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LENIENCY, COLLUSION, CORRUPTION, AND WHISTLEBLOWING

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ABSTRACT

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 article assesses the extent of this problem by describing and discussing the antitrust and anti-corruption provisions present in a few selected countries, under 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 done recently in Brazil and Mexico and is being experimented in the United States, is only a first step. The antitrust experience has taught us that to achieve their goals of inducing whistleblowing, these policies must be carefully designed and sufficiently generous with (only) the first reporting party, they should not be discretional, they must be backed by robust sanctions, and they must be consistently implemented. Hence, the road ahead appears a long one. To increase the effectiveness of leniency in multiple offense cases, we suggest,

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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 nondiscretional leniency program, there is little hope that these provisions 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 nonaccomplice whistleblowers, as is already done with apparent success by several law enforcement agencies in the United States.

JEL: K21; K42

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 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]

[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 Transl. 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 reflect the opposite, that is, that 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), ssrn.com/abstract=2530545, date last accessed 6 November 2016; 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.

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 greatly reduce the attractiveness of reporting the cartel.[6]

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 for the related infringements in the same or in other jurisdictions. 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, the relevant authorities may have their own ways of granting leniency and encouraging

[5] Private litigation may reduce the attractiveness of leniency programs if the applicant is not sufficiently protected against civil claims from a cartel's victims. There is a current debate on this issue, since different jurisdictions have addressed it by enacting different provisions (such as the 2004 Antitrust Criminal Penalty 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). The provisions may differ in their effectiveness in preventing a negative impact on leniency programs, but most offer 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* (November 29, 2015), ssrn.com/abstract=2566774, date last accessed 2 May 2016.

[6] *See* Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 458–459 (2006), who points 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 United States). 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.

whistleblowing, such as plea bargaining,[7] *Qui Tam* rewards, or deferred prosecution agreements (DPAs) and nonprosecution agreements (NPAs), which are typical in—but not exclusive to—common law countries.[8] And some countries have recently introduced explicit leniency programs for corruption (including Brazil[9], Mexico, and more recently the United States as a pilot program; 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,[10] it is imperative that each jurisdiction set an appropriate legal framework to prevent the conflict of incentives and to promote a high degree of coordination among the different agencies involved.[11]

In this article, we survey legal provisions in various jurisdictions to examine this problem in detail regarding a particularly frequent and deleterious example of a multiple offense situation: the simultaneous occurrence of *collusion* (bid rigging) and *corruption*[12] in *public procurement* (that is, the purchase of goods and services by governments and state-owned enterprises). We

[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 win Petrobras' projects, bribing company personnel as well as politicians with influence over the company.

[10] *See* Emmanuelle Auriol et al., *Deterring corruption and cartels: In search of a coherent approach*, 1 Concurrences 1, 9 (2017) (concluding that 'the lack of coordination between different public agencies that aim to protect citizens, consumers and tax payers from corporate misconduct lead to, at best, uncoordinated and inefficient enforcement of regulations, and at worse, counterproductive/conflicting actions that hamper the impact of law enforcement reactions and reduce trust in government institutions').

[11] *See id.* (stating that '[g]overnments need to make sure that the different tools work together, in the same direction, instead of opposing each other. As a minimum, the different law enforcement institutions need to consider various possible reactions following detected corporate misconduct, and align their own reactions in a planned, principled and strategic manner').

[12] Because in this article, 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*, J. ECON. PERSPECT., Summer 2005, at 19, 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

focus on the largest western jurisdictions, and on two that recently tried to introduce leniency for corruption.

Public procurement is important due to its sheer size—it amounts to 15–20 per cent of GDP in developed countries.[13] Collusion and corruption are both fundamental problems of public procurement.

Cartels in public procurement are estimated to raise prices by 20 per cent or more above competitive levels.[14] The greater prices[15] 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.[16]

On the other hand, public procurement is highly regulated precisely because of the risk of corruption.[17] A recent European Commission anti-corruption report estimates that corruption may be adding 20–25 per cent to the cost of public procurement in Europe.[18] Similarly, the OECD suggests that bribes may add 5–25 per cent to total contract values.[19]

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market imperfections or an institutional position that grants discretionary authority (Susan Rose-Ackerman, *The Economics of Corruption*, 4 J. PUBLIC ECON., 187, 187 (1975).

[13] According to the OECD, the value of public procurement is between 13 and 20 per cent of world GDP. *See* OECD, PUBLIC PROCUREMENT FOR SUSTAINABLE AND INCLUSIVE GROWTH —ENABLING REFORM THROUGH EVIDENCE AND PEER REVIEWS 5 (2011), www.oecd.org/gov/ethics/PublicProcurementRev9.pdf, date last accessed 10 November 2016.

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

[15] 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?*, 47 Rev. Ind. Organ., 119 (2015), and Florian Smuda, *Cartel Overcharges and the Deterrent Effect of EU Competition Law*, 10 J. COMPETITION L. & ECON., 63 (2014).

[16] *See* OECD, GLOBAL FORUM ON COMPETITION ROUNDTABLE ON COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT 10 (2010), www.oecd.org/competition/cartels/46235884.pdf, date last accessed 8 June 2016.

[17] *See id.* 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 per cent 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), www.oecd-ilibrary.org/governance/oecd-foreign-bribery-report_9789264226616-en, date last accessed 19 November 2015.

[18] EUROPEAN COMM'N, REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT—EU ANTI-CORRUPTION REPORT 2014 at 21, ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf, date last accessed 10 April 2015.

[19] OECD, BRIBERY IN PUBLIC PROCUREMENT: METHODS, ACTORS AND COUNTER-MEASURES 47 (2007), www.oecd.org/daf/anti-bribery/anti-briberyconvention/44956834.pdf, date last accessed 10 April 2015. In the same manner, a recent OECD survey found that, although they vary across sectors, on average bribes equaled 10.9 per cent of the transaction value and 34.5 per cent of the profits (OECD, *supra* note 17, at 26–27).

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.[20] Corruption also undermines public trust in the government and the rule of law, threatening democratic values and the state's legitimacy.[21] For these reasons, in the last two decades, corruption has become a major concern in international policymaking circles, and several international conventions have been pushing countries to develop or enhance legislation and implement rigorous anti-corruption enforcement.[22]

It has been noted that leniency policies and other schemes that encourage whistleblowing—such as reward[23] and protection policies—should work in the fight against corruption as well as in the fight against collusion.[24] Cartels, corruption, and many other types of multiagent 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.[25] Instead, most anti-corruption regulations in public procurement try to increase accountability by increasing 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.[26]

[20] *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 et al., eds., 2012); and Svensson, *supra* note 12.

[21] *See, e.g.*, OECD, OECD PRINCIPLES FOR INTEGRITY IN PUBLIC PROCUREMENT (2009), www.oecd.org/gov/ethics/48994520.pdf, date last accessed 23 February 2015.

[22] 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 31, 2003; the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, signed on December 17, 1997; the Inter-American Convention Against Corruption, adopted on March 29, 1996; the Criminal Law Convention on Corruption of the Council of Europe, adopted on January 27, 1999; and the Civil Law Convention on Corruption of the Council of Europe, adopted on November 4, 1999.

[23] 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).

[24] *See* Giancarlo Spagnolo, *Divide et Impera: Optimal Leniency Programs*, CEPR Discussion Paper 4840, 2 (Dec. 2004), ssrn.com/abstract=716143, date last accessed 31 October 2016; Paolo Buccirossi & Giancarlo Spagnolo, *Leniency policies and illegal transactions*, 90 J. PUBLIC ECON., 1281, 1282 (2006); and Spagnolo, *supra* note 1, at 260.

[25] *See* Spagnolo, *supra* note 24, at 3; Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 518 (2004); and Maria Bigoni et al., *Trust, Leniency and Deterrence*, 31 J. LAW ECON. ORGAN., 663, 663 (2015).

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

Indeed, even abstracting from the interaction in the leniency domain at the heart of this article, corruption and collusion are already acknowledged as "concomitant threats to the integrity of public procurement",[27] and "strategic complements"[28] that reinforce and feed off each other.[29] It is already acknowledged that to ensure the effectiveness of public procurement (that is, 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".[30]

[27] OECD, *supra* note 16, at 9. *See also* Gary R. Spratling, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, International Cartels: The Intersection Between FCPA Violations and Antitrust Violations 15 (December 9, 1999), http://www.justice.gov/atr/public/speeches/3981.pdf, date last accessed 20 March 2015 (stating that, regarding the overlapping of bid-rigging and corruption offenses in international cases, '[c]orrupt payments to foreign government officials are often made to facilitate international bid-rigging conspiracies').

[28] OECD, 13TH GLOBAL FORUM ON COMPETITION DISCUSSES THE FIGHT AGAINST CORRUPTION, EXECUTIVE SUMMARY 5 (2014), www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2014)12/FINAL&doclanguage=en, date last accessed 10 February 2015 (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').

[29] *See* Piga, *supra* note 17, at 143; and OECD, *supra* note 28, 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*, 36 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).

[30] Robert D. Anderson et al., *Ensuring integrity and competition in public procurement markets: a dual challenge for good governance*, www.researchgate.net/publication/265222261, at 1, date last accessed 4 July 2016. 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' (UNITED NATIONS OFFICE ON DRUGS AND CRIME, 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), www.unodc.org/unodc/en/corruption/publications.html, date last accessed 24 September 2015).

Considering that success in deterring cartels depends largely on the incentives provided to infringers to self-report,[31] the interaction between leniency provisions for cartels and the legal treatment of corruption adds a powerful new channel to the above-noted interdependence and thus should be—and already is[32]—a concern to antitrust and anti-corruption authorities.

This article 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,[33] under 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. We also discuss the impact of foreign corruption provisions on international cartel enforcement, analyzing how possible inconsistencies on legal frameworks and enforcement may affect the attractiveness of antitrust leniency programs and global anti-corruption efforts themselves, because of regulatory competition and *bis in idem* claims. Finally, we summarize the article's findings and outline some legal improvements aimed at enhancing the effectiveness of leniency policies in multiple offense cases.

There is, as we have mentioned, an extensive literature that discusses the use and the optimal design of leniency programs in antitrust law.[34] Leniency

[31] Incentives to self-report are indeed crucial to the fight against corruption, given its similar characteristics to collusion regarding secrecy, as previously mentioned. The OECD found that 'defendants self-reported or voluntarily disclosed their involvement in' 31 per cent 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-report in countries whose legal systems permit voluntary disclosure, especially when such behaviour leads to mitigated sanctions' (OECD, *supra* note 17, at 16).

[32] *See* OECD, *supra* note 28, 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').

[33] We studied examples of countries that have created *ex ante* leniency programs (programs with clear provisions that ensure leniency and do not rely on prosecutorial or judiciary discretion), both for antitrust and anti-corruption (Brazil and Mexico), and countries that have not. For the latter, we describe jurisdictions that adopt some form of cooperation between antitrust and anti-corruption authorities (the United States and United Kingdom) and others that do not (the European Union, Germany, and Italy).

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

programs for fighting corruption, on the other hand, are just starting to be studied by the academic community.[35] Although 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, for example, for cartels and for corruption.

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 to their involvement in the illegal antitrust activity as a part of the corporate confession.[36] The Individual Leniency Policy applies instead to all individuals who come forward on their own behalf to report an antitrust violation.[37]

Although there is no specific leniency program for corruption[38] in the United States,[39] self-reporting and cooperation are given great importance by both the Department of Justice and the Securities and Exchange Commission[40]

[35] *See, e.g*, Spagnolo, *supra* note 24; Buccirossi & Spagnolo, *supra* note 24; Johann G. Lambsdorff & Mathias Nell, *Fighting corruption with asymmetric penalties and leniency*, CeGE Discussion Paper No. 59 (2007), https://www.econstor.eu/dspace/bitstream/10419/32012/1/524498032.pdf, date last accessed 9 June 2015; 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), www.kaushikbasu.org/Act_Giving_Bribe_Legal.pdf, date last accessed 3 June 2015; 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 1, 2014), ssrn.com/abstract=2458219, date last accessed 21 August 2015; and Bigoni et al., *supra* note 25.

[36] U.S. Dep't of Justice, Corporate Leniency Policy (1993), Part C, www.justice.gov/atr/public/guidelines/0091.pdf, date last accessed 19 April 2015; and Scott D Hammond & Belinda A Barnett, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters* (November 19, 2008), Question 23, www.justice.gov/atr/public/criminal/239583.pdf, date last accessed 19 April 2015.

[37] U.S. Dep't of Justice, Individual Leniency Policy (1994), Part A, www.justice.gov/atr/public/guidelines/0092.pdf, date last accessed 19 April 2015.

[38] The criminal provisions related to domestic and foreign corruption can be found at 18 U.S. C. § 201(b) and 15 U.S.C. §§ 78dd-1–78dd-3. (Foreign Corrupt Practices Act—FCPA).

[39] For literature discussing the creation of a leniency program for corruption in the United States, *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).

[40] *See* U.S. Dep't of Justice & U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012), 54, www.justice.gov/criminal/fraud/fcpa/

and may lead to leniency, and even immunity, through plea agreements, nonprosecution agreements (NPAs) or deferred prosecution agreements (DPAs).[41] Nevertheless, these leniency provisions rely heavily on prosecutorial discretion, which we know from experience of antitrust can possibly lead to inconsistent treatment, and, consequently, under-reporting.[42]

In April 2016, the Fraud Section of the Department of Justice's Criminal Division introduced an enforcement pilot program to further incentivize voluntary disclosure of Foreign Corrupt Practice Act (FCPA) violations, to increase transparency of the Fraud Section's requirements to award greater reductions in sanctions, and to improve consistency in the outcomes of voluntary disclosure.[43] Under the Fraud Section's Pilot Program Guidance, hereinafter "the Guidance,"[44] further discounts on the fines (considering the lower bound of fines set in the Sentencing Guideline) and exemption from having appointed an outside compliance monitor (if the company has, by the time of resolution, implemented an effective compliance program), or even immunity[45] may be granted to business organizations that voluntary self-disclose criminal conduct

guide.pdf, date last accessed 10 June 2015 (stating that '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').

[41] Following the principles and procedures presented at the U.S. Sentencing Guidelines Manual § 6B (U.S. Sentencing Comm'n 2015), and at the United States Attorneys' Manual, §§ 9-27.400 and 9-28.1500. Leniency for cooperation with the authorities is possible under the USSG, § 8C4.1—Substantial Assistance Departure (corporations) and § 5K1.1—Substantial Assistance to Authorities (individuals).

[42] *See* Fraser, *supra* note 39, at 1021-2 (analyzing fines set under the FCPA and concluding that '[t]here is no clear pattern as to why certain discounts are greater than others and how a company's cooperation is valued in this determination' which makes companies 'question whether to cooperate in an investigation or to decline to report violative conduct').

[43] U.S. Dep't of Justice, Memorandum about The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance 2 (April 5, 2016), www.justice.gov/archives/opa/blog-entry/file/838386/download, date last accessed 15 October 2016. The pilot program became effective on April 5, 2016, as part of a one-year program applicable to all FCPA cases under the responsibility of the Fraud Section. After this period, the Fraud Section may extend and modify the Guidance, in light of the experience. The Fraud Section has informed that the pilot program will continue in force until an evaluation of its utility and efficacy is concluded (*see* Kenneth A. Blanco, Acting Assistant Attorney General, Remarks as prepared for delivery, Speech before the American Bar Association National Institute on White Collar Crime, Miami (March 10, 2017), www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national, date last accessed 4 May 2017).

[44] It should be noted, however, that the Guidance applies only to the Fraud Section's FCPA Unit and not to any other part of the Fraud Section, the Criminal Division, the United States Attorneys' Offices, the Department of Justice, or any other agency (U.S. Dep't of Justice, *supra* note 43, at 9).

[45] *See id.* at 8. The Guidance requires voluntary self-disclosure, full cooperation and timely and appropriate remediation for a company to be eligible to the credit of up to 50 per cent reduction off the bottom end of the Sentencing Guidelines fine range. If all requirements are met, the authorities will consider declining prosecution. On the other hand, if the firm has not self-disclosed in accordance to the standards set forth in the Guidance, it will be eligible only to a

(before any imminent threat of disclosure or investigation), fully cooperate, and remediate flaws in their compliance program, as well as disgorge all profits resulting from the violation.[46]

Even though the pilot program may be praised as a step forward in the direction of a more transparent process, as well as for conditioning fine reductions on self-reporting—that is, on the functioning of a compliance program, not just its presence—it may still fall short of accomplishing its intended certainty-increasing goal. There is still substantial prosecutorial discretion, relating both to the decision whether or not to grant credit—or immunity—for self-disclosure and to the level of fines (because it depends on the applicable Sentencing Guideline fine range, which has to be negotiated).[47] Furthermore, the benefits promised are controversial inasmuch as the Criminal Division has already been practicing discounts of around 50 per cent off the minimum threshold under the Sentencing Guidelines.[48] All in all, the FCPA's pilot program, as the first version of the United States antitrust leniency policy,[49] does not appear powerful enough to appropriately incentivize self-reporting, although we will know more once the evaluation of the pilot program is published. Finally, because we cannot see which counterpart will suffer higher sanctions to compensate for the fine reductions awarded to the self-reporting firm by this program, it is not clear to us how well this is likely to deter corruption in the first place.[50]

U.S. antitrust leniency programs can provide protection for nonantitrust violations if they are committed in connection with an antitrust violation.[51]

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limited credit of up to a 25 per cent reduction off the bottom of the Sentencing Guidelines fine range (*id*. at 9).

[46] *See id*. at 2.

[47] For a selection of opinions from legal practitioners about the Fraud Section's FCPA Pilot Program, *see* Mike Koehler, *What Others Are Saying About The DOJ's "New" FCPA "Pilot Program"* (April 13, 2016), fcpaprofessor.com/what-others-are-saying-about-the-dojs-new-fcpa-pilot-program/, date last accessed 4 May 2017.

[48] *See* Mike Koehler, *Grading the DOJ's Foreign Corrupt Practices Act 'Pilot Program'* (April 29, 2016), 11 Bloomberg BNA White Collar Crime Report 353, 2016, ssrn.com/abstract=2772105, date last accessed 4 May 2017, at 3.

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

[50] *See* Berlin et al., *Leniency, Asymmetric Punishment and Corruption: Evidence from China*, Stockholm Institute of Transition Economics Working Paper Updated No. 34 (May 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2718181, date last accessed 14 June 2017 (presenting evidence on the deleterious effects of increases in leniency without a corresponding increase in sanctions to other parties to the corrupt exchange).

[51] If there is no connection between the offenses, the applicant will have to apply for leniency to the competent agency, separately. *See* U.S. Dep't of Justice, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (2008), www.justice.gov/atr/frequently-asked-questions-regarding-antitrust-divisions-leniency-program, date last accessed 19 April 2015, at 7, recommending that '[i]f the applicant has exposure for an antitrust and non-antitrust violation, the applicant may seek non-prosecution protection for the non-antitrust violation in a separate agreement in return for self-reporting that violation to the relevant prosecuting agency'.

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 nonantitrust violation.[52] If the applicant requests it, the Antitrust Division will inform other prosecuting offices or administrative agencies about the agreement.[53]

Consequently, in cases involving multiple antitrust and nonantitrust offenses, the infringer will have to seek nonprosecution through two separate agreements. One agreement should be pursued with the Antitrust Division, and the other with the prosecuting agency responsible for the nonantitrust 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. This holds even for foreign bribery, because the FCPA's pilot program currently in force does not offer enough certainty about the outcomes of self-disclosing a violation. 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, because 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.

[52] Even though there is this risk, according to the Antitrust Division, '[t]o date, in situations where the additional offense has consisted of conduct that is usually integral to the commission of any criminal antitrust violation,…, there have been no instances where a separate prosecuting agency has elected to prosecute such conduct by a leniency applicant' (*id.*).

[53] *See* U.S. Dep't of Justice, Model Leniency Letters (2008), www.justice.gov/atr/public/criminal/leniency.html, date last accessed 19 April 2015.

B. United Kingdom

According to the Competition Act 1998[54] and the Enterprise Act 2002,[55] cartel activity in the United Kingdom is sanctioned at both the corporate and the 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 United Kingdom 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.[56] The CMA and the COPFS have signed agreements to cooperate in the investigation and prosecution of individuals in respect of cartel offenses.[57]

The U.K. leniency program may offer—along with immunity or reduction in fines for the corporation—"blanket"[58] 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 Competition and Markets Authority, 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 the CMA will report to the Lord Advocate[59] 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.[60]

[54] Competition Act, 1998, c. 41, § 2.

[55] Enterprise Act, 2002, c. 40, § 188.

[56] CMA, Cartel offense Prosecution Guidance (CMA9) (2014), ¶¶ 1.4 and 1.5, https://www.gov.uk/government/publications/cartel-offence-prosecution-guidance, date last accessed 30 April 2015.

[57] CMA & COPFS, Memorandum of Understanding between the Competition and Markets Authority and the Crown Office and Procurator Fiscal Service (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328403/CMA_and_COPFS_MOU.pdf, date last accessed 30 April 2015.

[58] 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, Applications for leniency and no-action in cartel cases—OFT's detailed guidance on the principles and process (OFT1495), ¶¶ 2.38 (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf, date last accessed 25 February 2015).

[59] *See id.* at ¶¶ 8.21.

[60] CMA & COPFS, *supra* note 57, ¶¶14 and 16.

No-action letters cannot prevent prosecution for separate and distinct offenses such as bribery, even if they are related to the cartel violation. Moreover, the CMA will only refer the case to another U.K. agency, such as the Serious Fraud Office, 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.[61]

In relation to corruption, the U.K. Bribery Act 2010, which came into force on July 1, 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[62] may be strictly criminally liable if it fails to prevent a person associated[63] with that 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 demonstrate that adequate procedures designed to prevent persons associated with the organization from undertaking such conduct were in place.[64]

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.[65]

Anti-corruption law enforcement in the United Kingdom 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, which leads on serious or complex and foreign bribery and corruption cases. The Crown Prosecution Service advises on investigations and conducts all relevant prosecutions other than those brought by the SFO.[66]

[61] *See* OFT, *supra* note 58, ¶¶ 8.20.

[62] A relevant commercial organization means (Bribery Act, 2010, c. 23, § 7, sched. 5):

(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.

[63] 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, § 8).

[64] Bribery Act, 2010, § 7.

[65] Bribery Act, 2010, § 14.

[66] U.K., UK ANTI-CORRUPTION PLAN (December 2014), 38, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388894/UKantiCorruptionPlan.pdf, date last accessed 25 February 2015.

The prosecuting guidelines encourage the consideration of self-reporting as a factor when deciding whether or not to prosecute a company. There are, however, no guarantees that a prosecution will not follow.[67]

Additionally, deferred prosecution agreements (DPAs) were introduced in England and Wales for corporations accused of 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.[68]

To coordinate their approach to prosecutions, the Serious Fraud Office and Crown Prosecution Service 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.[69]

The United Kingdom has established a set of rules that mitigate the undermining effect of other violations on leniency in antitrust. Developing a coordinated approach among the law enforcement and prosecuting agencies prevents their individual efforts from harming each other. Specifically, other prosecuting agencies will have to agree not to 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 the Competition and Markets Authority 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

[67] SFO & CPS, Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, 5, 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, date last accessed 5 April 2015, and CPS, Joint Guidance on Corporate Prosecutions, 8, www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf, date last accessed 5 April 2015.

[68] Crime and Courts Act, 2013, c. 22, sched. 17, www.legislation.gov.uk/ukpga/2013/22/pdfs/ukpga_20130022_en.pdf, date last accessed 5 April 2015.

[69] Serious Organised Crime and Police Act, 2005, §§ 71–73. 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.

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 entitied.[70] 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.[71]

In Brazil, cartels are both an administrative offense and a crime, punishable by a criminal fine and imprisonment.[72] Additionally, the Brazilian Public Procurement Law specifically targets bid rigging, providing for imprisonment, and a criminal fine.[73]

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.[74]

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.[75] These detrimental acts include bribery of public officials and corruption on public procurement (for example, bid rigging).[76]

[70] Lei No. 12.529, de 30 de Novembro de 2011 [Competition Law], art. 31.
[71] Competition Law, art. 86.
[72] Lei No. 8.137, de 27 de Dezembro de 1990 [Economic Crimes Law], art. 4.
[73] Lei No. 8.666, de 21 de Junho de 1993 [Public Procurement Law], arts. 90 and 95.
[74] 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 82), 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.
[75] Lei No. 12.846, de 1 de Agosto de 2013 [Anti-corruption Law], art. 1.
[76] Anti-corruption Law, art. 5.

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.[77] These agreements may also cover administrative liability for illegal acts provided for in the Brazilian Public Procurement Law.[78]

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 concerning 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.[79] 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,[80] and through a form of plea bargaining, provided for in several other criminal laws.[81] Nevertheless, these provisions are not automatic, as they still require that each case go to trial—a consequence of the Brazilian inquisitorial system.[82] Therefore, they depend entirely on the judge's discretion, and we

[77] Anti-corruption Law, art. 16.

[78] Anti-corruption Law, art. 17.

[79] Código Penal [C.P.] [Penal Code], arts. 317, 333 and 337-B.

[80] C.P., 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).

[81] Heinous Crimes Law (Lei No. 8.072, de 25 de Julho de 1990), Economic Crimes Lei (Lei No. 8.137, de 27 de Dezembro de 1990, as amended by Lei No. 9.080, de 19 de Julho de 1995), the Law on Crimes against the National Financial System (Lei No. 7.492, de 16 de Junho de 1986, as amended by Lei No. 9.080/1995), the Penal Code (as amended by Lei No. 9.269, de 2 de Abril de 1996, for the crime of extortion with kidnapping), the Money-Laundering Law (Lei No. 9.613, de 3 de Março de 1998), the Cooperation and Witness Protection Law (Lei No. 9.807, de 13 de Julho de 1999, which extended the possibility of plea bargains to all other crimes) and the Drug Law (Lei No. 11.343, de 23 de Agosto de 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.

[82] 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 (*see* Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l L. J. 1 (2004), at 37). Compulsory prosecution in Brazil is derived

know from antitrust experience that discretional leniency provisions are not able to foster substantial whistleblowing.[83] 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 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 instead to grant them a sanction reduction or even absolute immunity based on their cooperation with the investigations and judicial proceedings (the so-called rewarded collaboration).[84]

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 individuals 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.[85] Moreover, under the currently 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, which substantially reduces the motivation for exposing corruption and collaborating with the authorities in its prosecution.[86]

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[87] (CGU, in the case of the Executive Branch of the Federal Government) for corruption offenses regarding corporate liability; and finally, the Public

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.'

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

[84] Lei No. 12.850, de 2 de Agosto de 2013 [Law against Organized Crime], art. 4.

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

[86] In order to mitigate this problem, public prosecutors may use the rewarded collaboration agreement to ensure that individuals who have also reported corruption infringements in their leniency agreements will not be prosecuted. Of course, this agreement will be subject to full prosecutorial discretion and depends on close coordination between CADE and public prosecutors.

[87] 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

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.[88]

D. Mexico

Like Brazil, Mexico also has a new Federal Antitrust Law which came into force on July 7, 2014 and applied to both individuals and legal entities in any form of participation in economic activity.[89] 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.[90] 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).[91] 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.

The Mexican antitrust leniency program, called the Immunity and Reduced-Sanctions Program,[92] is available to both individuals and legal persons.[93] Once leniency is granted, it extends to the corporations' employees

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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.

[88] In the Petrobras Case (*see supra* note 9), the Federal Public Prosecutors' Office (MPF) has already signed a considerable number of rewarded collaboration agreements with executives of companies involved in bribery, but it 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 (g1.globo.com/politica/operacao-lava-jato/noticia/2015/02/procuradores-da-lava-jato-tentam-barrar-acordo-de-leniencia-na-cgu.html, date last accessed 10 May 2015). 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' (www1.folha.uol.com.br/poder/2016/03/1747683-ao-banir-cupula-da-odebrecht-dos-negocios-moro-sugere-leniencia-para-limpar-reputacao.shtml, date last accessed 10 May 2015). This shows how complex is the Brazilian legal framework for cartel-corruption cases, making self-reporting much less attractive.

[89] *Ley Federal de Competencia Económica* [LFCE] [Federal Antitrust Law], art. 127, *Diario Oficial de la Federación* [DOF] 24-12-1992.

[90] Código Penal Federal [CPF] [Federal Criminal Code], art. 254 bis.

[91] CPF, art. 254, ¶ 1.

[92] *See* COFECE, *Guía del Programa de Inmunidad y Reducción de Sanciones* (March 2013), www.cofece.mx/ingles/index.php/cofece/que-hacemos/practicas-monopolicas-absolutas/immunity-program, date last accessed 15 April 2015.

[93] LFCE, art. 103.

involved in the infringement,[94] also providing for criminal immunity for these individuals whether they applied individually or jointly with their company.[95]

The Mexican Federal Anti-corruption Law in Public Procurement, hereinafter 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.[96] Individual criminal sanctions for corruption—both imprisonment and fines—are instead administered under the Mexican Criminal Code.[97] As with its Brazilian counterpart, the Mexican Anti-corruption Law considers several entities as competent to enforce it.[98] Similar to CGU in Brazil, the Ministry of the Public Administration is exclusively responsible for investigating and sanctioning the bribery of foreign officials,[99] 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.[100] 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 the Brazilian rules over their likely inability to induce wrongdoers to blow the whistle on corruption crimes, and over the corresponding negative effect they impose on the functioning of the antitrust leniency program in public procurement markets. The problems of the absence of a leniency program covering individual criminal penalties for corruption and of multiple, uncoordinated authorities having responsibility 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,[101] and is, therefore, fully discretional. And

[94] LFCE, art.103, ¶ 3.
[95] CPF, art. 254, ¶ 2.
[96] *Ley Federal Anticorrupción en Contrataciones Públicas* [LFACP] [Federal Corruption Law in Public Procurement], art. 2, DOF 11-06-2012.
[97] CPF, art. 222.
[98] The Ministry of the Public Administration; 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 (LFACP, art. 4).
[99] LFACP, art. 5, ¶ 1.
[100] LFACP, art. 31.
[101] CPF, art. 52, VI.

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 (DG Competition) is primarily responsible for the enforcement of competition law. However, in accordance with Council 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.[102] 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.[103]

Cartel infringements can be sanctioned with fines by the Commission. However, individuals involved in the cartel cannot be held criminally liable.[104]

The EU antitrust leniency program is managed by DG Competition and it is described in the European Commission's Notice on immunity from fines and reduction of fines in cartel cases (the "2006 Leniency Notice").[105]

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.[106]

In contrast to 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.[107] Despite

[102] Council Regulation (EC) No. 1/2003, art. 5, 2003 O.J. (L 1) 1, 9.
[103] Council Regulation (EC) No. 1/2003, art. 12.
[104] Council Regulation (EC) No. 1/2003, art. 23, ¶ 5.
[105] Commission Notice on immunity from fines and reduction of fines in cartel cases, 2006 O.J. (C 298) 11.
[106] Commission Notice on cooperation within the Network of Competition Authorities, 2004 O.J. (C 101) 03, ¶¶ 40 and 41.
[107] Convention of the European Union on the fight against corruption involving officials of the European Communities or officials of Member States, and the already mentioned Criminal

the strong cooperation within the ECN, which aims to prevents conflicts among authorities, this is likely to be a substantial obstacle to offenders wanting to blow the whistle and hoping to obtain leniency[108] 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 report bid-rigging schemes in public 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.

Considering that Member States are responsible for both competition law and anti-corruption law enforcement, we selected two jurisdictions (Germany and Italy) to better illustrate the discussion on the interaction between leniency provisions in Europe.

1. *Germany*

The German Federal Cartel Office (*Bundeskartellamt*, or FCO)[109] 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.[110]

The German leniency programme for cartels does not offer immunity from or leniency in criminal prosecution for individuals.[111] Yet, cartels do constitute a criminal offense in the case of bid rigging in public procurement

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Law Convention on Corruption of the Council of Europe, and the Civil Law Convention on Corruption of the Council of Europe, from 1999.

[108] 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, Nov. 2012, ¶ 2, ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf, date last accessed 22 June 2017).

[109] 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, § 48(2), www.gesetze-im-internet.de/englisch_gwb/, date last accessed 17 May 2015).

[110] *BekanntmachungNr. 9/2006—Bonusregelung* [Notice no. 9/2006—Leniency Programme], ¶ 17, www.bundeskartellamt.de/EN/Banoncartels/Leniency_programme/leniencyprogramme_node.html, date last accessed 15 May 2015.

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

tenders.[112] In these cases, the FCO must refer proceedings against the involved natural person to the public prosecutor.[113] 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.[114] And unfortunately we know from the pre-1993 U.S. experience that this increase in prosecutorial discretion is likely to greatly reduce the propensity of wrongdoers to blow the whistle on a cartel.

Criminal provisions for corruption of public officials are laid down in the German Penal Code.[115] 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.[116]

There is no formal leniency program for corruption, although mitigation of sentences or discharge are available at the discretion of the court under § 46b of the German Penal Code.[117] 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.[118] 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.[119]

The absence of a nondiscretional 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 informal 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.

[112] *STRAFGESETZBUCH* [STGB] [PENAL CODE], §§263 and 298.

[113] *Gesetz über Ordnungswidrigkeiten* [OWiG] [Act on Regulatory Offenses], § 41, and 2006 Leniency Notice, ¶ 24.

[114] STGB, § 46b, (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.

[115] STGB, § 331–338.

[116] OWiG, §§ 30 and 130.

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

[118] STGB, § 46b, (3).

[119] *STRAFPROZESSORDNUNG*—[STPO] [CODE OF CRIMINAL PROCEDURE], § 257c.

2. Italy

In Italy, cartels are subject to the Antitrust Law[120] 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.

In addition, 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.[121] The consequent criminal procedures are conducted by the public prosecutor and the eventual sanctions are imposed by criminal courts. This form of collusion is not covered by the antitrust leniency program but is only subject to the standard provisions of the Penal Code[122] that allow the judge to attenuate sanctions for collaborating individuals.

As for corruption, a new Anti-corruption Law[123] has recently changed art. 323-bis of the Penal Code, allowing a reduction in the sentence of up 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 appears to have no real incentives to blow the whistle and collaborate with the law enforcement authorities.[124]

F. Other Jurisdictions

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

[120] *Legge* 10 *ottobre* 1990, n. 287, G. U. Oct. 13, 1990, n. 240.

[121] CODICE PENALE [C.P.] [PENAL CODE], art. 353 (*Turbata libertà degli incanti*).

[122] C.P., art. 62 bis.

[123] *Legge* 27 *maggio* 2015, n. 69, G. U. May 30, 2015, n. 124.

[124] 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 article would be solved, particularly if the protection from criminal prosecution includes corruption infringements.

the interaction among leniencies for multiple and concomitant offenses is being addressed in some important jurisdictions.

We did survey leniency provisions from other countries,[125] but we considered that they do not present characteristics that could add to the discussion and we, therefore, do not address them in detail here. In a way, because most countries have signed the same conventions on competition and corruption, their legal frameworks are expected to show some resemblance, even though different countries may implement guidelines in different, and sometimes more creative, ways.

OECD guidelines have influenced leniency program design in countries all over the world. European countries, in particular, structure their antitrust leniency programs according to the ECN Model Leniency Programme. Regarding anticorruption provisions, countries have put 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 on Combating Bribery of Foreign Public Officials in International Business Transactions.[126] Additionally, European countries also observe the standards set by the Group of States against Corruption (GRECO) for the implementation of the Criminal Law Convention of the Council of Europe on Corruption from 1999.[127]

In some countries, such as Austria and France, individuals are not liable for cartel offenses, but there is criminal liability for cartels in public procurement (that is, bid rigging).[128] In such cases, however, the leniency agreement does not cover the bid-rigging offense,[129] as discussed in the case of Italy.

[125] For a comparison among leniency provisions in anti-corruption law from United States, Mexico, Brazil and China, *see* Reinaldo D. Luz et al., *Anti-corruption Leniency: Legal Frameworks and Practices* (forthcoming).

[126] Essentially, these Conventions recommend the adoption of legislative and other measures to establish bribery of a foreign public official as criminal offenses, and the application of appropriate sanctions to deter corruption; and suggest the implementation of preventive anti-corruption policies and practices and the creation of anti-corruption bodies, promoting strong international cooperation and assistance in the fight against corruption, including assets recovery. Both Conventions also ask each Party to consider, in accordance with its legal principles, establishing the liability of legal persons for the bribery of a foreign public official. Particularly relevant to this article, Article 37 of the United Nations Convention Against Corruption recommends that State Parties should consider the possibility of offering immunity or reduction in sanction for offenders that participate in the commission of corruption offenses, provided they report their offenses and cooperate with the authorities.

[127] 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.

[128] *Strafgesetzbuch* [StGB] [Penal Code], § 168b, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296, date last accessed 13 June 2015, and *Code de commerce* [C. Com.] [Commercial Code], art. L 420-6.

[129] FCA, Handbook of the Federal Competition Authority on the Implementation of Section 11 paragraph 3 of the Austrian Competition Act (WettbG) ("Leniency Programme"),

Competition authorities may have discretion over whether or not to refer the criminal offense to the public prosecutor,[130] but even if they do not refer it, there is no formal mechanism that prevents the latter from deciding to press charges. Additionally, antitrust leniency programs do not offer coverage over associated offenses (for example, corruption) for the legal person and its personnel.

Bribery and corruption of public officials, both domestic and foreign, are usually regulated by national criminal codes. Even in countries where only individuals are primarily liable for corruption infringements, corporations may also be sanctioned if the crime benefited them and they have failed to comply with their supervision duties over their employees.[131] Overall, existing leniency provisions for corruption cases remain largely under prosecutorial and judiciary discretion.

Corruption laws are enforced by agencies other than the competition authorities. Thus, uncertainty and coordination issues are also likely to arise in cases of cartels in public procurement, 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 managers and employees when applying for antitrust leniency, and will have to negotiate with different agencies. This is likely to result in reluctance to approach the competition authority 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).

Even in countries where individuals are not liable in any way for cartel offenses, such as Switzerland,[132] the existing anti-corruption provisions still undermine the effectiveness of the cartel leniency program when a bid-rigging scheme also involves corruption of a public official. Individuals will likely be unsure about reporting the cartel to the competition authority, because the information presented to the antitrust authority may then be

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December 2005, www.en.bwb.gv.at/CartelsAbuseControl/Leniency/Documents/Handbook%20leniency_english%20version.pdf, date last accessed 13 June 2015, and Competition Authority Procedural Notice, April 3, 2015. *Autorité de la concurrence*, *Communiqué de procédure du 3 avril 2015 relatif au programme de clémence français*) [Competition Authority, Procedural Notice relating to the French Leniency Program, April 3, 2015], www.autoritedelaconcurrence.fr/doc/cpro_autorite_clemence_revise.pdf, date last accessed 3 June 2015.

[130] *Autorité de la concurrence*, *supra* note 129, ¶ 53.

[131] Article 2 of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions establishes that '[e]ach Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official' (OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, 1997, https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf, date last accessed 28 August 2015). Thus, whether the country is going to adopt administrative or criminal liability of legal persons for corruption will depend on its legal principles. Civil law countries do not usually accept corporate criminal liability.

[132] *KARTELLGESETZ* [KG] [CARTEL ACT] October 6, 1995, art. 2.

used by public prosecutors in criminal proceedings against the company and the reporting individual himself.

II. IMPACT ON INTERNATIONAL COMPETITION LAW ENFORCEMENT

Even though international cartels are not a recent phenomenon,[133] globalization and information technology developments, as well as extraterritorial cartel enforcement,[134] have increased the occurrence of cross-border cartel cases.[135]

In a multiple jurisdiction cartel case, there are risks created by regulatory competition:[136] 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 over-enforcement, raising concerns related to double jeopardy (*ne bis in idem*).[137]

[133] *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).

[134] 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').

[135] 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 per cent between 1990–1994 and 2007–2011) (OECD, CHALLENGES OF INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT 29 (2014), www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf, date last accessed 20 May 2017).

[136] '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.'

[137] *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 [anticompetitive] behavior because of the lack of an effective remedy'); OECD, IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS 11 (2012), www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf, date last accessed 20 May 2017 (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 134, at 55 (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').

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,[138] 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."[139] To address this problem in Europe, and to reduce the costly burden of multiple applications, for both applicants and authorities, the European Commission introduced in 2012 the possibility of summary applications.[140] Filing a summary application protects the applicant's position under the leniency program of the national competition authorities concerned for the alleged cartel case on which the applicant has submitted, or is in the process of submitting, a leniency application to the European Commission. However, a summary application reduces but does not eliminate the risk borne by applicants seeking immunity or leniency in more than one Member State, because several inconsistencies remain.[141]

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

[138] *See* OECD *supra* note 137, 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').

[139] *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').

[140] ECN MODEL LENIENCY PROGRAMME, *supra* note 108, ¶¶ 24–27.

[141] In 2015, the European Commission surveyed different stakeholders (companies, business associations, public authorities, consumer organizations, competition practitioners, researchers, etc.) on how to improve enforcement effectiveness of national competition authorities (NCAs). The survey found that "divergences in the way summary applications are applied [were] considered to be a problem by nearly half of respondents in terms of the effective and consistent application of EU rules, legal certainty for business and incentives to apply for leniency" (EUROPEAN COMM'N, SUMMARY REPORT OF THE REPLIES TO THE COMMISSION'S PUBLIC CONSULTATION ON EMPOWERING THE NATIONAL COMPETITION AUTHORITIES TO BE MORE EFFECTIVE ENFORCERS 11 (2016), http://ec.europa.eu/competition/consultations/2015_effective_enforcers/Summary_report_of_replies.pdf, date last accessed 12 March 2016. A recently proposed directive addressed these divergences in the treatment of summary leniency applications (*see* EUROPEAN COMM'N, PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL TO EMPOWER THE COMPETITION AUTHORITIES OF THE MEMBER STATES TO BE MORE EFFECTIVE ENFORCERS AND TO ENSURE THE PROPER FUNCTIONING OF THE INTERNAL MARKET (2017), Art. 21, http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf, date last accessed 20 March 2016).

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.[142] Notwithstanding this, in international cartel cases with bribery, provisions against foreign corruption add to the complexity of an already multijurisdictional situation, involving a possibly larger number of competent prosecuting authorities if issues relating to extraterritorial anti-corruption enforcement 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, because they would risk being prosecuted for corruption at home.[143]

For instance, let us consider a case where a group of German companies formed a cartel to obtain public contracts in Brazil. As usual, they might also bribe the Brazilian officials in charge of the awarding procedure. Let us now imagine that one of the members of the cartel is willing to report. Although it is possible to apply for leniency in Brazil, both for the cartel 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.[144] 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.

[142] *See* Ilias Bantekas, *Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies*. 4 JICJ 466, 470 (2006) (explaining that 'from an international law point of view it is important to comprehend that the recognition by the 1997 [OECD] Convention of bribery as a transnational offence means that the offender incurs criminal responsibility not only under national law but also under international law', which in practice means that 'the corrupt act is a criminal offence in more than one jurisdiction and even if an offender is not prosecuted in one country, his or her criminal liability remains alive in others').

[143] *See* Fraser, *supra* note 39, at 1019 (highlighting that since U.S. leniency aims at creating a "race for amnesty", '[t]he value of this race is maximized when non-U.S. enforcers have a similar system, as a company with potential exposure in a non-amnesty jurisdiction may decline to self-report conduct where there is amnesty available because of the potential of discovery of overseas conduct that cannot be immunized').

[144] 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.

In addition to the reduction in the attractiveness of antitrust leniency programs, the possible inconsistencies among legal frameworks and enforcement may actually undermine global anti-corruption efforts themselves, because regulatory competition may lead to serious under-enforcement of anti-corruption laws.[145] Badly designed leniency programs can be exploited to escape punishment in the home country or in other, stricter 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 examples and create *ex ante* leniency programs for corruption infringements.[146] In contrast to these programs, however, leniency should cover not only companies but also individuals, especially regarding criminal liability for bid rigging and corruption, as in the proposal presented by the Italian antitrust authority (AGCM) mentioned above.[147] 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 United States.[148]

[145] For an opposite, and more optimistic view on anti-corruption regulatory competition, *see* Stephan, *supra* note 136 (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 35, 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. The OECD's High-Level Advisory Group (HLAG) on Anti-Corruption and Integrity has shown similar concerns regarding inconsistencies and under-enforcement arisen from excessive prosecutorial discretion on voluntary disclosure regimes and settlements. The HLAG has advised OECD to 'promote the harmonisation in this area by developing model guidelines and minimum requirements for negotiated settlements', as well as to 'include in its country reviews a review of the use of negotiated settlements against the guidelines that are developed'. *See* HLAG, REPORT TO THE OECD SECRETARY-GENERAL ON COMBATING CORRUPTION AND FOSTERING INTEGRITY, 2017, http://www.oecd.org/corruption/HLAG-Corruption-Integrity-SG-Report-March-2017.pdf, date last accessed 12 June 2017, at 20–21.

[146] For an outline of an anticorruption leniency program for the United States, *see* Robert W. Tarun & Peter P. Tomczak, *A proposal for a United States Department of Justice Foreign Corrupt Practices Act leniency policy*, 47 AM. CRIM. L. REV. 153 (2010).

[147] *See supra* note 124 and accompanying text.

[148] 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*, The 26th Annual National Institute on White Collar Crime, ABA Center for Continuing Legal Education, 7 (March 1, 2012), www.justice.gov/atr/file/518936/download, date last accessed 9 August 2016 (arguing that '[t]he threat of a prison sentence provides individuals involved in cartel

These anti-corruption leniency programs, however, must be carefully designed to prevent them being exploited by wrongdoers.[149] For instance, they must be transparent and predictable to allow individuals and their counsel to assess risks and benefits from disclosing infringements.[150] Programs should restrict leniency to the first to report to prevent individuals and companies from "gaming the system" by agreeing to collude and systematically reporting to the authorities, resulting in a reduction in fines for many of them, and to prevent wrongdoers from adopting a "wait and see" strategy, only confessing after the first one has self-reported.[151] Consequently, fine reductions for a second applicant should not be allowed unless they are essential to increase the chances of a successful conviction.[152] Programs must also be sufficiently generous, offering immunity (and not only reducing sanctions) to the first[153] wrongdoer to blow the whistle.[154] There is recent

activity with the single greatest incentive to self-report through a leniency application and thereby escape sanctions').

149 Buccirossi & Spagnolo, *supra* note 24, at 1296; and Raymond Fisman & Miriam Golden, *How to fight corruption*, SCIENCE, 803, 804. For discussions on the characteristics of effective leniency programs, *see* Spagnolo, *supra* note 1; and Marvão & Spagnolo, *supra* note 1.

150 See Fraser, *supra* note 39, at 1039 (concluding that '[c]ompanies have elected not to report violative conduct due to the absence of calculable benefits, and coconspirators within and outside of companies do not have sufficient incentives to alert their counsel or, more precisely, to warrant reporting it to the DOJ').

151 *See*, *e.g.*, Spagnolo, *supra* note 24, at 18.

152 *See* Spagnolo, *supra* note 1, at 293, and Leslie, *supra* note 39, at 173.

153 While collusion is a horizontal offense, among competing entities, corruption is a vertical one, involving buyer and seller (Leslie, *supra* note 39, at 175), so it is possible to have only one company bribing one official. In such a scenario, the first-only approach, and the concept of "race for amnesty" (*see supra* note 143 and accompanying text), would make sense only if the law allowed leniency also for the bribe-taker, which is not common, as our survey and others have shown. *See*, *e.g.*, Mathias Nell, *Strategic Aspects of Voluntary Disclosure Programs for Corruption Offences: Towards a Design of Good Practice*, BGPE Discussion Paper No. 43 (February, 2008), https://www.econstor.eu/bitstream/10419/73347/1/bgpe-dp_043.pdf, date last accessed 23 February 2016 (identifying only three countries that allow voluntary disclosure for passive bribery from 56 countries surveyed). Nevertheless, other interested parties, such rival companies that also resort to bribery to compete, may also participate in the "race". *See* Fraser, *supra* note 39, at 1035 (explaining that 'former executives have acknowledged that competitors bribe foreign officials because this conduct was required to compete effectively against others who were engaged in the same behavior, suggesting the possibility of follow-on prosecution of FCPA individual and corporate coconspirators').

154 Whether offenders should be allowed to self-report after the beginning of an anti-corruption investigation is a controversial issue (*see*, *e.g.*, Fraser, *supra* note 39, and Leslie, *supra* note 39, arguing against it, and Tarun & Tomczak, *supra* note 146, supporting this alternative) and it is not going to be addressed here. We agree, however, that to maximize the deterrence power of the first-only approach and the attractiveness of a leniency program, it is important to either reward self-reporting only before an investigation has begun or offer much smaller reduction in the sanctions in exchange for a late disclosure. *See* Spagnolo, *supra* note 1, at 294 (noting in relation to antitrust law enforcement that 'leniency awarded to parties reporting after an investigation has been opened,…, has a real cost in terms of reduced deterrence linked to the lower expected fines for a cartel it may generate…, and should therefore be less generous than for spontaneous reports of non-detected cartels').

empirical evidence showing how leniency provisions may backfire when poorly designed,[155] highlighting the importance of setting the correct incentives to effectively deter and detect crime.

As our survey has shown, leniency provisions for corruption do not usually allow immunity, especially regarding criminal liability. This is normal, because in these cases, there may be few other parties (if any) to pay large sanctions, so that giving large fine discounts to the self-reporting party is tantamount to reducing sanctions for all parties, which will likely have negative effects on deterrence. Some countries have, however, created provisions to allow bribers to be exempted from all criminal sanctions provided they cooperate fully with authorities.[156] These provisions recognize the benefits of incentivizing self-reporting to more easily prosecute corruption. Nevertheless, for corruption cases where there are not several other parties to be heavily sanctioned, it is not clear that these changes will have a positive effect on deterrence.

Additionally, considering the problem of multiple authorities and how this may undermine the interest of leniency in multiple offense cases, it is advisable not to rely on collaboration between law enforcement groups,[157] even when they belong to the same agency (as in the case of the United States) or when they have to formally agree not to prosecute (as occurs with the United Kingdom's Serious Fraud Office). Collaboration is particularly troublesome because cartels and corruption are subject to different types of jurisdictions in most countries. As shown in Section I, anti-cartel law enforcement efforts are often run by administrative agencies, while corruption usually falls under criminal jurisdiction.[158] Criminal law's stricter procedural rules and higher

[155] See Berlin et al., *supra* note 50 (analyzing the reasons for the reduction on the number of prosecuted corruption cases after the 1997 Criminal Law reform in China and finding that the 'strengthening of leniency for both parties [bribe-takers and bribe-givers] and the reduction in sanctions by the 1997 Chinese reform failed to improve deterrence, as predicted by theory, because it did not generate the necessary asymmetry between reporting and non-reporting parties' and 'also allowed reported bribe-takers to enjoy more lenient sanctions by collaborating with law enforcers, thereby improving their ability to retaliate and reducing bribe-givers incentives to blow the whistle in the first place'.

[156] *See supra* notes 45, 84, and 117, for American, Brazilian, and German legal provisions, respectively, that offer immunity or amnesty. Unfortunately, they still remain under a high degree of discretion which, as we have highlighted, poses serious risks to any effective leniency program. Currently, there is a bill at the Brazilian House of Representatives proposing to amend the anti-corruption law to include the possibility of amnesty in its leniency program (Câmara dos Deputados [Brazilian House of Representatives], Projeto de Lei n° 5,208/2016, http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2083754, date last accessed 18 November 2016.

[157] For an example of possible conflicts between agencies, *see supra* note 88 and accompanying text.

[158] There are exceptions, however. In United States, the Department of Justice is responsible for both competition and corruption law enforcement, although different divisions are in charge of each one, and Brazil has bifurcated (administrative and criminal) jurisdictions both in antitrust (CADE and public prosecutors) and anti-corruption (CGU and public prosecutors)

standard of proof, as well as peculiarities of the inquisitorial system adopted by several jurisdictions,[159] make it especially hard for criminal authorities to accept not prosecuting or sanctioning wrongdoers, even when they provide valuable information and evidence.[160] This attitude might make coordination difficult and increase uncertainty for individuals interested in disclosing their illegal acts.

Thus, in countries in which immunity can be extended to sanctions for corruption or bid rigging, it would be ideal to establish clear legal provisions—that are formally binding for the law enforcing agencies—to allow wrongdoers to report all illegal acts simultaneously, or at least before the authorities know about them,[161] and to be confident that they would escape sanctions upon cooperation with the authorities and the presentation of evidence, that is the creation of a "one-stop point."[162] Any other violation discovered by the law enforcement authority during the investigative procedures that was not originally reported by the applicant would be referred to the competent agency and the applicant should not get any reduction in the sanctions for it. Applicants must be aware that only spontaneously self-reporting all infringements will grant them full leniency treatment.

On the other hand, in countries where the legal tradition does not allow immunity to be offered for criminal infringements like corruption or bid

(*see supra*, section C). Coordination issues still remain, though, because of the differences between principles and resulting practices adopted in each jurisdiction.

159 *See supra* note 82 and accompanying text. In Brazil, nevertheless, the principle of compulsory prosecution has been relaxed (*see supra* note 84).

160 *See supra* note 32 and accompanying text. This is changing, as we have already mentioned (*see supra* note 156). Other important arguments against immunity/amnesty provisions in criminal law are the probative value of confession and the privilege against self-incrimination, a fundamental right in democratic states. Self-reporting goes beyond confession as the agent will have to report his violations, but will have also to present evidences to support his confession and to allow effective investigation and prosecution. A mere confession should never be the basis to leniency, let alone immunity. Moreover, since leniency application constitutes a voluntary act, an option available to—and in benefit of—the defendant, we believe that there is no grounds for any civil or constitutional rights concern. These understandings, along with the more pragmatic consideration on social welfare gains from leniency provisions, support the implementation of leniency provisions in general.

161 Such a provision allows that an infringement that was not originally known by the applicant, but that it became aware of later during subsequent internal investigations, be also reported to the authorities. This would unlikely occur otherwise, since leniency applicants would probably have serious concerns about whether reporting other infringements afterwards could jeopardize leniency.

162 During an event in São Paulo, promoted by the Brazilian Institute of Studies in Competition, Consumer Relations and International Trade Law [Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional, IBRAC], legal practitioners have asked for something like the 'one-stop point' suggested here, but while Brazilian authorities reported having considered the idea, they do not believe it would be feasible, at least in the near future. *See* IBRAC Eventos, Painel 1 –21° Seminário Internacional de Defesa da Concorrência – IBRAC (October 17, 2015), https://www.youtube.com/watch?v=SEI_LeqtzvE, date last accessed 17 August 2016).

rigging in connection to a cartel, the optimal policy may be guaranteeing the confidentiality of any aspect—or related infringement—that is not a competence of the competition authority and is reported by the leniency applicant. This may at least ensure a higher cartel detection rate, without interfering with criminal enforcement policies.

The "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. To prevent conflicts among agencies, the authority first contacted by the wrongdoer must be obliged to call any other agency that may be competent over the other possible infringements reported by the wrongdoer to participate in the process.

Although authorities want to create a race among potential leniency applicants, it is obvious that gathering accurate information on possible illegal conducts, where they were committed, for how long, and about other parties eventually involved, takes time. Thus, a reasonable time must be granted to the applicant to collect detailed information on the infringements.[163] At this first stage, applicants must reveal only limited information[164] that the initially contacted authority would then transmit to the other agencies indicated by the applicant to secure its position as the first to come forward also for the infringements related to them. Limiting the information initially disclosed reduces the applicants' exposure to the risk of prosecution for the related illegal acts, encouraging the decision to self-report.

The one-stop point saves time and money both for authorities and applicants, by avoiding multiple and concurrent leniency applications. It also increases cooperation among law enforcement agencies, and facilitates self-reporting from small- and medium-size companies, which do not have expertise and resources to deal with several regulations and regulators at the same time.

However, it is paramount that the self-reporting wrongdoer be reasonably certain that he will be granted leniency for all reported wrongdoings, provided, of course, that he fulfills the legal requirements for each infringement. Failing to report all known involvement in infringements may be a reason to reduce or

[163] We will not discuss this issue in depth, but we consider that it should be more than 30 days, to allow careful internal investigations, and less than 90 days, in order not to be used opportunistically and strategically by applicants, which could harm other potential parties interested in leniency.

[164] Preliminary information could be restricted to name and contact information, description of the infringements, date or duration, other parties involved in the infringements, other authorities to be notified about the infringements reported. The set of information could be different depending on the agencies involved (for example, industry and market when antitrust authorities are involved).

even revoke leniency altogether, creating a penalty *plus*-like provision over different areas of law[165] and a more powerful incentive for a thorough self-report.

Such a model for the "one stop-point" respects the competences and the expertise of different agencies, which makes it more efficient to deter crimes when compared with the alternatives of either centralizing leniency decisions on just one law enforcement authority or forcing one agency to recognize and accept leniency related decisions made by other. This might avoid the power struggle among authorities and reduce their reluctance to the introduction of the "one stop-point." It also acknowledges and respects differences in substantive and procedural leniency rules among agencies. After self-reporting, the applicant will have to comply successfully with the legal requirements set by each authority to be awarded immunity or a reduction in the sanctions.

Additionally, information about the possibility of reporting several illegal acts at the same time, and of obtaining leniency for each, must be consistently disseminated to minimize detection and prosecution costs, as well as to contribute to the deterrence of future criminal behavior.

In a corrupting cartel case, whether the offender has approached the antitrust authority or the anticorruption agency, or one of the agencies has detected the offense and the company involved wants to apply for leniency, the authority leading the case must contact the other one and bring it to participate in the negotiations.[166] If the applicant meets the requirements provided for in each law, as assessed by the competent authority, leniency will

[165] In the United States, the Antitrust Division has a Penalty Plus policy that increases sanctions for a company that, being granted leniency for an infringement, fails to discover or to inform the Division about a second infringement it is a part of (*see* Scott D. Hammond, An Update of the Antitrust Division's Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law, Cartel Enforcement Roundtable, Fall Forum (November 16, 2005), www.usdoj.gov/atr/public/speeches/213247.htm, date last accessed 20 March 2016).

[166] Auriol et al. argue that corrupting cartel cases should be coordinated by the competition authorities, 'that are already used to considering policy choices and reactions against corporate misconduct with a view to the trade-offs between market consequences and other policy aims, such as crime deterrence', but in a very close collaboration with criminal law enforcement' (Auriol et al., *supra* note 10, at 8). On the other hand, Vinicius Marques de Carvalho, president of the Brazilian antitrust authority between 2012 and 2016, defend this leading role to the agency that has started first any investigation: '[i]t is very much possible in a cooperation environment to recognize that when there is an overlap of competences one must recognize a kind of leading role in the conduct of the investigation strategy, which belongs to who made the first move'. According to him '[f]rom that moment on, the strategy of investigation as a whole will be… a general strategy." (*see* IBRAC, MLEX IN BRAZIL: REPORT FROM IBRAC'S 21ST INTERNATIONAL SEMINAR ON COMPETITION DEFENSE, São Paulo (October 16–17, 2015), http://www.ibrac.org.br/UPLOADS/Eventos.old/Eventos/21SeminarioConcorrencia/MLEX%20in%20BRAZIL%20October%202015.pdf, date last accessed 20 October 2016). In our opinion, such rule should not depend, however, on agreements between agencies, but must be stated in the law in order to be effective. We believe that allowing every agency to be a possible entry point for self-reporting, and stipulating that they must involve other agencies according to the matter at hand, is a better solution. It increases opportunities to a voluntary disclosure and improves the process, since the different agencies would have the chance to contribute with their specific expertise.

be granted to the legal person and individuals involved, upon request of the company.

The Brazilian Competition Law has probably the closest provision to such a rule,[167] 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, and to demand the involvement of other law enforcement agencies.[168]

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

IV. CONCLUSION

The OECD 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.[169] These characteristics are also shared by the fight against cartels.

[167] Apart from the proposal by the AGCM (*see supra* note 124).

[168] Regarding only antitrust offenses, the Brazilian Competition Authority, CADE, works closely with the Public Prosecutor's Office to coordinate administrative and criminal leniency (*see supra* note 74), but similar coordination with other authorities, specifically in relation to administrative sanctions under the Anti-corruption Law, would have to be developed. Considering, as mentioned, that the Anti-corruption 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), a high degree of coordination with such a multitude of authorities is hard, if not impossible, to achieve. Thus, specific provisions may be needed to establish this coordination and avoid conflicts that would likely undermine the attractiveness and effectiveness of leniency policies.

[169] OECD, *supra* note 131, at 6.

Consequently, legal harmonization, coordination and co-operation—both on procedural and substantive issues, across and within 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.

We hope that the present work contributes to clarifying these required changes with a legal and economic analysis of wrongdoers' incentives to blow the whistle in multiple offense 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 collaborates in cases against corrupting cartels 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.

To increase the effectiveness of leniency programs in multiple offense cases, we suggest the creation of a "one-stop point," enabling firms and individuals to report various 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 U.S. enforcement authorities.[170] Rewards for innocent whistleblowers have already been introduced by a few competition authorities (including in Hungary, South Korea, and the United Kingdom), although the rewards allowed for in pioneering antitrust programs appear far too small to compensate for the

[170] Rewards for innocent whistleblowers are present, for instance, in the U.S. False Claim Act (FCA). The FCA was enacted during the U.S. 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 15–30 percent of the amount of funds recovered. Thanks to the FCA's success, the Internal Revenue Service (IRS), the Securities and Exchange Commission, and the Commodity Futures Trading Commission (CFTC) have created their own whistleblower programs to promote 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), http://www.phmy.com/images/uploads/QuiTam.pdf, date last accessed 28 October 2017.

retaliation costs typically suffered by whistleblowers.[171] 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 renders leniency programs ineffective.

[171] *See*, *e.g.*, Spagnolo *supra* note 1 (discussing the pros and cons of rewards for innocent whistleblowers); and Klaus Abbink & Kevin Wu, *Reward self-reporting to deter corruption: An experiment on mitigating collusive bribery*, 133 J. ECON. BEHAV. ORGAN., 256 (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), https://www.bozeman.net/home/showdocument?id=502, date last accessed 12 October 2017 (showing the large retaliation costs that whistleblowers are typically subject to, even in advanced countries with detailed provisions for protection of whistleblowers' against retaliation).