The Anti-Corruption and Antitrust Connection

Josh Goodman

Three major U.S. aerospace companies stand accused of bribing foreign government officials to secure jet aircraft sales. The defendant companies settle the charges by entering into consent orders that require them to adopt new compliance policies for documenting their foreign payments. No—these are not the details of the latest Foreign Corrupt Practices Act (FCPA) case. These are the facts behind a trio of 1978 consent orders resolving antitrust law complaints brought by the Federal Trade Commission against Lockheed, Boeing, and McDonnell Douglas.[1] As these cases illustrate, antitrust law and foreign corruption law in the United States have a long, yet often overlooked, shared history.

The past decade has witnessed a resurgence in U.S. anti-corruption enforcement, and several cases in that time period serve to illustrate the parallel trends and convergences between the FCPA and the antitrust laws. Three such trends are particularly striking: (1) the rise of a compliance-focused enforcement model, (2) cases that combine antitrust and anti-corruption claims, and (3) an increase in international enforcement coordination and harmonization.

The FCPA, the FTC Aircraft Cases, and Their Antecedents

The FTC's 1978 aircraft industry bribery cases grew out of post-Watergate Securities and Exchange Commission (SEC) and Congressional investigations that revealed widespread corporate bribery of foreign government officials by many American corporations.[2] In the mid-1970s, the bribery charges against Lockheed Corporation, in particular, became headline news and a focal point for public perceptions of declining corporate integrity in that era, although hundreds of other companies ultimately disclosed similar foreign conduct.[3] Following public revelations of Lockheed's questionable payments, an investigation commissioned by a special committee of Lockheed outside directors found that Lockheed had paid more than $30 million in bribes from 1970 to 1975 to influential figures in the governments of Japan, Germany, the Netherlands, Italy, and other countries.[4] The Lockheed scandal's impact reverberated widely, leading to the arrest of former Japanese Prime Minister Kakuei Tanaka and other Japanese politicians, the impeachment of two former Italian

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[1] Lockheed Corp., 92 F.T.C. 968 (1978); Boeing Co., 92 F.T.C. 972 (1978); McDonnell Douglas Corp., 92 F.T.C. 976 (1978) [hereinafter *FTC Aircraft Cases*].

[2] *See* S. Comm. on Banking, Hous. & Urban Affairs, 94th Cong., Rep. of the Sec. & Exch. Comm'n on Questionable and Illegal Corporate Payments and Practices (Comm. Print 1976).

[3] *See* Philip Urofsky, Hee Won (Marina) Moon & Jennifer Rimm, *How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don't Break What Isn't Broken—The Fallacies of Reform*, 73 Ohio St. L.J. 1145, 1149 (2012) (noting that over 600 companies disclosed illicit foreign payments under the SEC's voluntary disclosure program).

[4] Brent Fisse & John Braithwaite, The Impact of Publicity on Corporate Offenders 144 (1983).

defense ministers, and other international political fallout.[5] Domestically, Lockheed and other aircraft firms faced investigations from the SEC, FTC, and the Department of Justice.[6]

These scandals also spurred U.S. policymakers to debate whether new anti-corruption legislation was necessary or whether existing laws, including antitrust laws, were sufficient to combat the problem of American corporations bribing foreign governments.[7] Policymakers recognized that the antitrust laws, as well as the securities laws and other statutes, could apply to certain instances of bribery by U.S. corporations overseas.[8] On the other hand, many experts concluded that it would be more efficient simply to legislate against this type of foreign bribery directly. In testimony before Congress in 1975, Donald Baker, the Deputy Assistant Attorney General for the Antitrust Division of the DOJ, explained that, while foreign bribery would violate the antitrust laws in certain circumstances, antitrust would not be "the most cost effective enforcement tool" for combating it due to the need to show the bribery scheme caused harm to competition under the antitrust framework.[9]

The use of the antitrust laws, including the FTC Act, to challenge bribery, though uncommon, was not unprecedented.

Ultimately, the Congressional consensus favored new legislation. In late 1977, Congress enacted the FCPA, making it a crime to bribe foreign government officials to win a business advantage.[10] Because the FCPA had not been in effect when Lockheed and other companies had made the payments that gave rise to the public scandal, federal agencies pursued charges under other laws, including civil antitrust laws. Thus, in the 1978 FTC Aircraft Cases, the FTC alleged that Lockheed, Boeing, and McDonnell Douglas had violated Section 2(c) of the Robinson-Patman Act (RPA) and Section 5 of the Federal Trade Commission Act (FTC Act) by paying bribes to win contracts abroad during the early 1970s.[11]

The use of the antitrust laws, including the FTC Act, to challenge bribery, though uncommon, was not unprecedented. In its early years, the FTC made pursuing and exposing bribery within the United States a significant focus of its enforcement activities.[12] Combating domestic bribery had waned as an FTC priority many decades earlier, however. The FTC's renewed attention to bribery proved short-lived because, with the FCPA's enactment in 1977, the perceived need for antitrust to serve as an enforcement gap-filler for foreign corrupt payments diminished.

Antitrust and foreign corruption law thus largely diverged over the following three decades. During the 1980s, the FCPA fell into disuse, with prosecutors bringing few cases for the next two

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[5] *Id.* at 152.

[6] *Id.* at 145–46.

[7] *See* James F. Rill & Richard L. Frank, *Antitrust Consequences of United States Corporate Payments to Foreign Officials: Applicability of Section 2(c) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act*, 30 VAND. L. REV. 131, 132–65 (1977).

[8] *See id.* at 132–35. *See also Hearing Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 87–97 (1975) (statement of Donald I. Baker, Deputy Assistant Att'y Gen., Antitrust Div., Dept. of Justice) [hereinafter Baker Testimony]; Letter from Elliot L. Richardson, Sec'y of Commerce, to Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous. & Urban Affairs (June 11, 1976), *available at* http://www.fordlibrarymuseum.gov/library/document/0248/whpr19760611-019.pdf.

[9] Baker Testimony, *supra* note 8, at 96.

[10] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 103(a), 91 Stat. 1495, 1495–98 (1977) (codified at 15 U.S.C. §§ 78dd-1 to -3). *See also* William L. Larson, *Effective Enforcement of the Foreign Corrupt Practices Act*, 32 STAN. L. REV. 561, 561 n.1 (1980). The FCPA also contains certain accounting provisions. *See* 15 U.S.C. § 78m. The anti-bribery provisions of the FCPA only apply to bribes paid for a business advantage; bribes paid for non-commercial reasons, as well as "facilitating or expediting" payments to government employees performing routine functions, are not criminalized by the law. 15 U.S.C. §§ 78dd-1 to -3.

[11] *FTC Aircraft Cases*, *supra* note 1. The SEC and DOJ also brought enforcement actions arising out of the same general conduct.

[12] *See* Note, *Bribery in Commercial Relationships*, 45 HARV. L. REV. 1248, 1251 (1932); Franklin A. Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT'L L. 211, 222–23 (1987).

decades. Beginning in the mid-2000s, however, a massive expansion of FCPA enforcement occurred, and has continued unabated.

The reasons for the waning and waxing of FCPA enforcement over time are open to debate. Explanations for the growth in FCPA prosecutions during the past decade include increased awareness of violations due to the corporate accounting requirements of the Sarbanes-Oxley Act of 2002, a push for international anti-corruption enforcement following a 1997 anti-bribery treaty among OECD member states (discussed below), and the embrace of new prosecutorial tools in the form of deferred prosecution agreements and non-prosecution agreements (also discussed below).[13] Former Attorney-General John Ashcroft has also suggested that the anti-terrorist financial tracking efforts following the September 11, 2001 attacks contributed to an increase in FCPA enforcement.[14] Whatever the correct explanation may be, in the years since the recent FCPA expansion, several similarities between the worlds of the FCPA and antitrust have emerged.

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The Treatment of Foreign Bribery Under the FCPA and the Antitrust Laws

The antitrust laws prohibit bribery in ways that are simultaneously broader and narrower than the FCPA. In terms of jurisdiction, both the FCPA and the antitrust laws apply to certain categories of extraterritorial activity, but they have a different focus:

With antitrust, jurisdiction hinges on any bribe payment's *effect* on U.S. competition and commerce, while FCPA jurisdiction turns on the identity of the bribe payer or the location of the corrupt activity. The FCPA applies broadly to any bribe paid to a foreign government official anywhere in the world by a U.S. person, business, or securities issuer.[15] In addition, the FCPA creates jurisdiction over non-U.S. persons who, "while in the territory of the United States," corruptly "make use of the mails or any means or instrumentality of interstate commerce" or commit any act "in furtherance of" a bribe of a foreign government official.[16] By contrast, the Sherman Act and Section 5 of the FTC Act, as amended by the Foreign Trade Antitrust Improvements Act of 1982, could only cover foreign bribery with a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce or U.S. export businesses.[17] The broader overseas reach of the FCPA makes sense since regulating the foreign conduct of U.S. businesses and securities issuers is fundamental to the law's purpose.

The types of bribes covered by each area of law differ as well. For example, the FCPA bans bribery of foreign government officials, but does not reach general commercial bribery. Section 5 of the FTC Act, which broadly prohibits "[u]nfair methods of competition in or affecting commerce," contains no such limitation and can thus apply regardless of a bribe's recipient.[18] The FCPA's limitation to bribery of foreign government officials only has sparked lively debate over who qualifies

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[13] *See* John Ashcroft & John Ratcliffe, *The Recent and Unusual Evolution of an Expansive FCPA*, 26 Notre Dame J.L. Ethics & Pub Pol'y 25, 30–36 (2012); Nicholas M. McLean, *Cross National Patterns in FCPA Enforcement*, 121 Yale L.J. 1970, 1977–78 (2012).

[14] Ashcroft & Ratcliffe, *supra* note 13, at 27–30.

[15] 15 U.S.C. § 78dd-1 (addressing U.S. issuers); 15 U.S.C. § 78dd-2 (addressing U.S. "domestic concerns").

[16] 15 U.S.C. §§ 78dd-3.

[17] *See* 15 U.S.C. § 6a; 15 U.S.C. § 45(a)(3); *see also* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004). This limitation, added in 1982, would not have changed the 1978 charges in the *FTC Aircraft Cases*, since the FTC alleged that Lockheed, Boeing, and McDonnell Douglas made payments "to procure aircraft sales for [themselves] and deny such sales to domestic competitors."

[18] 15 U.S.C § 45(a)(1).

as a government official in foreign countries where state-owned businesses are common,[19] a definitional conundrum that is not relevant to antitrust cases. Section 1 of the Sherman Act, for its part, does not prohibit commercial bribery per se, but could apply where a bribery scheme qualifies as, or is paid in furtherance of, any "contract, combination . . . or conspiracy, in restraint of trade."[20]

The Robinson-Patman Act[21] has its own unique possibilities and limitations for combating bribery. Section 2(c) of the RPA—one of the provisions invoked in the *FTC Aircraft Cases*—prohibits the payment of commissions, brokerage fees, or other compensation in connection with the sale of goods except payments made for services rendered.[22] This provision arose to combat the practice of "large stores using their economic dominance to force sellers to pay a fee for doing business."[23] Several federal appeals courts have held that Section 2(c) more generally encompasses a ban on commercial bribery connected to the sale of goods.[24] But the range of bribery proscribed by the RPA has its own idiosyncratic limitations. By its terms, Section 2(c) of the RPA only relates to payments connected to the sale of "goods, wares, or merchandise," thus excluding bribes paid for services or other types of contracts.[25]

One significant difference between the RPA or the Sherman Act and the FCPA or FTC Act is that persons injured by RPA or Sherman Act violations may bring an action for treble damages and counsel fees pursuant to Section 4 of the Clayton Act,[26] while the FCPA and FTC Act contain no similar private rights of action. Some litigants have attempted to argue that the FCPA contains an implied private right of action, but courts thus far have unanimously rejected that view.[27] In part, courts have premised their rejection of an implied private right of action under the FCPA on the availability, in appropriate cases, of a remedy under the antitrust laws for persons who suffer competitive harm resulting from the bribery of foreign government officials.[28] In the 1990 case of *Lamb v. Phillip Morris, Inc.*, the Sixth Circuit became the first federal appeals court to consider whether to recognize an implied private right of action under the FCPA.[29] The Sixth Circuit

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[19] *See, e.g.*, Br. for Appellant, United States v. Joel Esquenazi (11th Cir. 2012) (No. 11-15331-C) (appealing a conviction for FCPA violations on the grounds that certain employees of a Haitian telecommunications company were not "foreign officials" under the FCPA); Samuel Rubenfeld, *Justice Department Attacks 'Foreign Official' Challenge in Appellate Brief*, WALL ST. J. (Aug. 21, 2012), http://blogs.wsj.com/corruption-currents/2012/08/21/justice-department-attacks-foreign-official-challenge-in-appellate-brief; *see also* CRIMINAL DIV. OF THE U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV. OF THE U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 19–21 (2012) [hereinafter *FCPA Resource Guide*] (explaining that "Foreign officials under the FCPA include officers or employees of a department, agency, or instrumentality of a foreign government" and "[t]he term 'instrumentality' is broad and can include state-owned or state-controlled entities.").

[20] *See* Williams Electronics Games, Inc. v. Garrity, 366 F.3d 569, 578 (7th Cir. 2004) ("[C]ommercial bribery that does not involve any collusion between competitors does not violate the Sherman Act's prohibition against price-fixing."); Morning Star Packing Co. v. SK Foods, L.P., 754 F. Supp. 2d 1230, 1236 (E.D. Cal. 2010) (allegation of defendants' payment of bribes to win bids and obtain bid information did state cause of action under the Sherman Act).

[21] Robinson-Patman Act, 15 U.S.C. §§ 13–13(b), 21(a).

[22] 15 U.S.C. § 13(c).

[23] 2660 Woodley Road Joint Venture v. ITT Sheraton Corp., 369 F.3d 732, 737 (3d Cir. 2004).

[24] *Id.* at 738 n.6 (collecting cases).

[25] Gevurtz, *supra* note 12, at 227. *See also* World Wrestling Entm't, Inc. v. Jakks Pac., Inc., 425 F. Supp. 2d 484, 501–07 (S.D.N.Y. 2006).

[26] 15 U.S.C. § 15.

[27] *See* Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 419–20 (2012).

[28] *See id.* at 456–57; *see also* Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1030 (6th Cir. 1990).

[29] *Lamb*, 915 F.2d at 1027.

observed, citing Sherman Act cases, that "the international reach of federal antitrust laws dilutes the plaintiffs' assertion that a private cause of action under the FCPA constitutes the only viable mechanism for redressing anticompetitive behavior on a global scale."[30] The *Lamb* court further noted that "the potential for recovery under federal antitrust laws . . . belies the plaintiffs' contention that an implied private right of action under the FCPA is imperative."[31]

Due to recent court decisions, however, the extent to which bribery occurring outside the United States may give rise to an RPA claim is an unsettled question. In one recent case featuring allegations of foreign bribery, a federal district court held that Section 2(c) of the RPA does not apply extraterritorially.[32] In 2010, a chemical maker, Innospec, pleaded guilty to FCPA violations, which arose from bribes paid to Iraqi officials to secure fuel additive contracts.[33] Under the plea, Innospec agreed to pay multimillion-dollar fines to various enforcement agencies.[34] Subsequently, NewMarket Corporation, a competitor of Innospec, filed suit under the Sherman Act, Section 2(c) of the RPA, and Virginia state antitrust laws, alleging competitive harm resulting from Innospec's foreign bribery.[35] Innospec moved to dismiss NewMarket's RPA and Virginia state law claims. Following the reasoning set forth in *Morrison v. National Australia Bank Ltd.*, a 2010 U.S. Supreme Court case involving the securities laws,[36] the district court held that there is a presumption against applying any statute to conduct overseas absent a clear legislative intent to the contrary.[37] Finding no clear intent for extraterritorial application of Section 2(c) of the RPA, the court dismissed NewMarket's RPA claim, leaving the Sherman Act and state law claims intact.[38] Innospec ultimately paid $45 million to settle the remaining claims.[39]

The *NewMarket* court's ruling that Section 2(c) does not apply extraterritorially may not be the last word on the issue. First, the *NewMarket* court did not directly address the existing precedents that sanction such claims.[40] For example, in *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, a Pennsylvania supplier of aircraft medical equipment sued under the RPA and other laws following the loss of a foreign contract to a competitor who admitted violating the FCPA and bribing foreign officials to obtain the contract.[41] In a 1988 ruling, the Third Circuit held that "[a]s far as [the

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[30] *Id.* at 1030.

[31] *Id.*

[32] *See* NewMarket Corp. v. Innospec, Inc., No. 3:10-cv-503, 2011 WL 1988073, at *3–4 (E.D. Va. May 20, 2011).

[33] Plea Agreement as to Innospec, Inc., United States v. Innospec, Inc. (D.D.C. Mar. 18, 2010) (No. 10-cr-00061, ECF No. 4). For a summary of the case, see *FCPA Digest* (Shearman & Sterling LLP), Jan. 2, 2013, at 61, *available at* http://shearman.symplicity.com/files/e92/e9263053e7f0083efaddfa8a241e66df.pdf.

[34] *See* Press Release, U.S. Dep't of Justice, Innospec, Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (2010) [hereinafter DOJ Innospec Press Release], *available at* http://www.justice.gov/opa/pr/2010/March/10-crm-278.html.

[35] Second Amended Compl., Newmarket Corp. v. Innospec, Inc. (E.D. Va. Jan. 27, 2011) (No. 3:10-cv-503, ECF No. 41). *See also* Rachel S. Brass, Winston Y. Chan & Joshua S. Lipshutz, *From Antitrust to FCPA Liability*, The Recorder, Jan. 16, 2012, *available at* http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202538470450&slreturn=20130220115334.

[36] Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869 (2010).

[37] *NewMarket Corp.*, 2011 WL at *4.

[38] *Id.*

[39] Brass, Chan & Lipshutz, *supra* note 35.

[40] *See, e.g.*, Envtl. Tectonics Corp. v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1066–67 (3d Cir. 1988); Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc., 227 F. Supp. 829, 833–34 (N.D. Ohio 1964).

[41] *Environmental Tectonics*, 847 F.2d at 1054–56.

plaintiff's] antitrust standing is concerned, the allegations . . . make out an actionable violation of section 2(c) of the Robinson-Patman Act."[42]

Further, the *Morrison* ruling may actually have left open more possibilities for extraterritorial application than it might seem. In *Morrison*, the Supreme Court stated that the presumption against extraterritoriality often "is not self-evidently dispositive, but its application requires further analysis."[43] The Australian plaintiffs in that case had filed a U.S. securities fraud lawsuit against an Australian securities issuer over securities purchased in Australia, but the plaintiffs alleged that the underlying fraud had been committed by executives at the firm's U.S. subsidiary.[44] Since, as the Court in *Morrison* observed, "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States,"[45] the real question the Supreme Court answered was whether the defendants' alleged conduct fell within the regulatory ambit of the statute at issue. The Court in *Morrison* concluded that "the focus of the [Securities] Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."[46] Arguably, then, *Morrison* requires a similar analysis of the "focus" of Section 2(c) of the RPA to determine whether suits like NewMarket's claim should be dismissed on extraterroriality grounds. If a court finds the "focus" of the RPA to be protection of competition in the United States, that would not necessarily require the dismissal of all RPA claims based on bribery overseas, if the purpose or effect is to harm U.S. businesses.

Since the dawn of a robust FCPA enforcement program in the past decade, there have been a number of cases in which FCPA and competition law claims coincide.

Trends of Convergence

The *NewMarket* case illustrates the first area of convergence for antitrust and anti-corruption law: litigants asserting claims that relate to both areas of law in the same proceeding. Since the dawn of a robust FCPA enforcement program in the past decade, there have been a number of cases in which FCPA and competition law claims coincide. This trend is likely a result of the increased exposure of foreign bribery and the realization that such bribery may cause competitive harm or occur in tandem with other corporate misconduct, like price fixing. The competition law claims may be brought by private plaintiffs following public revelations of an FCPA investigation, as in *NewMarket*.

In at least one notable recent DOJ case, both antitrust and FCPA allegations appeared together. In 2011, Bridgestone Corporation entered into a plea agreement with the DOJ that simultaneously settled charges for conspiracy to violate both the FCPA and the Sherman Act.[47] The Sherman Act charge stemmed from the company's involvement in a price-fixing cartel among manufacturers of marine hose, a type of rubber hose used to transfer oil, while the related FCPA charge arose from bribes that Bridgestone's sales agents paid to officials at state-owned customers in Latin America to secure marine hose contracts and other business. Unlike the FTC's Aircraft Case settlements, the bribery itself did not serve as the predicate for the antitrust charge

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[42] *Id.* at 1066. The defendants subsequently appealed the case to the Supreme Court on the ground that the suit was barred by the act of state doctrine. The Supreme Court affirmed the Third Circuit. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 401–02, 409–10 (1990).

[43] *Morrison*, 130 S. Ct. at 2884.

[44] *Id.* at 2875–76.

[45] *Id.* at 2884.

[46] *Id.*

[47] Plea Agreement as to Bridgestone Corp., United States v. Bridgestone Corp. (S.D. Tex. Oct. 5, 2011) (No. 4:11-00651, ECF No. 21), *available at* http://www.justice.gov/atr/cases/f282400/282479.pdf.

in the *Bridgestone* case, but this case still illustrates how antitrust violations and foreign bribery can occur—and be prosecuted—together.[48]

The second point of convergence is the rise of a compliance-focused enforcement model for both FCPA and antitrust enforcers. For the past few decades, the antitrust enforcement agencies have strived to publicize extensive guidelines and policy statements designed to aid businesses in understanding and complying with the antitrust laws. Among other steps, the FTC and the Antitrust Division of the DOJ have published joint guidelines covering horizontal mergers, non-horizontal mergers, collaborations among competitors, the licensing of intellectual property, and other antitrust topics.[49] The appetite for antitrust guidelines publications was fueled in part by a shift away from an enforcement model based more heavily on courtroom litigation. For example, prior to the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, which introduced mandatory pre-merger waiting periods for antitrust review, the antitrust agencies typically would sue to challenge a merger after the merger had already been consummated.[50] A lengthy litigation might then have ensued, but effective post-merger remedies proved difficult to obtain even in cases the government won.[51] The HSR Act created a new, proactive model of merger review that shifted much of the action away from the courtroom to the pre-merger investigations conducted by the FTC and DOJ. This change, in turn, necessitated well-publicized guidelines to inform businesses about the agencies' mode of legal analysis.

More recent developments signal a parallel trend in the FCPA context. Throughout the boom in FCPA enforcement in the past decade, the DOJ has resolved most cases without litigation—and thus typically without judicial commentary and guidance.[52] In the early 2000s, federal prosecutors began settling FCPA cases via deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).[53] These settlement agreements allow defendants to settle criminal allegations without either a public trial or a guilty plea, while also enabling prosecutors to obtain fines and commitments about future behavior.

With so many FCPA cases resolved out of court, businesses and their lawyers have clamored for the enforcement agencies to provide detailed FCPA guidance documents.[54] In November

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[48] *See* Brass, Chan & Lipshutz, *supra* note 35. This article provides a good discussion of both the *Bridgestone* and *Innospec* cases, discussed above.

[49] *See, e.g.*, Fed. Trade Comm'n, *FTC Guide to the Antitrust Laws*, http://www.ftc.gov/bc/antitrust/index.shtm (linking to various guideline publications); U.S. Dep't of Justice, *Guidelines and Policy Statements*, http://www.justice.gov/atr/public/guidelines.

[50] *See* William J. Baer, Dir., Bureau of Competition, Fed. Trade Comm'n, Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act (Oct. 29, 1996), *available at* http://www.ftc.gov/speeches/other/hsrspeec.shtm.

[51] *Id.*

[52] Judges do occasionally provide some comment on negotiated dispositions. For example, at a plea hearing in the Innospec FCPA case, U.S. District Judge Ellen Huvelle questioned whether the proposed plea agreement applied appropriate cost controls on the proposed independent compliance monitor. *See* Joseph Rosenbloom, *Guard Duty*, Am. Law., Mar. 27, 2012, *available at* http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202547843681.

[53] For statistics on the DOJ's use of these agreements, see *2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements* (Gibson Dunn), Jan. 4, 2011, at 2, *available at* http://gibsondunn.com/publications/Documents/2010Year-EndUpdate-CorporateDeferredProsecutionAndNon-ProsecutionAgreements.pdf. *See also* Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 Am. Crim. L. Rev. 159, 159, 176 (2008) (noting that "prior to December 2004, prosecutors appear never to have resolved a corporate FCPA case through pretrial diversion.").

[54] *See, e.g.*, Letter from the U.S. Chamber of Commerce et al. to Lanny A. Breuer, Assistant Att'y Gen., Criminal Div., U.S. Dept. of Justice, and Robert Khuzami, Dir. of Enforcement, U.S. Sec. & Exch. Comm'n (Feb. 21, 2012) *available at* http://www.instituteforlegalreform.com/doc/letter-to-the-doj-and-sec-regarding-forthcoming-guidance-on-the-foreign-corrupt-practices-act.

2012, the DOJ and the SEC published a comprehensive, 120-page FCPA Resource Guide,[55] which serves a function similar to the antitrust agencies' guidelines by explaining the views of the DOJ and SEC on how to interpret the FCPA, including by way of hypothetical examples.

After the past several years in which the DOJ Criminal Division has relied heavily on deferred prosecution and non-prosecution agreements to resolve FCPA cases, the same types of agreements have begun to show up in the DOJ Antitrust Division's resolution of price-fixing cases as well, though less frequently. In 2010 and 2011, the Antitrust Division entered into five non-prosecution agreements with major financial firms to settle charges arising from a municipal bond bid-rigging conspiracy,[56] a substantial increase in the Antitrust Division's usage of NPAs.[57] In addition, in 2012 and to date in 2013, the DOJ entered into non-prosecution or deferred prosecution agreements with three banks to settle LIBOR rate rigging allegations in cases jointly investigated by the Antitrust Division and the Criminal Division.[58] Even so, the Antitrust Division's use of this tool remains very sparing in comparison with the Criminal Division's FCPA prosecutions, and the recent increase may not signal a new trend, but rather may merely reflect the circumstances of the particular cases involved.

Some commentators have hypothesized that the Antitrust Division may be more hesitant to use NPAs and DPAs because of the perception that these settlements create tension with the Division's Corporate Leniency Program.[59] The Corporate Leniency Program relies on a carrot-and-stick approach to encourage cartel members to stop their illegal conduct and report it to the Division. Under the program, the first corporation to report its involvement in a cartel can potentially avoid criminal conviction, fines, and prison sentences for its employees.[60] Corporations later found to be involved in the cartel typically must either plead guilty or go to trial. This policy creates a strong incentive to be the first party to report involvement in a cartel. The possibility that a corporation could still avoid criminal conviction by negotiating an NPA or DPA, without being the first cartel member to report the cartel, might reduce the incentive for cartel participants to come forward in the first place.[61] In contrast to a cartel situation, in an FCPA case, typically, the bribing company and its employees may be the only parties with knowledge (apart from the foreign official who received the payoff). In those circumstances, absent multiple conspirators, the possibility of

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[55] *See FCPA Resource Guide*, *supra* note 19.

[56] Antitrust Div., U.S. Dep't of Justice, *Division Update* (Spring 2012), *available at* http://www.justice.gov/atr/public/division-update/2012/criminal-program.html.

[57] *See 2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, Gibson Dunn (Jan. 4, 2012), *available at* http://www.gibsondunn.com/publications/Documents/2011YearEndUpdate-CorporateDeferredProsecution-NonProsecutionAgreements.pdf.

[58] *See* Press Release, U.S. Dept. of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay $160 Million Penalty (June 27, 2012), *available at* http://www.justice.gov/opa/pr/2012/June/12-crm-815.html; Press Release, U.S. Dept. of Justice, UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates (Dec. 19, 2012), *available at* http://www.justice.gov/opa/pr/2012/December/12-ag-1522.html; Press Release, U.S. Dept. of Justice, RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates (Feb. 6. 2013), *available at* http://www.justice.gov/opa/pr/2013/February/13-crm-161.html. Certain defendant corporations in the LIBOR investigations also pleaded guilty to charges.

[59] *See Another Antitrust Division Non-Prosecution Agreement—Anomaly or NewTrend?*, *Antitrust Alert*, Akin Gump Strauss Hauer & Feld LLP (Dec. 20, 2011) [hereinafter *Antitrust Alert*], *available at* http://www.akingump.com/communicationcenter/newsalertdetail.aspx?pub=2936.

[60] U.S. Dep't of Justice, Corporate Leniency Policy (1993), *available at* http://www.justice.gov/atr/public/guidelines/0091.htm.

[61] *Antitrust Alert*, *supra* note 59.

avoiding prosecution via NPA or DPA may be the best way to encourage an offending company to report the bribery, rather than to try to hide it.

The third significant developing convergence between FCPA and antitrust enforcement involves frequent, high-level international coordination among enforcement agencies and harmonization of legal regimes for anti-corruption and antitrust. The *Innospec* case, discussed above, provides a good example here, too: The investigation and settlement in that case was coordinated among U.S. authorities and the UK Serious Fraud Office, and the plea agreement included the joint appointment of an independent monitor acceptable to both U.S. and UK authorities.[62] The 2008 FCPA case against German multinational Siemens, in which U.S. and German authorities collaborated, provides another notable instance of cross-border enforcement coordination.[63] Anti-bribery laws and enforcement techniques are also crossing borders; the 2010 UK Bribery Act contains provisions similar to the FCPA, and legislation that would bring DPAs to the UK was introduced in the British Parliament in 2012.[64]

Antitrust authorities from different countries also frequently collaborate on major international investigations. The International Competition Network, founded in 2001 to bring together antitrust authorities from different nations, promotes harmonization of international antitrust legal regimes and coordination among global competition agencies.[65] The OECD and other forums serve a similar function in harmonizing national anti-corruption enforcement regimes. For example, the OECD Working Group on Bribery in International Business Transactions monitors the implementation and enforcement of a 1997 treaty initiated to combat bribery in international business deals.[66] This treaty, which has been adopted by forty countries and which establishes legal standards for criminalizing bribery of foreign public officials in business transactions, helped lay the foundation for the expansion of effective FCPA enforcement in the 2000s.[67] Some observers have called for improved coordination among international anti-bribery enforcement agencies,[68] and the work of the International Competition Network in the antitrust arena might serve as a valuable model.

Conclusion

Abundant differences exist between the legal treatment of foreign bribery and more typical antitrust concerns. Even so, the current trend appears to be one of convergence between anti-corruption and antitrust in certain respects. The continuing globalization of international business cre-

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[62] *See* DOJ Innospec Press Release, *supra* note 34; Plea Agreement as to Innospec, Inc., *supra* note 33, ¶ 13.

[63] *See* Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines, (Dec. 15, 2008) [hereinafter DOJ Siemens Press Release], http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html.

[64] Samuel Rubenfeld, *UK to Move Forward with Deferred-Prosecution Agreements*, Wall St. J. (Oct. 23, 2012), http://blogs.wsj.com/corruption-currents/2012/10/23/uk-to-move-forward-with-deferred-prosecution-agreements; Bribery Act, 2010 (UK).

[65] *See generally* Int'l Competition Network, ICN Factsheet and Key Messages, (2009), http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf.

[66] *See* OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm.

[67] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998), *available at* http://www.oecd.org/corruption/oecdantibriberyconvention.htm. *See also* DOJ Siemens Press Release, *supra* note 63 (noting that high-level cooperation between U.S. and German authorities "including sharing information and evidence, was made possible by the use of mutual legal assistance provisions of the 1997 Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which entered into force on Feb. 15, 1999.").

[68] *See* Philip Urofsky et al., *supra* note 3, at 1179.

ates an environment in which claims of corrupt foreign payments and claims of antitrust violations are likely to arise in the same case. Businesses' desire for predictable and familiar legal rules likely will continue to support a compliance-focused enforcement model, with corporate compliance personnel playing a role in both FCPA and antitrust compliance. Cross-border legal harmonization and enforcement coordination will continue to be driven both by governmental interests in thorough, effective, and efficient enforcement, and by businesses' needs for cost-effective resolution of investigations and clarification of the legal environments in which they operate.

In this environment, antitrust and FCPA practitioners may be able to benefit greatly from each other's knowledge and experiences. For, while not obvious at first, the common threads between antitrust law and anti-corruption law should not be too surprising in light of their shared and overlapping history and development. ●