers to blow the whistle on corruption crimes, and of the corresponding negative effect they impose on the functioning of the antitrust leniency program in public procurement markets. The problems of having no leniency program covering individual criminal penalties for corruption and of having multiple, un-

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[77] *See* Comisión Federal de Competencia, *Guía del Programa de Inmunidad y Reducción de Sanciones*, (March 2013), available at http://www.cofece.mx/ingles/index.php/cofece/que-hacemos/practicas-monopolicas-absolutas/ immunity-program.

[78] Mexican Federal Competition Law, art. 103.

[79] Mexican Federal Competition Law, art.103, Paragraph 3.

[80] Mexican Federal Criminal Code, art. 254, Paragraph 2.

[81] Mexican Federal Anti-corruption Law in Public Procurement (*Ley Federal Anticorrupción en Contrataciones Públicas*), as of April 25th, 2012, art. 2.

[82] Mexican Federal Penal Code, art. 222.

[83] The Ministry of the Public Administration (SFP); the Senators Chamber and the Deputies Chamber of the Congress of the Union; the Supreme Court of Justice of the Nation, the Council of the Federal Judicature, and the Electoral Tribunal of Judicial Power of the Federation; the Federal Court of Fiscal and Administrative Justice; the Federal Court of Conciliation and Arbitration, the agrarian courts; the Federal Electoral Institute; the Federation Superior Auditor's Office; the Human Rights National Commission; the National Statistics and Geography Institute; the Bank of Mexico; and other autonomous public entities, as provided by law (Mexican Anti-corruption Law, art. 4).

[84] Mexican Anti-corruption Law, art. 5, Paragraph 1.

[85] Mexican Anti-corruption Law, art. 31.

coordinated authorities responsible for anti-corruption leniency are both present. The possibility of a reduction of individual criminal sanctions in exchange for whistleblowing and further collaboration only exists at the end of the judicial process, when the judge considers the behavior of the defendant after the crime in determining the sentence,[86] and is therefore fully discretional. And unfortunately we know from antitrust experience that leniency programs at the discretion of the prosecutor do not succeed in inducing wrongdoers to blow the whistle and collaborate with prosecutors.

E. European Union

In the European Union, cartels are regulated both by Article 101 of the Treaty on the Functioning of the European Union (the TFEU) and by each member's own competition law.

The European Commission's Competition Directorate General (Competition DG) is primarily responsible for the enforcement of competition law. However, in accordance with Regulation 1/2003, the national competition authorities of all members are competent to enforce Article 101 of the TFEU, as well as their own domestic competition rules regarding cartels.[87] There is close cooperation between the Commission and the national competition authorities, which form the European Competition Network (ECN), including assistance in collecting information and information exchange.[88]

Cartel infringements can be sanctioned with fines by the Commission. However, individuals involved in the cartel cannot be held criminally liable.[89]

The EU antitrust leniency program is managed by the Competition DG and it is described in the European Commission's Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006/C 298/11), the "2006 Leniency Notice".[90]

In the context of a leniency application, an ECN member may pass on information submitted by an applicant to other ECN members if the applicant has consented to the transmission. Consent is not necessary, however, if the other ECN member has received a leniency application from the same applicant in relation to the same infringement; if the receiving competition authority commits not to use the information received, or obtained after that moment, to impose sanctions on the applicant; or if the information was collected on behalf of the ECN member to whom the leniency application was made.[91]

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[86] Mexican Federal Criminal Code, art. 52, VI.

[87] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 5.

[88] Council Regulation (EC) No 1/2003 of 16 December 2002, Article 12.

[89] Council Regulation (EC) No 1/2003 of 16 December 2002, Article 23, paragraph 5.

[90] Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006/C 298/11), available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC1208(04).

[91] Commission's Notice on cooperation within the Network of Competition Authorities (OJ 2004/C 101/03), Paragraphs 40 and 41.

Unlike for competition rules, the EU has not enacted anti-corruption regulation, even though it has advised its members on the legal framework to be set against corruption that will be enforced by each country.[92] Despite the strong cooperation within the ECN, which prevents conflicts among authorities, this is likely to be a substantial obstacle to offenders wanting to blow the whistle and hoping to obtain leniency[93] when both collusion and corruption are features of the infringement. If just one of the countries affected by the cartel does not provide leniency for the corruption offense, the incentive to reporting bid rigging schemes in pubic procurement that involve public buyer corruption vanishes. In fact, this may actually induce members of a bidding ring to corrupt a public buyer in one of the involved countries precisely to undermine the effectiveness of EU antitrust anti-cartel enforcement. With just one of the public buyers bribed, all incentives to blow the whistle and report under the EU leniency program will be counterbalanced by the risk of being criminally prosecuted for that very case of public buyer corruption.

F. Germany

The German Federal Cartel Office (*Bundeskartellamt*, or FCO)[94] operates a leniency program (*Bonusregelung*) that is available both to companies and to individuals independently of their employers. However, if a company applies for leniency, the FCO understands that it will cover its current and former employees unless otherwise indicated either in the application or through the conduct of the leniency applicant.[95]

The German leniency programme for cartels does not offer immunity from or leniency in criminal prosecution for individuals.[96] Yet, cartels do constitute a criminal offense in the case of bid rigging in public procurement tenders.[97] In these cases, the FCO must refer proceedings

[92] Convention of the European Union on the fight against corruption involving officials of the European Communities or officials of Member States, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0625(01):EN:HTML, and the already mentioned Criminal Law Convention on Corruption of the Council of Europe, and the Civil Law Convention on Corruption of the Council of Europe, from 1999.

[93] As stated in the European Competition Network Model Leniency Programme, its purpose is 'to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programs within the ECN' (ECN Model Leniency Programme, paragraph 2, available at http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf).

[94] According to the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, or GWB), the FCO has jurisdiction if the effect of the restricting practice goes beyond the territory of a single German federated state. In all other cases, the regional competition authorities (*Landeskartellbehörden*) will be responsible for cartel enforcement (GWB, Section 48(2), available at: http://www.gesetze-im-internet.de/englisch_gwb/).

[95] German 2006 Leniency Notice (*Bekanntmachung Nr. 9/2006 – Bonusregelung*), Paragraph 17, available at www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Notice%20-20Leniency%20Guidelines.pdf?__blob=publicationFile&v=5.

[96] Under German law, only individuals can be subject to criminal prosecution.

[97] German Criminal Code (*Strafgesetzbuch* – StGB), Sections 263 and 298, available at http://www.gesetze-im-internet.de/englisch_stgb/.

against the involved natural person to the public prosecutor.[98] Co-operation of an individual with the FCO during the administrative proceedings may still be considered by the criminal court as a mitigating circumstance, reducing imposed penalties or even allowing a discharge depending on the offense's possible sanctions, but this will be entirely at the discretion of the court.[99] And unfortunately we know from the pre-1993 US experience that this increase in prosecutorial discretion is likely to greatly reduce the propensity of wrongdoers to blow the whistle on the cartel.

Criminal provisions for corruption of public officials are laid down in the German Criminal Code.[100] The individual is liable for corruption acts; the corporation itself may only be fined when its managers commit criminal offenses to its benefit, or when it intentionally or negligently fails to take the supervisory measures required to prevent the offenses.[101]

There is no formal leniency program for corruption, although mitigation of sentences or discharge are available at the discretion of the court under Section 46b of the German Criminal Code.[102] Mitigation of sentences or discharge may only be granted if the offender discloses his knowledge before the indictment against him has been admitted by the court.[103] However, there is also a form of plea agreement that can be offered by the courts, upon acquiescence of the public prosecutor office, to reduce sanctions for defendants in exchange for a confession and collaboration during the judicial procedure.[104]

The lack of a non-discretional leniency program for both individual and corporate sanctions for corruption is likely to add to the lack of automatic leniency for bid rigging in further undermining the incentives to blow the whistle on the bidding ring when it also bribed a public official. Any cartel member who considers applying to the FCO's program will have to rely on coordination between the FCO and the public prosecutor's office, weighing up the chances that the latter will deem the collaboration worthy of mitigation of the sentence or discharge.

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[98] Act on Regulatory offenses (*Gesetz über Ordnungswidrigkeiten* – OWiG), Section 41, available at http://www.gesetze-im-internet.de/englisch_owig/englisch_owig.html#p0238; and 2006 Leniency Notice, Paragraph 24.

[99] German Criminal Code, Section 46b. Subsection (1) establishes that a discharge is possible when the offense is punishable only by a fixed-term sentence of imprisonment and the maximum possible sentence does not exceed three years.

[100] German Criminal Code, Sections 331-338.

[101] Act on Regulatory offenses, Sections 30 and 130.

[102] Section 46b, Subsection (1), of the German Criminal Code applies to serious crime offenses as defined in the Code of Criminal Procedure, Section 100a, Subsection (2), which includes active and passive corruption and restricting competition through agreements in the context of public bids.

[103] German Criminal Code, Section 46b, Subsection (3).

[104] Code of Criminal Procedure (*Strafprozessordnung* – StPO), Section 257c, available at http://www.gesetze-im-internet.de/englisch_stpo/.

G. Austria

According to the Austrian antitrust leniency program,[105] when the Austrian Federal Competition Authority (*Bundeswettbewerbsbehörde* or FCA) grants leniency to an applicant undertaking, it informs the Federal Cartel Prosecutor (*Bundeskartellanwalt*, or FCP), who loses his right to impose a fine against the applicant.[106]

Individuals are not administratively liable under the Austrian Competition Act and, since 2002, there have been no criminal sanctions for cartel offenses except bid-rigging and fraud.[107] However, as is the case in Germany, natural persons involved in anti-competitive conducts in the context of public procurement proceedings may be penalized with prison sentences, and these are not covered by the antitrust leniency program.[108]

Corruption infringements are established in the Criminal Code[109] and are prosecuted by the Public Prosecutor's Office for Combatting Economic Crimes and Corruption (*Wirtschafts- und Korruptionsstaatsanwaltschaft*, or WKStA).[110] Individuals are primarily liable for criminal offenses. Corporations can be held liable for crimes committed by their decision-makers and employees if the crime benefited the corporation and – in the case of employees – the corporation failed to comply with its supervision duties.[111]

Individual leniency from criminal prosecution has been available since 2010 for both bid-rigging cartels and corruption infringements under the Criminal Procedure Code, but again this depends on the discretion of the prosecutors regarding the specific occurrence of the infringements.[112]

Uncertainty and coordination issues are also likely to arise in cases of cartels in public procurement under Austrian law, inasmuch as a member of a bid-rigging conspiracy that also bribed a public buyer will not have guarantees of a reduction of criminal sanctions for their

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[105] Austrian Competition Act (*Wettbewerbsgesetz* – WettbG), 2005, Section 11 paragraphs 3 through 7; and Handbook of the Federal Competition Authority on the Implementation of Section 11 paragraph 3 of the Austrian Competition Act (WettbG) ("Leniency Programme"), available at http://www.en.bwb.gv.at/CartelsAbuseControl/Leniency/Documents/Handbook%20leniency_english%20version.pdf

[106] Austrian Cartel Act (*Kartellgesetz* – KartG), 2005, Section 36, paragraph 3.

[107] This seems a rather interesting development from a political economy point of view, in the light of the fact that most other jurisdictions are going the other way (i.e. introducing criminal sanctions against cartels, together with leniency programs that waive them), and of the historical tradition of cartelization in the country.

[108] Austrian Criminal Code (*Strafgesetzbuch* – StGB), Section 168b, available at https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296.

[109] Austrian Criminal Code, Sections 146, 168b, 304 et seq.

[110] Austrian Criminal Procedure Code (*Strafprozessordnung* – StPO), Section 20a, available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002326.

[111] Austrian Corporate Liability Act (*Verbandsverantwortlichkeitsgesetz* – VbVG), 2005, Section 3, available at https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004425.

[112] Austrian Criminal Procedure Code, Sections 209a and 209b.

managers and employees when applying for antitrust leniency, and will have to negotiate with different agencies – the FCA/FCP in relation to cartel infringements, and the WKStA for the other criminal offenses. This is likely result in reluctance to approach the FCA and disclose information that can be used to prosecute and sanction the company and its personnel for bid rigging, corruption, or both (the typical case).

H. Switzerland

Leniency for cartel infringements can be granted by the Swiss Federal Competition Commission (FCC), according to the rules established in the Federal Act on Cartels and Other Restraints of Competition 1995 and in the Cartel Act Sanctions Ordinance.[113] However, individuals are not subject to administrative or criminal sanctions for infringement of competition rules, including cartel offenses.[114]

Bribery and corruption of public officials, both domestic and foreign, are regulated by the Swiss Criminal Code.[115] Under Swiss criminal law, it is the individual who is primarily liable for criminal offenses. Nevertheless, corporations may be criminally liable when, because of inadequate organization of the company, it is not possible to attribute an offense that was committed in the exercise of commercial activities to any specific individual within the company, and if the company did not undertake all requisite and reasonable organizational precautions required to prevent such a crime, regardless of whether or not an individual can be identified and punished.[116]

The public prosecutor's office (PPO) of each canton is responsible for investigating bribery and corruption in its territory, except if the offenses are committed by or against federal authorities, abroad (at least in a substantial way), or in several cantons without a specific focus on one, where the Office of the Attorney General of Switzerland is the competent enforcement agency.[117]

No leniency program for corruption-related infringement is present. A form of plea agreement has been available since 2011, when the new Criminal Procedure Court entered into force. The Accelerated Proceedings allow that the accused may request the public prosecutor to conduct accelerated proceedings at any time prior to bringing charges, provided

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[113] Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (*Kartellgesetz*, KG), Article 49a (2)), available at: https://www.admin.ch/ch/e/rs/251/index.html; and Ordinance of 12 March 2004 on Sanctions imposed for Unlawful Restraints of Competition (KG-*Sanktionsverordnung* – SVKG, Articles 8-14, available at: https://www.admin.ch/ch/e/rs/251_5/index.html.

[114] KG, Article 2. Individuals can be, however, fined for willfully violating a settlement, a final and non-appealable ruling of the competition authority or a decision of an appellate body, as well as for intentionally not, or at least not fully, complying with a ruling of the Competition Commission, concerning, *e.g*. the obligation to provide information (KG, Articles 54 and 55).

[115] Swiss Criminal Code, Articles 322ter et seq, available at: https://www.admin.ch/ch/e/rs/311_0/.

[116] Swiss Criminal Code, Article 102.

[117] Swiss Criminal Procedure Code, Articles 22 et seq., available at: https://www.admin.ch/ch/e/rs/312_0/index.html#id-ni4-ni6-1.

that the accused admits the matters essential to the case and recognizes, at least in principle, any civil claims.[118] This possibility largely relies on prosecutorial judgment.

Even though individuals are not liable in any way for cartel offenses in Switzerland, the existing anti-corruption provisions still undermine the effectiveness of the cartel leniency program when a bid-rigging scheme also involved corruption of a public official. Individuals will likely have serious doubts about reporting the cartel to the FCC, since the information presented to the antitrust authority may then be used by public prosecutors in criminal proceedings against the company and the reporting individual himself.

I. France

Cartels are regulated in France under the Commercial Code,[119] which was amended in 2001 to include provisions regarding the leniency program.[120] The current French leniency program[121] complies with the EU competition network's Model Leniency Programme, which is only available to legal persons. Since the French Competition Authority (*Autorité de la concurrence*) has no power to impose penalties on corporations' employees and agents, there is no leniency programme for individuals.

However, under French law it is a criminal offense, punishable by imprisonment and a fine, for individuals to personally and decisively take part in designing, organizing, or carrying out anti-competitive practices with fraudulent intent, and bid-rigging conspiracies in public procurement may fall under this heading.[122]

If the Competition Authority suspects that the facts may imply criminal violations, it can refer the case to the public prosecutor (*Procureur de la République*). The consequent criminal procedures are conducted by the public prosecutor and eventual sanctions are imposed by criminal courts. The Competition Authority, however, is not obliged to – and in fact is committed not to – refer to the Public Prosecutor's Office the cases of individuals who are employees of an applicant that has been granted leniency.[123] This may alleviate the concerns of undertakings about potential criminal sanctions in cases involving bid rigging, which are not covered by the leniency program and are therefore likely to greatly reduce the attractiveness of blowing the whistle and exposing cartels in the first place.

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[118] Swiss Criminal Procedure Code, Article 358.

[119] French Commercial Code, Article L 420-1

[120] French Commercial Code, Articles L 464-2 IV and R 464-5.

[121] Competition Authority Procedural Notice, March 2nd, 2009.

[122] Article L 420-6, French Commercial Code

[123] Procedural Notice relating to the French Leniency Program (*Communiqué de procédure du 3 avril 2015 relatif au programme de clémence français*), Paragraph 53, available at http://www.autoritedelaconcurrence.fr/doc/cpro_autorite_clemence_revise.pdf. The public prosecutor is obviously not bound to prosecute the case brought to him by the Competition Authority, he will analyze the case and decide whether there is in fact an infringement and which is the appropriate course of action (French Penal Procedure Code (*Code de procédure pénale*), Article 40-1, available at: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071154.

The French Anti-corruption Law[124] amended the Penal Code with respect to offenses related to corruption. In France, both individuals and corporate entities may be prosecuted for corruption and may be sanctioned with fines and prison, respectively.[125] Corporate liability does not preclude prosecution of natural persons who are the actual perpetrators of or accomplices to the offenses,[126] so individuals and companies can both be prosecuted for the same facts, under discretion of the public prosecutor.

French law offers a limited form of plea bargaining (*comparution sur reconnaissance préalable de culpabilité,* or CRPC, also called *'plaider coupable'*),[127] which may result in a reduction of sanctions upon judicial approval, but has no strong leniency provisions to encourage whistleblowing. Specifically for corruption, there are provisions allowing for a reduction by half of prison sentences for individuals who, by alerting the authorities, helped to end the offense or to identify other perpetrators or accomplices.[128] Hence, a member of a cartel that corrupted a public buyer and reported the anti-competitive and corruption infringement expects in the best case to receive half of the prison sentence for corruption.

Even though the Competition Authority may not refer the criminal offense to the Public Prosecutor's Office, there is no formal mechanism that prevents the latter from pursuing it on its own. Additionally, there is no coverage over associated offenses (e.g. corruption) for either for the individual of the legal person. Thus, both of them might be sanctioned for corruption, even though they have collaborated with the antitrust authority and were granted leniency for the cartel activities. CRPC and the provisions for reduction in imprisonment time may have helped, but they are very limited and are conceded on a case-by-case basis, already in the judicial sphere, still providing too much uncertainty around the consequences of applying for leniency to the Competition Authority. Again, overall the incentives provided by the legislation to wrongdoers to blow the whistle and report cases of bid rigging in public procurement, in particular when involving corruption, appear inexistent.

J. Italy

In Italy cartels are subject to the Antitrust Law (Law 10/10/1990, n. 287 – Regulation for competition and market protection) that is administered by the *Autorita' Garante della Concorrenza e del Mercato* (AGCM), the Italian antitrust authority. A first version of a leniency program was introduced in 2007, and the current version was amended in March 2013 to align it with the November 2012 version of the European Competition Network Model Leniency Program. The Italian leniency program follows closely the EU Model Leniency Program, and makes leniency only available to legal persons, as are Italian antitrust sanctions.

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[124] *Loi no. 2007-1598 du 13 novembre 2007 relative à la lutte contre la corruption*.

[125] French Penal Code (*Code Pénal*), Articles 435.1 et seq., available at: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719.

[126] French Penal Code, Article 121-2, Paragraph 3.

[127] French Penal Procedure Code, Articles 495-7 à 495-16 et 520-1.

[128] French Penal Code, Articles 435-6-1 and 435-11-1.

Also, bid rigging in public procurement (*Turbativa d'asta*) is a criminal offense under Italian law, punishable by imprisonment of up to five years and a fine (art. 353, *Codice Penale, 'Turbata libertà degli incanti'*). The consequent criminal procedures are conducted by the public prosecutor and the eventual sanctions are imposed by criminal courts. As in France, this form of collusion is not covered by the antitrust leniency program, but is only subject to the standard provisions of the Penal Code (art. 62/bis, *Codice Penale*) that allow the judge to attenuate sanctions for collaborating individuals.

As for corruption, a new Anti-corruption Law (Law 27/05/2015, n. 69) has recently increased the reduction in the sentence to two thirds (from one third) for someone who is found guilty of corruption-related infringements but efficiently tried to prevent them from developing further consequences, provided evidence of the illegal activities, identified other jointly responsible people or helped recover the money or other transferred utilities.

Again, in the absence of automatic leniency coverage for criminal penalties for both bid rigging and corruption, the management of companies that took part in a bid-rigging agreement in public procurement that corrupted a public official appear to have no real incentives to blow the whistle and collaborate with the law enforcement authorities.[129]

K. Other jurisdictions

We have analyzed other countries, including Argentina, Portugal and Spain. While Argentina does not have leniency programs, even for antitrust infringements,[130] Portugal and Spain do and follow the EU guidelines in structuring their leniency programs.

Regarding anticorruption provisions, all of these countries have been putting into place over the past years a considerable number of statutes to comply with the recommendations made by the United Nations, in the context of implementing the 2003 Convention against Corruption, and by the OECD, under the 1997 Convention application against Corruption of Foreign Public Officials in International Business Transactions. Additionally, European countries also observe the standards set by the Group of States against Corruption (GRECO)

[129] We are aware that the AGCM recently proposed a legal change to the government and the parliament that would extend the coverage of the leniency program to criminal prosecution, for example in cases of *Turbativa d'asta*. Under the proposal, protection against penal actions would only be granted to the first applicant that benefits from immunity, whereas in relation to the other applicants who obtain a reduction in the fine, the proposal would only allow the leniency application to be considered as a mitigating factor. If the proposal were transformed into law, many of the problems discussed in this paper would be solved, particularly if the protection from criminal prosecution includes corruption infringements.

[130] Argentine Competition Authority (*Comisión Nacional de Defensa de la Competencia* – CNDC) has proposed a draft bill to amend the Argentine Competition Law (*Ley de Defensa de La Competencia* – Law No. 25,156, as of Septembre 16th, 1999), introducing a leniency program (*see* CNDC's Resolution Nº 157/2010, available at http://www.cndc.gov.ar/archivos/anteproyecto_de_ley.pdf), but it has not been approved yet by the Congress. Similarly, Bill n. 5834 was introduced in 2013 proposing amendments to the Argentine Penal Code to include leniency provisions for corruption (available at http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=5834-D-2013).

for the implementation of the Criminal Law Convention of the Council of Europe on Corruption from 1999.[131]

For the countries mentioned above, we consider that they do not present characteristics that could add to the discussion and we therefore do not address them here. In a way, since most countries have signed the same conventions on competition and corruption, their legal frameworks may show some resemblance. Of course, different countries may implement guidelines in different, and sometimes more creative, ways to address the same issues. The present work makes no pretense of being an exhaustive review on the subject, for obvious practical reasons, but simply aims to analyze if and how the interaction among leniencies for multiple and concomitant offenses is being addressed in some important jurisdictions.

II. IMPACT ON INTERNATIONAL COMPETITION LAW ENFORCEMENT

Even though international cartels are not a recent phenomenon,[132] globalization and information technology developments, as well as extraterritorial cartel enforcement,[133] have increased the occurrence of cross-border cartel cases.[134]

In a multiple jurisdiction cartel case, there are risks created by regulatory competition:[135] under-enforcement, given the inherent difficulty in dealing with cross-border cases for any jurisdiction alone; inconsistent outcomes for cases dealt with concurrently across different jurisdictions; and also over-enforcement, raising concerns related to double jeopardy (*ne bis in idem*).[136]

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[131] The United Nations, OECD, European Commission and GRECO evaluate periodically the implementation of their conventions by each member. Reports on several countries can be found at their websites.

[132] *See, e.g.*, Bert F. Hoselitz, *International Cartel Policy*, 55 J. POL. ECON. 1 (1947), and Joel Davidow, *Cartels, Competition Laws and the Regulation of International Trade*, 15 N.Y.U. J. INT'L L. & POL. 351 (1982-1983).

[133] See John Terzaken & Pieter Huizing, *How much is too much? A call for global principles to guide the punishment of international cartels*, 27 ANTITRUST 53, 54 (2013) (stating that '[e]xtraterritorial cartel enforcement has become standard practice for the major enforcement jurisdictions', since '[o]ut of almost fifty of the world's major antitrust regimes, Colombia and arguably Canada are the only countries for which the location of the conspiracy is a decisive factor in establishing prosecutorial jurisdiction, while for the others 'it is sufficient for the conduct to affect the national trade or commerce').

[134] According to the OECD, '[t]he number of cross-border cartels revealed in an average year has increased substantially since the early 1990s' (around 527% between 1990-1994 and 2007-2011) (OECD, *Challenges of International Co-operation in Competition Law Enforcement*, 29 (2014), available at: http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf).

[135] 'The theory of regulatory competition assumes a dynamic world where private actors (the persons regulated) can make choices with a view to affecting which regulatory regime will apply to their transactions' (Paul B. Stephan, *Regulatory Competition and Anticorruption Law*, 53 VA J. INT. LAW 53, 54 (2012)). It would be analogous to phenomenons known as 'treaty-shopping' or 'forum shopping'.

[136] *See* Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*. 77 BOSTON U. LAW REV. 343, 343 (1997) (suggesting that the system of national competition laws would be 'inadequate to regulate a rapidly expanding economy, in which no individual state has the resources or power to cope with the full effects of business activity beyond its borders', allowing 'firms to escape the legal consequences of such

To mitigate such problems, legal harmonization, coordination and co-operation among national competition authorities have been developed by multilateral fora, such as the International Competition Network (ICN) and the OECD, and by general, regional and bilateral agreements, such as the European Competition Network (ECN). Nonetheless, international cartel enforcement still faces many obstacles,[137] including the risk of disclosure of confidential information that could specifically undermine the effectiveness of leniency programs, considering that 'parallel applications to different authorities have become more frequent'.[138]

Anti-corruption law enforcement faces the same risks of under- and over-enforcement, and of inconsistency, despite all the similar efforts for legal harmonization through the several above-mentioned international conventions that set the framework for the fight against corruption practices all over the world.

Moreover, these agreements also recommend the adoption of rules to sanction bribery and corruption of foreign public officials. The idea behind this is that allowing the home country the right to prosecute and punish its companies and individuals that commit corruption offenses abroad will help deter this behavior, even if the country where the offenses were actually committed does not do the same. Notwithstanding this, in international cartel cases with bribery, provisions against foreign corruption add to the complexity of an already multi-jurisdictional situation, involving a possibly larger number of competent prosecuting authorities if extraterritorial anti-corruption enforcement related issues are also present.

Companies and individuals from jurisdictions where there are no leniency provisions for corruption, or where such provisions rely largely on prosecutorial or judiciary discretion, would be less inclined to report cartel behavior abroad when bribing foreign public officials, since they would risk being prosecuted for corruption at home.

For instance, let us consider a case where a group of German companies formed a cartel to obtain public contracts in Mexico. As usual, they might also bribe the Mexican officials in charge of the awarding procedure. Let us now imagine that one of the members of the cartel is willing to report. While it is possible to apply for leniency in Mexico, both for the cartel

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[anticompetitive] behavior because of the lack of an effective remedy'); OECD, *Improving International Co-operation in Cartel Investigations*, 11, OECD Policy Roundtables, DAF/COMP/GF(2012)16 (February 2012), available at http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf (stating that 'while cartels have gone global, many competition authorities operate predominantly within the framework of their national jurisdiction', with the result that '[i]nvestigating cartels with international scope therefore poses both procedural and substantive challenges'); and Terzaken & Huizing, *supra* note 133, at 55 et seq (arguing that the 'approach to global coordination on punishment and prosecution… [of] modern cartel enforcement […] is characterized by a troubling lack of consistency, the potential for producing disproportionate sanctions for cartel defendants due to the piling on of individual fines, and even instances of double counting').

[137] See OECD *supra* note 136, at 13 (citing as other problems to a 'more effective co-operation' among national competition authorities: the 'different legal systems underpinning enforcement and the sheer diversity of competition agencies seeking to work together').

[138] See *id*. (describing that '[w]hen leniency applicants apply to more jurisdictions in parallel, they often waive confidentiality of the information provided so as to enable the authorities involved to co-ordinate investigative steps and share information and evidence', which are, however, viewed with 'legitimate reluctance' by the leniency applicants 'in certain situations where doing so might have negative consequences for them').

infringement and the corruption offense, in Germany these companies and their directors and managers might still be prosecuted and convicted for corruption.

Consequently, a country with no leniency provision for bribery and corruption of foreign officials may actually impose corruption on others that do have such provisions.[139] Furthermore, the focus on foreign bribery laws may block antitrust leniency agreements by removing the incentives to self-report, undermining the ability to catch international corrupting cartels.

In addition to the reduction in the attractiveness of antitrust leniency programs, the possible inconsistencies in terms of legal frameworks and enforcement may actually undermine global anti-corruption efforts themselves, since regulatory competition may lead to serious under-enforcement of anti-corruption laws.[140] Badly designed leniency programs can be exploited to escape punishment in the home country or in other more strict countries under *bis in idem* claims.

III. HOW TO IMPROVE THE CURRENT LEGAL FRAMEWORKS

From the previous sections, it is possible to argue that countries should follow Brazil and Mexico's example and create *ex ante* leniency programs for corruption infringements.[141] Unlike with these programs, however, leniency should cover not only companies, but also individuals, especially in terms of criminal liability for bid rigging and corruption, as in the proposal presented by the Italian antitrust authority (AGCM) mentioned above (*see supra* note 129). The protection from lawsuits for managers and directors could then become a primary incentive for them to blow the whistle on their and their companies' illegal acts, as is the case with antitrust leniency in the US.[142]

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[139] One could think that confidentiality rules, such as those provided for in most leniency programs, would help solve or at least mitigate this problem, however we believe it would not suffice, because at some point the confession would be disclosed and the offender would be exposed to sanctions at home as well.

[140] For an opposite, and more optimistic view on anti-corruption regulatory competition, *see* Stephan, *supra* note 135 (arguing that the risk of under-enforcement does not seem to be significant, since 'the existence of overlapping regulatory jurisdiction means that the state with the most intrusive regime will have its rules apply in all instances of overlap', i.e. 'states that impose weak enforcement... only surrender their jurisdiction to the more aggressive state'). We feel, however, that Professor Stephan does not consider the problem of detection. In the same way as cartels, the detection of corruption strongly depends on reports from people inside the arrangement (*see* Rose-Ackerman, *supra* note 32, at 227), so incentivizing self-reporting is important to successfully deter these conducts. If corruption is not detected, even the country that most actively wants to enforce anti-corruption law will not have the chance to do so.

[141] Leniency clearly provided for before the illegal act is reported, not relying on prosecutorial or judiciary discretion.

[142] According to the U.S. antitrust experience, it is the threat of criminal sanctions that induces self-reporting and makes the leniency program effective. *See, e.g.*, Gregory J. Werden et al., *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, 7 (March 1, 2012), available at http://www.justice.gov/atr/file/518936/download (arguing that '[t]he threat of a prison sentence provides individuals involved in cartel activity with the single greatest incentive to self-report through a leniency application and thereby escape sanctions').

These anti-corruption leniency programs, however, must be carefully designed to prevent them being exploited by wrongdoers.[143]

Additionally, considering the problem of multiple authorities and how this may undermine the interest of leniency in multiple offenses cases, it is advisable not to rely on collaboration between law enforcement groups,[144] whether they belong to the same agency (as in the case of the U.S.) or if they have to formally agree not to prosecute (as occurs with the U.K.'s SFO). It would be ideal, instead, to establish clear legal provisions – i.e. formally binding enforcers – to allow wrongdoers to report all illegal acts simultaneously and to be confident that they would escape sanctions upon co-operation with the authorities and presentation of evidence, i.e. the creation of a 'one-stop point'.

This 'one-stop point' should be available preferably for applicants with every law enforcement agency, not only with the competition authority, and must prevent other agencies from prosecuting the leniency applicant. In other words, when someone approaches – as an individual or as a representative of a legal person – any authority to report crimes he is involved in, it is important to allow him to report any other crimes that he knows about in exchange for lenient treatment. Information about the possibility of reporting several illegal acts at the same time, and of obtaining leniency for each one, must be consistently disseminated to minimize detection and prosecution costs, as well as to contribute to the deterrence of future criminal behavior.

The new Brazilian Competition Law has probably the closest provision to such a rule,[145] as its leniency agreement can cover the company and its employees for all the administrative and criminal offenses related to a cartel. It needs to be amended, however, to also cover corruption offenses, both at the corporate and individual level.

The U.S., the most advanced and experienced jurisdiction in terms of inducing whistleblowing in antitrust and anti-corruption law enforcement, relies on simpler (at least in principle) informal coordination between the different divisions within the same agency – the Department of Justice. We believe that a more detailed analysis is necessary to evaluate whether this could be a problem. Europe, on the other hand, presents a very problematic scenario because of the heterogeneity among national competition and anti-corruption authorities and legal frameworks. Even though antitrust legislations have been harmonized as a consequence of international antitrust and anti-corruption conventions, there is still much to be done to make leniency programs attractive to corrupting cartel members.

Regarding foreign bribery and corruption, laws should be amended to allow leniency for a company or someone that self-reports abroad. Obviously, this would require further coordination and collaboration between agencies from different countries, but it is necessary

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[143] Buccirossi & Spagnolo, *supra* note 22, at 1296. For instance, programs that do not restrict leniency to the first to report, may allow companies to agree to collude and to systematically report to the authorities, resulting in that all of them receive a reduction in fines – wrongdoers would adopt a strategy "wait and see", only confessing after the first had self-report (*see, e.g.*, Spagnolo, *supra* note 22, at 18).

[144] For an example of possible conflicts between agencies, *see supra* note 73 and accompanying text.

[145] Apart from the proposal by the AGCM (*see supra* note 129).

to avoid stabilizing criminal collusion and to avoid regulatory competition from undermining the effectiveness of leniency programs.

CONCLUSION

The OECD's Anti-bribery Convention states that the responsibility for the fight against bribery in international business transactions must be shared among all countries, requiring efforts on a national level as well as multilateral co-operation, and equivalence among the measures taken by each country.[146] Such characteristics are also shared by the fight against cartels.

Consequently, legal harmonization, coordination and co-operation – both on procedural and substantive issues – as well as *inter* and *intra* jurisdictions, become of even greater importance. Important improvements in the current legislation seem to still be necessary in the fight against corrupting cartels in public procurement.

The present work hopefully contributes to clarifying these required changes with a legal and economic analysis of wrongdoers' incentives to blow the whistle in multiple offenses situations, and in particular when collusion and corruption occur together in public procurement markets.

Creating leniency policies to fight corruption, and coordinating them with antitrust leniency policies, emerges as an important priority for all the countries considered. The absence of formal leniency programs for corruption, besides hindering anti-corruption enforcement, reduces wrongdoers' incentives to blow the whistle and collaborate in corrupting cartel cases through the risk of criminal prosecution for the corruption offense. These policies must be carefully designed, however, to avoid opportunistic behavior and thus to achieve their goal of deterrence.

In order to increase the effectiveness of leniency programs in multiple offenses cases, we suggest the creation of a 'one-stop point', enabling firms and individuals to report different crimes simultaneously and obtain leniency, provided that they offer sufficient information and evidence for their partners in crime to be prosecuted.

In the absence of these legal reforms, it is likely that cartels and corruption will continue to hinder the functioning of public procurement markets. A simpler measure that could be introduced to improve enforcement, while waiting for these rather complex coordinated legal changes, is monetary rewards for innocent whistleblowers, as administered by several US enforcement authorities.[147] Rewards for innocent whistleblowers have already introduced by a

[146] OECD's Convention on Combating Bribery of Foreign Officials in International Business Transactions, 1997, available at: https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf, at 6.

[147] Rewards for innocent whistleblowers are present, for instance, in the US False Claim Act (FCA). The FCA was enacted during the US Civil War 'to unleash whistleblowers to help the government suppress fraud that was plaguing the Union Army'. Although weakened during the World War II, the FCA was revived in 1986, and since then allowed the recovery of over US$30 billion in judgments and settlements. False Claims Act's *qui tam* provisions, 'allow people with evidence of fraud against the government to sue on behalf of the Government'. The so-called 'relators' or 'whistleblowers' are eligible for 15% to 30% of the amount of funds recovered. Thanks to the FCA's success, the Internal Revenue Service (IRS), the Securities and Exchange Commission (SEC), and the Commodity Futures Trading Commission (CFTC) have created their own

few competition authorities (e.g. Hungary, South Korea and the U.K.), although the rewards allowed for in pioneering antitrust programs appear far too small to compensate for the retaliation costs typically suffered by whistleblowers.[148] Sufficiently large monetary rewards for innocent whistleblowers may encourage employees to share crucial information even in the face of the typically very large retaliation costs faced when blowing the whistle, and thereby substantially increase the probability that corrupting cartels in public procurement are discovered even when the current legislation makes leniency programs ineffective.

whistleblower programs to incentivize integrity. *See* The Taxpayers Against Fraud Educational Fund, *The 1986 False Claims Act Amendments A Look At Twenty-five Years of Effective Fraud Fighting In America* (2011), available at http://taf.org/public/drupal/TAF-fca-25anniversary_12%281%29.pdf.

[148] *See*, *e.g.*, Spagnolo *supra* note 1 (discussing the pros and cons of rewards for innocent whistleblowers); Kevin Wu & Klaus Abbink, *Reward Self-Reporting to Deter Corruption: An Experiment on Mitigating Collusive Bribery*, Monash University Discussion Paper 42/13 (2013) (a recent experimental analysis of the effectiveness of whistleblower policies, emphasizing the importance of the large size of the rewards); and The Ethics Resource Center, *Retaliation: When Whistleblowers Become Victims*, A Supplemental Report of the 2011 National Business Ethics Survey (2012), available at http://www.kkc.com/wp-content/uploads/2014/08/ERC_RETALIATION-When-Whistleblowers-Become-Victims.pdf (showing the large retaliation costs that whistleblowers are typically subject to, even in advanced countries with detailed provisions for protection of whistleblowers' against retaliation).