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COMMERCIAL LAW



ARTICLES:

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FCPA

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VICARIOUS LIABILITY RISKS FACING THE FINANCIAL INDUSTRY UNDER THE FCPA

Ike Adams & Robert Keeling *

I. INTRODUCTION

In 1977, the United States Congress enacted The Foreign Corrupt Practices Act (the “FCPA” or the “Act”) to prohibit U.S. companies from engaging in bribery abroad.¹ The FCPA contains two categories of provisions: (i) anti-bribery provisions that outlaw bribery of foreign officials and (ii) accounting provisions that impose certain accounting transparency requirements on issuers. The FCPA provides for criminal penalties, enforced by the U.S. Department of Justice (“DOJ”), and civil penalties, enforced by the U.S. Securities and Exchange Commission (“SEC”).

For the first two decades of its existence, the FCPA remained a quiet backwater of the U.S. securities and criminal law, with U.S. regulators seldom enforcing the Act. But starting in the late-1990s, the FCPA became a primary tool for U.S. regulators, and the DOJ and SEC began enforcing the FCPA with ever-increasing vigor. Senior DOJ and SEC officials have repeatedly stated that pursuing FCPA cases is one of their agencies’ top priorities. In 2017, Acting Principal Deputy Assistant Attorney General Trevor McFadden stated that FCPA enforcement is “alive as ever” while

* The authors are both partners in Sidley Austin LLP’s Washington D.C. office and have extensive experience handling FCPA investigations and enforcement actions. The authors wish to thank John Lupton and Matthew Letten of Sidley Austin LLP for their assistance in writing this Article.

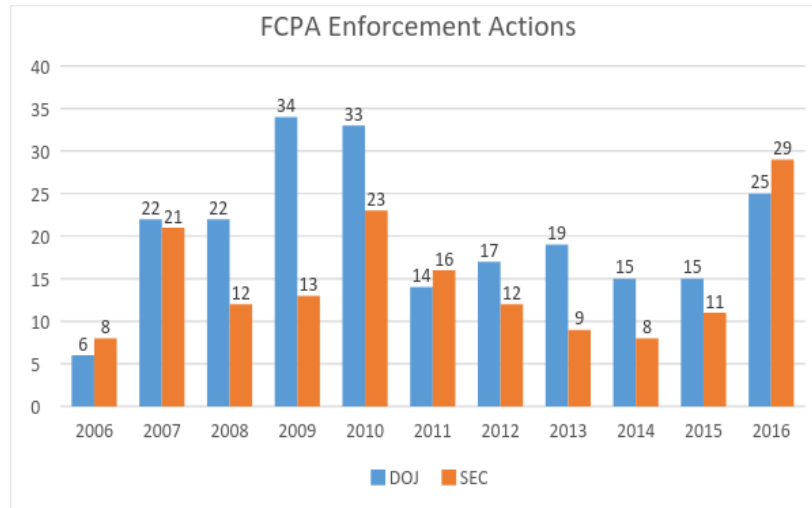
¹ FOREIGN CORRUPT PRACTICES AND DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1977, S. REP. No. 95-114, at 4 (1977); UNLAWFUL CORPORATE PAYMENTS ACT OF 1977, H.R. REP. No. 95-640, at 4-5 (1977) [hereinafter UNLAWFUL CORPORATE PAYMENTS ACT HOUSE REPORT]. The House Report made clear Congress’s concerns:

The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business

touting the results of DOJ's FCPA unit in 2016.² Today, both the DOJ's Criminal Division and the SEC's Enforcement Division have specialized units of attorneys and other professionals dedicated solely to handling FCPA investigations and enforcement.

The government's focus on FCPA enforcement and prosecutions has been relatively steady over the last several years. In November 2015, Assistant Attorney General Leslie Caldwell announced that the DOJ would be adding ten new prosecutors to its FCPA unit, increasing the unit by 50 percent.³ As seen in the charts below, the DOJ and SEC continue to exact large fines from companies while the number of new FCPA cases and publicly reported pending investigations each year remains substantial. This trend is likely to continue as the DOJ and SEC now coordinate investigations with foreign authorities.⁴

FCPA-Related Cases: New enforcement actions instituted by year⁵



² Press Release, DOJ, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden of the Justice Department's Criminal Division Speaks at ACI's 19th Annual Conference on Foreign Corrupt Practices Act (Apr. 20, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-justice-department-s>.

³ Press Release, DOJ, Assistant Attorney General Leslie R. Caldwell Delivers Remarks at American Conference Institute's 32nd Annual International Conference on Foreign Corrupt Practices Act (Nov. 17, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-americanconference>.

⁴ Press Release, DOJ, VimpelCom Limited and United LLC Enter into Global Foreign Bribery Resolution of More than \$795 Million; United States Seeks \$850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016), <https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolutionmore-795-million>.

⁵ *DOJ and SEC Enforcement Actions*, STANFORD LAW SCHOOL, <http://fcpa.stanford.edu/statistics-analytics.html> (last visited Nov. 12, 2017).

In enforcing the FCPA, DOJ and SEC often conduct what have come to be known as “industry sweeps”—investigations of multiple players in a given industry based on suspicion that potential FCPA violations by one company may be endemic across the industry. Financial services is one industry in the government’s crosshairs. In 2015, the SEC brought its first case against a bank under the FCPA⁶ and opened investigations into other financial institutions. At the time, Kara Brockmeyer, the Chief of the SEC’s FCPA Unit, announced, “[f]inancial services providers face unique corruption risks when seeking to win business in international markets, and we will continue to scrutinize industries that have not been vigilant about complying with the FCPA.”⁷ The SEC has been true to its word, bringing additional cases against banks and hedge funds in 2016. As recently as February 2017, the Deputy Chief of the SEC’s FCPA unit told a conference of lawyers, “[a]s far as what else you might see in the FCPA space in the coming year – more significant cases – I think you are likely to see more cases in the financial services sector; I think you will see us using cooperation tools, NPAs and DPAs as appropriate.”⁸ Given the current enforcement climate, banks, hedge funds, and private equity firms should work to improve their FCPA compliance programs and head off potential investigations.

This Article aims to assist the financial industry in understanding and responding to the risks posed by recent enforcement trends. In particular, we focus on the government’s sometimes aggressive and cryptic view of agency liability in charging FCPA violations and its implications for financial services firms. In bringing FCPA charges, the DOJ and SEC have taken a broad view of the persons and entities that might qualify as a corporate agent. Absent indications that the DOJ and SEC will step back from their position on agency liability, a comprehensive compliance program should account for the full scope of potential liability.

The Article begins with a summary of the FCPA and anti-bribery liability for an industry trying to adapt to heightened regulatory scrutiny. We then discuss the enforcement proceedings brought against financial institutions to date and discuss the lessons that might be gleaned from the relatively short history of FCPA enforcement in this area. Next, we analyze the risks of corporate criminal liability based on a principal-agent relationship with particular attention to the potential agency relationships

⁶ *In the Matter of the Bank of New York Mellon Corporation*, Exchange Act Release No. 75720 (Aug. 18, 2015); <https://www.sec.gov/litigation/admin/2015/34-75720.pdf>; Press Release, Sec. and Exch. Comm’n, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015), <https://www.sec.gov/news/pressrelease/2015-170.html>.

⁷ Press Release, SEC, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015), <https://www.sec.gov/news/pressrelease/2015-170.html>.

⁸ Roger Hamilton-Martin, *More Financial Sector Cases “Likely,” Says SEC Foreign Bribery Unit Official*, GLOBAL INVESTIGATIONS REVIEW (Feb. 27, 2017), <http://globalinvestigationsreview.com/article/1106159/more-financialsector-cases-%E2%80%9Clikely%E2%80%9D-says-sec-foreign-bribery-unit-official>.

that might be attributed to financial institutions. Finally, we discuss the key components of an effective compliance program.

II. THE FCPA'S ANTI-BRIBERY PROVISIONS

The FCPA's anti-bribery provisions make it illegal for companies and individuals to bribe, directly or through intermediaries, officials of foreign governments or political parties in order to obtain a business advantage. This section will first describe what constitutes illegal conduct under the FCPA. Then, this section will examine the one exception and two narrow affirmative defenses to FCPA violations. Finally, this section will describe the three categories of potential defendants who are subject to the FCPA anti-bribery provisions.

A. *The Illegal Conduct*

1. What Counts as a Bribe Under the FCPA?

Under the FCPA, a bribe is “an offer, payment, promise to pay, or authorization of the giving of anything of value.”⁹ Although the FCPA does not include a specific definition of what constitutes “a thing of value,” there is a generally accepted definition of the term in other contexts that can be applied to the FCPA. In practice, “anything of value” can take many forms. Regulators, of course, have pursued FCPA cases where the thing of value was cash or cash equivalents (such as stock or bonds),¹⁰ but they have also pursued enforcement actions based on the provision of a wide-range of gifts, such as cars and furs coats;¹¹ excessive travel and entertainment;¹² educational or executive training;¹³ promises of future employment;¹⁴ and many other examples.

⁹ 15 U.S.C. §§ 78dd-1(a) (issuers), 78dd-2(a) (domestic concerns), 78dd-3(a) (foreign entities) (2010).

¹⁰ Compl. at 2, *Sec. and Exch. Comm'n v. Halliburton Co. and KBR, Inc.*, (S.D. Tex. Feb. 11, 2009) (No. 09-cv-399), ECF No. 1;

Info. at 1, *United States v. Kellogg Brown & Root LLC*, (S.D. Tex. Feb. 6, 2009) (No. 09-cr-071), ECF No. 1.

¹¹ *See, e.g.*, Compl. at 5, *Sec. and Exch. Comm'n v. RAE Sys. Inc.*, (D.D.C. Dec. 10, 2010) (No. 10-cv-2093), ECF No. 1; RAE Systems, Non-Prosecution Agreement, 9 (Dec. 10, 2010), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/12-10-10rae-systems.pdf>; Compl. at 13, *Sec. and Exch. Comm'n v. Daimler AG*, (D.D.C. Mar. 22, 2010) (No. 10-cv-473) (armored Mercedes Benz worth €300,000); Info. at 28, *United States v. Daimler AG*, (D.D.C. Mar. 22, 2010) (No. 10-cr-00063).

¹² Compl. at 3, *Sec. and Exch. Comm'n v. UTStarcom, Inc.*, (N.D. Cal. Dec. 31, 2009) (No. 09-cv-6094), ECF No. 1; UTStarcom, Inc., Non-Prosecution Agreement, 5 (Dec. 31, 2009), <https://www.justice.gov/criminal/fraud/fcpa/cases/utstarcom-inc/12-31-09utstarcom-agree.pdf>.

¹³ Compl. at 8, *Sec. and Exch. Comm'n v. Lucent Technologies Inc.*, (D.D.C. Dec. 21, 2007) (No. 07-cv-2301), ECF No. 1; Lucent Technologies Inc., Non-Prosecution Agreement, 8 (Nov. 14, 2007), <https://www.justice.gov/criminal/fraud/fcpa/cases/lucent-tech/11-14-07/lucent-agree.pdf>.

What's more, the bribe in question does not have to be tangible (like money), but can include anything that the recipient subjectively values—even if the benefit does not have readily ascertainable monetary value.¹⁵ For example, gifts given to a foreign official's girlfriend have been considered a "thing of value" to the official for the purposes of a statute concerning domestic gratuity because the official "placed . . . value on the provision of gifts to his girlfriend."¹⁶ In addition, U.S. regulators have viewed gifts to foreign officials' family members or favored charities as "things of value" to the official and pursued FCPA enforcement actions on those bases.¹⁷

Furthermore, the FCPA does not have a *de minimis* exception, and U.S. regulators have pointed out that "what might be considered a modest payment in the United States could be a larger and much more significant amount in a foreign country."¹⁸ But the government has acknowledged that items of nominal value—such as cab fare, reasonable meals and entertainment expenses, or company promotional items—are unlikely to improperly influence an official and therefore have not resulted in enforcement action without more.¹⁹

2. Who Counts as a Foreign Official?

The FCPA only prohibits the bribery of "foreign officials."²⁰ Therefore, it is necessary, although sometimes difficult, to determine who is

¹⁴ *United States v. Gorman*, 807 F.2d 1299, 1304-05 (6th Cir. 1986) (holding that loans and promises of future employment are "things of value").

¹⁵ See, e.g., *United States v. Moore*, 525 F.3d 1033, 1048 (11th Cir. 2008) ("This broad interpretation is based upon a recognition that monetary worth is not the sole measure of value."); see also *United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996) ("The term 'anything of value' . . . is broad in scope and contains no language restricting its application to transactions involving money, goods, or services.") (citation omitted); *United States v. Singleton*, 144 F.3d 1343, 1349 (10th Cir. 1998) ("[C]ourts have uniformly rejected arguments that 'anything of value' should be restricted to things of monetary, commercial, objective, actual, or tangible value."); *United States v. Schwartz*, 785 F.2d 673, 680 (9th Cir. 1986) ("[I]n the ordinary sense *thing of value* is not limited in meaning to tangible things with an identifiable commercial price tag.").

¹⁶ See *United States v. Williams*, 7 F. Supp. 2d 40, 52 (D.D.C. May 29, 1998); see also *United States v. Sun-Diamond Growers*, 941 F. Supp. 1262, 1270 (D.D.C. Sep. 9, 1996) ("[A] thing of value does not necessarily require a direct benefit to the recipient but also includes a potential benefit to third parties."); *Model Penal Code & Commentaries* § 240.0(1) ("[B]enefit' means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested") (emphasis added).

¹⁷ See *United States v. Liebo*, 923 F.2d 1308, 1309, 1311 (8th Cir. 1991); see also *Sec. and Exch. Comm'n v. ScheringPlough Corp.*, Exchange Act Release No. 49838 (June 9, 2004) (order).

¹⁸ U.S. DEP'T OF JUSTICE & SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 15 (2012), <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [hereinafter *FCPA Guide*].

¹⁹ *Id.*

²⁰ *Id.* at 14.

considered a foreign official for purposes of the statute. The FCPA defines a “foreign official” as any officer, employee, or person working on behalf of a foreign government or a public international organization.²¹ The definition also includes officers, employees, and people working on behalf of “any department, agency, or instrumentality” of a foreign government.²² Judicial interpretations have only reinforced this complicated inquiry. In *Esquenazi*, the Eleventh Circuit held that an “instrumentality” under the FCPA is “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”²³ To determine whether the foreign government controls the entity, one should consider a variety of factors including the formal designation, whether the government has a majority interest in the entity, the government’s ability to hire and fire the entity’s principals, the extent to which the entity’s profits go directly to the government’s treasury, the extent to which the government would fund the entity if it failed to break even, and the length of time these indicia have existed.²⁴ When deciding whether the foreign government treats the entity’s function as its own, one should consider whether the entity has a monopoly over the function, whether the government subsidizes the costs associated with the entity, whether the entity provides services to the public at large and whether the foreign government generally perceives the entity to be performing a government function.²⁵ No one factor is dispositive, and the court provided no advice regarding how to weigh the various factors. Thus, financial institutions may find themselves dealing with a mixed bag and wondering what conclusion will be pulled out.

For example, in January 2011, financial news sources revealed that the SEC sent letters to several major banks and private equity firms, requesting information pertaining to their dealings with sovereign wealth funds.²⁶ The SEC reportedly stated in its letters that it considers employees

²¹ 15 U.S.C. §§ 78dd-1(f)(1)(A) (2010) (a foreign official is defined as: “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization”).

²² *Id.*

²³ *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014).

²⁴ *Id.*

²⁵ *Id.* at 926.

²⁶ Dionne Searcey & Randall Smith, *SEC Probes Banks, Buyout Shops Over Dealings with Sovereign Funds*, WALL ST. J (Jan 14, 2011, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704307404576080403625366100>.

of these funds to be “foreign officials” for FCPA purposes.²⁷ Despite the SEC’s stated position, it is far from clear that sovereign wealth funds are, as a category, instrumentalities of foreign governments.²⁸ The instrumentality analysis set out in *Esquenazi* is a fact-specific analysis based on a variety of factors.²⁹ Whether a particular sovereign wealth fund would be considered an instrumentality would depend on the structure of the fund and how it was operated, in particular the “features such as control, exclusivity, hiring and firing authority, subsidization, and how profits are allocated.”³⁰

3. Purpose of the Bribe

The FCPA applies only to payments made for a specific purpose: to encourage the foreign official to help the company obtain or retain business for itself or another.³¹ This requirement has been interpreted to mean that the FCPA covers general activities an entity undertakes to ensure the continued success of a business. It is not limited to only those activities undertaken in order to obtain or retain business on a particular government contract or business opportunity.

In one of the few judicial decisions interpreting the FCPA, the Fifth Circuit held that bribes paid in order to evade customs duties and sales tax can constitute a violation of the Act.³² Defendants David Kay and Douglas Murphy were charged in 2001 with making various payments to Haitian officials to get them to accept shipping documents that underreported ARI’s imports to reduce ARI’s import duties and other taxes. In holding that such payments could be considered violations of the Act, the

²⁷ Searcey & Smith, *supra* note 26. A sovereign wealth fund is “a government investment vehicle which is funded by foreign exchange assets, and which manages those assets separately from official reserves of the monetary authorities.” Martin A. Weiss, Congressional Research Service, *Sovereign Wealth Funds: Background and Policy Issues for Congress* at 4 (Sept. 3, 2008), fpc.state.gov/documents/organization/110750.pdf. It has long been a question whether the DOJ and SEC consider the representations of sovereign wealth funds to be “foreign officials” under the FCPA. Doug Cornelius, *Are Sovereign Wealth Funds State-Owned Enterprises?*, COMPLIANCE BUILDING, (Nov. 4, 2008), <https://www.compliancebuilding.com/2008/11/04/are-sovereign-wealth-funds-state-ownedenterprises/>.

²⁸ Michael D. Mann & Nicholas M. McLean, *New Case May Test the Status of Sovereign Wealth Funds Under the FCPA*, BLOOMBERG LAW (Apr. 3, 2017), <https://www.sidley.com/-/media/publications/spemployees-srlr-432017.pdf>.

²⁹ *Esquenazi*, 752 F.3d at 925.

³⁰ Mann & McLean, *supra* note 29, at 3-4.

³¹ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2010) (a company may not bribe foreign officials “for purposes of . . . influencing any act or decision of such foreign official in his official capacity, . . . inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or . . . securing any improper advantage; or . . . inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist [the company] in obtaining or retaining business for or with, or directing business to, any person”).

³² *United States v. Kay*, 359 F.3d 738, 756 (5th Cir. 2004).

Fifth Circuit concluded that, “Congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements.”³³

4. Corrupt Intent

In order to violate the FCPA, companies must not only bribe a foreign official in order to obtain business but they must do so “corruptly.”³⁴ Although the FCPA does not define what it means to act corruptly, the legislative history of the Act indicates that the word “corruptly” means with an intent or desire to wrongfully influence the recipient.³⁵ The corrupt intent requirement may shed light on the dividing line between a permissible offer to pay for a Chinese official’s lunch between morning and afternoon meetings and impermissibly “wining and dining” the official. Paying for lunch because the official paid for breakfast likely would not implicate the FCPA; paying for a lavish dinner to induce the official to sign a contract would.

5. Success of the Bribe

Because the FCPA focuses on the actions and intentions of the company paying the bribe, the FCPA does not require that the bribe succeed in its purpose. Nor must the foreign official actually solicit, accept, or receive the corrupt payment for the briber to be liable. For example, in one recent enforcement action, Innospec, Inc., a U.S.-and-UK-based chemical company, promised Iraqi government officials approximately \$850,000 in bribes for an upcoming contract. Although Innospec did not, in the end, make the payment, the government alleged that the company violated the FCPA.³⁶ Thus, an executive who authorizes another to bribe a foreign government official to obtain a contract has violated the FCPA even if no bribe is ultimately offered or paid.³⁷

³³ *Kay*, 359 F.3d at 749.

³⁴ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2010).

³⁵ “The word ‘corruptly’ is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function.” UNLAWFUL CORPORATE PAYMENTS ACT HOUSE REPORT, *supra* note 1, at 7; *see also Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber*, 327 F.3d 173, 183 (2d Cir. 2003); *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991).

³⁶ *See* Compl. at 11-12, *Sec. and Exch. Comm’n v. Innospec, Inc.*, (D.D.C. Mar. 18, 2010) (No. 10-cv-448), ECF No. 1; Info. at 8, *United States v. Innospec, Inc.*, (D.D.C. Mar. 17, 2010) (No. 10-cr-61), ECF No. 1.

³⁷ *Id.*

6. Payments Made By Third Parties

The FCPA also prohibits a company from indirectly offering or paying a bribe through a third party.³⁸ An entity can be held liable for the actions of a third party in three different ways: if the company (a) pays a third party, knowing that the payment will be used to bribe a foreign official; (b) authorizes a third party to bribe a foreign official; and (c) if the third party is an agent of the company.

a. Knowing use of a third party for bribery

Under the FCPA, companies may not give money or anything of value to any third party while knowing that the third party will use some portion of the money or thing of value to bribe a foreign official.³⁹ A company can be liable for giving money or something of value to *any* third party that bribes a foreign official. Entities have been held liable for payments made by their distributors,⁴⁰ consultants,⁴¹ joint ventures,⁴² foreign subsidiaries,⁴³ and customs brokers.⁴⁴ Critically, the FCPA does not require that the third party be subject to the FCPA. As such, a company

³⁸ See 15 U.S.C. § 78dd-1(a)(3) (issuers); § 78dd-2(a)(3) (domestic concerns); § 78dd-3(a)(3) (foreign entities) (2010).

³⁹ *Id.* (an entity may not give money or anything of value to “*any person*, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office” (emphasis added)).

⁴⁰ See, e.g., Compl. at 1, *Sec. and Exch. Comm’n v. GE InVision, Inc.*, No. C-05-0660, (N.D. Cal. Feb. 14, 2005) (No. C-05-0660).

⁴¹ See, e.g., Compl. at 3-4, *Sec. and Exch. Comm’n v. Baker Hughes, Inc.*, (S.D. Tex. Apr. 26, 2007) (No. 07-cv-1408), ECF No. 1 (alleging Baker Hughes’ subsidiary made payments to a tax consultant to facilitate receiving a lower tax bill).

⁴² See, e.g., Info. at 18-19, *United States v. Kellogg Brown & Root, LLC*, (S.D. Tex. Feb. 06, 2009) (No. 09-cr-071) (charging KBR under 15 U.S.C. § 78dd-2 with liability for corrupt payments made by a joint venture company of which KBR was a member).

⁴³ See, e.g., *In the Matter of Diagnostic Prods. Corp.*, Exchange Act Release No. 51724 2 (May 20, 2005) (order) (consenting to the entry of an order finding that DPC violated the FCPA by “routinely ma[king] improper commission payments” through its wholly owned foreign subsidiary).

⁴⁴ See, e.g., Press Release, DOJ, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay \$4.2 Million in Criminal Fines (Nov. 21, 2008), <https://www.justice.gov/archive/opa/pr/2008/November/08-crm-1041.html> (alleging Aibel made corrupt payments through a major freight forwarding company to receive preferential treatment in the customs clearance process); Compl. at 4, *Sec. and Exch. Comm’n v. Baker Hughes, Inc.*, (S.D. Tex. Apr. 26, 2007) (No. 07-cv-1408); Press Release, DOJ, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay \$11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007), http://www.justice.gov/opa/pr/2007/April/07_crm_296.html (alleging that Baker Hughes made payments to freight forwarders to import equipment and payments to customs brokers to facilitate the resolution of alleged customs deficiencies).

may be liable for the actions of another entity that has no legal responsibility to avoid such actions.⁴⁵

In order to be liable, the company must have paid a third party “while knowing” that the money or thing of value will subsequently be given to a foreign official. A company may be considered to have known of the bribery if it was actually aware of it or if it was aware that it was substantially certain to occur⁴⁶ and took a deliberate act to avoid learning the truth.⁴⁷ In addition, a company may have “known” of the bribery if it was aware of a “high probability” of the bribery, unless it actually believed it had not occurred.⁴⁸ Although simple negligence is not enough, the FCPA does not require a company to have “actual knowledge.”⁴⁹ A defendant cannot plead lack of “knowledge” by simply looking away when there are red flags. According to the Eighth Circuit in *King*, the FCPA’s knowledge standard encompasses a defendant’s “deliberate ignorance” of FCPA violations.⁵⁰ In that case, the defendant was convicted of violating the FCPA’s bribery provisions because, despite having notice of potential bribery activity at the company in which he was a significant investor, he declined to investigate.⁵¹

The DOJ’s enforcement actions have not been limited to cases where the defendant had actual knowledge. For example, in *Baker Hughes Services International*, the defendant hired a wide range of agents and consultants in connection with the pursuit of a Kazakhstan oil services

⁴⁵ Companies can, of course, use contracts to bind these third parties and then enforce these contractual duties in civil courts, assuming other jurisdictional requisites are met, but the DOJ and SEC would be without means to pursue the third parties directly.

⁴⁶ 15 U.S.C. §§ 77dd-1(f)(2), 78dd-2(h)(3), 78dd-3(f)(3) (2010) (“A person’s state of mind is ‘knowing’ with respect to conduct, a circumstance, or a result if (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur. (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist”).

⁴⁷ See *Global-Tech Appliances, Inc. v. SEB Inc.*, 563 U.S. 754, 769 (2011).

⁴⁸ *Id.*

⁴⁹ Specifically, the Conference Agreement indicates “that the requisite ‘state of mind’ for this category of offense include a ‘conscious purpose to avoid learning the truth.’” Thus, while “‘simple negligence’ or ‘mere foolishness’ should not be the basis for liability... the Conferees also agreed that the so-called ‘head-in-the-sand’ problem—variously described in the pertinent authorities as ‘conscious disregard,’ ‘willful blindness,’ or ‘deliberate ignorance’—should be covered so that management officials could not take refuge from the Act’s prohibitions by their unwarranted obliviousness to any action (or inaction), language or other ‘signaling device’ that should reasonably alert them of the high probability of an FCPA violation.” As such, the law is intended to cover “any instance where ‘any reasonable person would have realized’ the existence of the circumstances or result and the defendant has ‘consciously chose[n] not to ask about what he had ‘reason to believe’ he would discover.” H.R. REP. NO. 100-576, at 919-921 (1988) (Conf. Rep.) (internal citations omitted).

⁵⁰ *United States v. King*, 351 F.3d 859, 866-67 (8th Cir. 2002).

⁵¹ *Id.* at 863-64.

tender.⁵² The agents were paying bribes to foreign officials, and the company both failed to conduct due diligence on the agents and failed to place clear boundaries on the agents' conduct to prevent corrupt payments.⁵³ The DOJ asserted that the company satisfied the "knowing" standard because it freely funded its agents' activities without knowing exactly what those operations entailed.⁵⁴ Accordingly, companies should continue to ensure that third parties are not violating the FCPA throughout the business relationship and should always respond to any red flags that might emerge.

b. Authorization

The FCPA also prohibits companies from corruptly authorizing the payment of a foreign official.⁵⁵ For example, a company could be liable under the Act if it authorized a third party or subsidiary to make a corrupt payment to a foreign official for the purpose of obtaining business.⁵⁶ The statute does not specifically define "authorization," but the legislative history suggests that authorization does not have to be explicit: it can include any manifestation of assent or direction to carry out the conduct.⁵⁷

While liability based on "authorization" is not wholly independent from liability based on third party payments discussed above,⁵⁸ the authorization provisions do create a new path for liability where the money trail does not clearly link the accused company to the corrupt payment. This can be particularly significant in the context of a foreign subsidiary, where the parent company benefits from the subsidiary's corrupt acts, but the parent does not directly fund the transaction. Since the foreign

⁵² Info. at 12, *United States v. Baker Hughes Servs. Int'l. Inc.*, (S.D. Tex. Apr. 11, 2007) (No. 07-cr-0129).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2010).

⁵⁶ See, e.g., *Faro Technologies, Inc.*, Non-Prosecution Agreement 1 (June 3, 2008), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/06-03-08faro-agree.pdf> (alleging that Faro, through its subsidiary Faro China, authorized corrupt payments to employees of Chinese state-owned or controlled entities to secure business for Faro); *In the Matter of Schnitzer Steel*, Exchange Release No. 54606 4-5 (Oct. 16, 2006) (order), <https://www.sec.gov/litigation/admin/2006/34-54606.pdf> (noting that Schnitzer Steel authorized corrupt payments through its foreign subsidiary); see also Info. at 4, *United States v. AGA Medical Corp.*, (D. Minn. June 3, 2008) (No. 08-CR-172), discussed *infra* Section IV(B).

⁵⁷ See UNLAWFUL CORPORATE PAYMENTS ACT HOUSE REPORT, *supra* note 1, at 8 (1977).

⁵⁸ Subsection (a) in each of the corrupt payment provisions of the FCPA (§§ 77dd-1(a) (issuers), 78dd-2(a) (domestic concerns), and 78dd-3(a) (other entities)) contains prohibitions of both corrupt payments and the *authorization* of corrupt payments. These prohibitions apply to three groups: foreign officials (subsection (a)(1)), political party officials or candidates (subsection (a)(2)), and "any person" knowing that the ultimate recipient would be a foreign official, party official, or candidate (subsection (a)(3)). The last of these three provisions is the "third party payee" language discussed previously. See *supra* Part II.

subsidiary may not be subject to the jurisdiction of the FCPA,⁵⁹ government regulators may pursue the parent company by arguing that it “authorized” the subsidiary’s conduct.⁶⁰ Thus, companies with foreign subsidiaries or engaged in foreign joint ventures may need to require the entities to implement FCPA compliance programs to make it clear that the company does not authorize improper payments.

C. Agency Relationship

An entity also may be liable under the FCPA for actions of a third party if the third party is its “agent,” as defined by the common law. An “agent” is a legal term of art and encompasses those who “act on the principal’s behalf and subject to the principal’s control.”⁶¹ Under U.S. law, a principal may be criminally liable for the actions of a third party agent when the agent acted within the scope of authority granted by the principal.⁶² A company’s employees, for example, are typically its agents under common law, and their conduct can be imputed to the company. But the term “agent” can also encompass non-employees. The implications of the agency relationship for financial institutions under the FCPA are a focus of this Article.

B. Exception and Defenses

The FCPA contains one exception for “routine governmental action” and two narrow affirmative defenses. The exception states that the anti-bribery provisions do not apply to “facilitating or expediting payments” made to foreign officials to get them to carry out “routine governmental action.”⁶³ According to the Act, a “routine governmental action” is a commonly performed, usually procedural action taken by a foreign official.⁶⁴ The Act provides some examples, including “obtaining permits,

⁵⁹ See *infra* Part II.C (discussing FCPA jurisdiction).

⁶⁰ See, e.g., Compl. at 7, *Sec. and Exch. Comm’n v. Westinghouse Air Brake Technologies Corp.*, (E.D. Penn. Feb. 14, 2008) (No. 2:08-CV-00706), <https://www.sec.gov/litigation/complaints/2008/comp20457.pdf> (alleging the authorization of corrupt acts by a wholly-owned subsidiary). A subsidiary need not be wholly-owned or controlled to provide a basis for the parent company’s liability under the FCPA. What matters is the actual level of involvement—*i.e.*, oversight and control—by the parent company. See DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT §§ 6-5 - 6-13 (Practising Law Inst., 17th ed. 2012) (discussing noncontrolled foreign subsidiaries).

⁶¹ RESTATEMENT (THIRD) OF AGENCY, § 1.01 (Am. Law Inst. 2006) (defining “agency” as “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”).

⁶² *Id.* § 2.04 (Respondeat Superior).

⁶³ The anti-bribery provisions “shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.” 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2010).

⁶⁴ 15 U.S.C. §§ 78dd-1(f)(3)(A), 78dd-2(h)(4)(A), 78dd-3(f)(4)(A) (2010).

licenses, or other official documents to qualify a person to do business in a foreign country,” “providing police protection,” or “providing phone service, power and water supply.”⁶⁵ Decisions to award new business or to continue a business relationship or actions by individuals affecting the decision-making process are *not* “routine governmental actions.”⁶⁶ While the purpose of the payment ultimately determines whether a payment constitutes a “facilitating or expediting payment,” the size of the payment is also a factor—the larger it is, the more likely it is meant to influence a non-routine action.⁶⁷ In short, while it is legal to pay an official to perform some procedural function or to perform it faster, an FCPA violation occurs if a payment is made to an official to influence a substantive decision.

The defenses to the FCPA are limited. The first affirmative defense is available where an act otherwise prohibited by the FCPA is permitted under the *written* laws or regulations of the foreign official’s country. For example, if a country had a written law that explicitly made it legal for a company to make a contribution to the charity of a foreign official’s choosing, while that official was determining whether to allocate a government contract to the company, the defense may be available. This defense is not available, however, where a payment is lawful under a country’s custom or practice.⁶⁸ In practice, this defense is rarely available because few countries explicitly authorize the types of payments to their government officials that are covered by the FCPA.

The second affirmative defense is available when a payment, gift, offer, or promise is made as a reasonable and bona fide expenditure—such as travel or lodging expenses. The bona fide expenditure must be directly related to either “the promotion, demonstration, or explanation of products or services” or the performance of a contract with a foreign government, which will depend on the specific facts involved.⁶⁹ For example, a company may be able to pay for foreign officials’ travel, lodging, and expenses to visit the company’s factory in the United States. Some have questioned the utility of this affirmative defense, arguing that any payment

⁶⁵ 15 U.S.C. §§ 78dd-1(f)(3)(A), 78dd-2(h)(4)(A), 78dd-3(f)(4)(A) (2010). (“[A]n action which is ordinarily and commonly performed by a foreign official in (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.”)

⁶⁶ “The term ‘routine governmental action’ does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.” 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B) (2010).

⁶⁷ *FCPA Guide*, *supra* note 18, at 14-15.

⁶⁸ 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c).

⁶⁹ *Id.*

related to a bona fide expenditure would not be implicated by the FCPA in the first place because there was no corrupt intent. In other words, the affirmative defense seems to protect payments that are not otherwise prohibited by the FCPA.⁷⁰

C. Parties Subject to the FCPA Anti-Bribery Provisions

In order for a company to be subject to the FCPA anti-bribery provisions, it must fall into one of the three categories of potential defendants included in the statute, and the U.S. government must have jurisdiction over it as a result of some connection to the United States.⁷¹ The first category includes entities that are “issuers” under the securities laws. The second includes non-issuers that constitute “domestic concerns.” The third category includes entities that are neither issuers nor domestic concerns but that take some action related to the illegal activity while in the territory of the United States.⁷² By taking action within the United States, these entities fall under the jurisdiction of the U.S. government. In order for the U.S. government to have jurisdiction over an issuer or domestic concern, it must be a U.S. person or have engaged in interstate commerce. Additionally, the government may obtain jurisdiction over any entity under conspiracy and aiding and abetting charges.

1. Issuers and Domestic Concerns

Any company that is considered an “issuer” under the securities laws is subject to the FCPA.⁷³ In practice, any company (including foreign companies) with a class of securities listed on a national securities exchange in the U.S. is considered an issuer under the FCP.⁷⁴ Additionally, officers,

⁷⁰ See Kyle Sheahan, *I'm Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT'L L.J. 464, 478 (2010) (“[I]t is unclear how a defense permitting only ‘reasonably and bona fide payments’ would help FCPA defendants since the government must allege that the payments were made corruptly.”).

⁷¹ See 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (2010).

⁷² One decision narrowly interpreting the scope of the FCPA’s anti-bribery provisions deserves particular mention. On February 19, 1991, the U.S. Supreme Court declined to review a Sixth Circuit decision, *Lamb v. Philip Morris, Inc.*, 915 F.2d 1024, 1028-29 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 961 (1991), holding that there is no private right of action under the FCPA. Relying on the FCPA’s legislative history to reach its decision, the court said that Congress designed the FCPA primarily to protect the integrity of U.S. foreign policy and domestic markets and never intended a private right of action under the Act.

⁷³ A company is an “issuer” under the FCPA if it has a class of securities registered with the SEC under Section 12 of the Securities Exchange Act of 1934 (“Exchange Act”) or is required to file periodic and other reports with the SEC under Section 15(d) of the Exchange Act. 15 U.S.C. § 781 (2015).

⁷⁴ A company with a class of securities quoted in the over-the-counter market in the United States is also considered an issuer. *Id.*

directors, employees, agents, or stockholders acting on behalf of an issuer can be prosecuted for FCPA violations.⁷⁵

Even if a company is not an “issuer” under the FCPA, the Act will still apply if the party is a “domestic concern.”⁷⁶ Domestic concerns include all U.S. citizens, nationals, and residents. In addition, the Act covers any company, partnership, trust, etcetera, which has its principal place of business in the U.S. or is organized under the laws of a state, territory, possession, or commonwealth of the U.S.⁷⁷

The government may obtain jurisdiction over an issuer or domestic concern if the entity is a U.S. person. The definition of a U.S. person is more limited than the definition of a domestic concern. A U.S. person must either be a citizen of the United States, a non-citizen owing permanent allegiance to the United States, or a business entity organized under the laws of the United States.⁷⁸ If an issuer or a domestic concern is also a U.S. person, the government need not prove any additional connection to the United States to assert jurisdiction under the FCPA.

Even if an issuer or domestic concern is not a U.S. person, the government may assert jurisdiction over the issuer or domestic concern if it was engaged in “interstate commerce.”⁷⁹ The government has taken an aggressive stance on what kind of conduct satisfies interstate commerce. For example, the *Resource Guide to the Foreign Corrupt Practices Act* states that placing a telephone call or sending an e-mail, text message, or fax from, to, or through the U.S. involves interstate commerce, as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system.⁸⁰ In addition, the defendant need not intend to use or even know it is using interstate commerce.⁸¹ Accordingly, the U.S. government is likely to assert jurisdiction over any issuer or domestic concern, even if it does not fit the definition of a U.S. person, because of the likelihood that the issuer or domestic concern will take an action that fits the government’s definition of interstate commerce.

2. Acting While In the U.S.

An entity that is neither an issuer nor a domestic concern can still fall within the statute if that entity, either directly or through an agent, engages in *any* act in furtherance of a corrupt payment while in U.S.

⁷⁵ See 15 U.S.C. § 78dd-1.

⁷⁶ See FCPA, § 104, codified as amended at 15 U.S.C. § 78dd-2.

⁷⁷ See 15 U.S.C. § 78dd-2(h)(1).

⁷⁸ See 15 U.S.C. § 78dd-1(g)(2) (citing The Immigration and Nationality Act, 101(a)(22), 8 U.S.C. § 1101(a)(22) (1965)).

⁷⁹ See 15 U.S.C. §§ 78dd-1, 78dd-2.

⁸⁰ See *FCPA Guide*, *supra* note 18, at 11.

⁸¹ See *Sec. and Exch. Comm’n v. Straub, et al.*, 921 F. Supp. 2d 244 (S.D.N.Y. 2013).

territory.⁸² Moreover, the act taken within the United States will allow the U.S. government to assert jurisdiction over the foreign company. Additionally, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities may be subject to the FCPA's anti-bribery provisions. For example, if the officer of a foreign company attends a meeting in the United States that in some way furthers the payment of a bribe in China, the foreign company may be liable under the FCPA, even though it is neither an issuer nor a domestic concern.

Unlike issuers and domestic concerns, the U.S. government cannot assert jurisdiction over a foreign entity simply because the entity engaged in interstate commerce; the foreign entity must have undertaken some action in furtherance of a corrupt payment while in U.S. territory. This jurisdictional hook is theoretically more stringent. The legislative history of the FCPA indicates that the defendant must take some action while "physically present" within the territory of the U.S.⁸³ The DOJ and SEC, however, have pursued an expansive interpretation of the "while in the territory" requirement, interpreting the section to confer jurisdiction even when only the agent of a foreign defendant acts within the territory of the U.S.⁸⁴

Because many FCPA cases are settled without litigation, the DOJ's expansive interpretation of the "while in the territory" jurisdictional provision has not received significant judicial scrutiny. A rare exception came in the summer of 2011 when a U.S. court dismissed a FCPA charge for lack of jurisdiction. The DOJ's charge was premised on the defendant's sending a DHL package from the United Kingdom to Washington, D.C. that contained a purchase agreement in furtherance of the allegedly corrupt deal.⁸⁵ The court held that this action alone did not constitute activity "within the territory of the U.S." for the purposes of the FCPA.⁸⁶ Until courts further develop the law regarding this type of jurisdiction, companies should assume that U.S. regulators will continue to pursue their expansive interpretation of "while in the territory," and they should take the necessary steps to minimize the risk of FCPA liability.

3. Conspiracy and Aiding and Abetting

Even if an entity does not fall into any of the three categories just discussed, it may still be vicariously liable for the actions of an entity that is covered by the FCPA. Conspiracy jurisdiction allows jurisdiction over all

⁸² See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302; 15 U.S.C. § 78dd-3(a); see also *FCPA Guide*, *supra* note 18, at 11.

⁸³ H.R. REP. NO. 105-802, at 21-22 (1998), <http://www.gpo.gov/fdsys/pkg/CRPT105hrpt802/pdf/CRPT-105hrpt802.pdf>.

⁸⁴ See *FCPA Guide*, *supra* note 18, at 11-12.

⁸⁵ See *United States v. Goncalves, et al.*, (D.D.C. June 6, 2011) (No. 09-CR-0335).

⁸⁶ See Hr'g Tr. at 10, *United States v. Goncalves, et al.*, (D.D.C. June 6, 2011) (No. 09-CR-0335), ECF No. 434.

co-conspirators even if only *one* conspirator is subject to FCPA jurisdiction in its own right.⁸⁷ Relatedly, prosecutors can pursue an entity that aids and abets an FCPA violation by an entity under U.S. jurisdiction. Thus, an individual or entity that has not committed an act in furtherance of an FCPA violation within the United States and that is not otherwise subject to direct jurisdiction under the Act, may be subject to jurisdiction as a coconspirator or abettor so long as there is jurisdiction over one co-conspirator or principal.⁸⁸ One federal district court has placed limitations on this expansive reading,⁸⁹ but it is unclear whether these restrictions will be more widely adopted in other jurisdictions.

III. THE FCPA ACCOUNTING PROVISIONS

The FCPA's accounting provisions apply only to issuers. There are two main aspects of the accounting provisions: (i) the books and records requirements and (ii) the internal controls requirement.⁹⁰

The books and records provision of the FCPA requires issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."⁹¹ In other words, the books and records must accurately depict the issuer's economic activity.

The internal controls provisions require issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

- (i) transactions are executed in accordance with management's general or specific authorization;
- (ii) transactions are recorded as necessary

⁸⁷ See 18 U.S.C. § 371 ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.").

⁸⁸ Charging a party with conspiracy and aiding and abetting has additional benefits for the government. Because the acts of one conspirator are attributable to other members of the conspiracy, conspiracy charges are easier to prove. If a member of a criminal conspiracy does at least one overt act, then all the members of the conspiracy are considered to have committed the crime. Additionally, conspiracy charges help the government avoid problems with the statute of limitations for substantive FCPA offenses, which is only five years. The limitations period for FCPA-related conspiracies can reach back much further because conspiracy is a continuing offense. The statute of limitations begins to run on the date of the last overt act, so prosecutors can charge parties under a conspiracy theory even when their evidence of a substantive violation has gaps.

⁸⁹ *United States v. Hoskins*, Crim. No. 3:12cr238(JBA) (D. Conn. Aug. 13, 2015). The decision in *Hoskins* is currently on appeal before the Second Circuit.

⁹⁰ See 15 U.S.C. § 78m(b)(2)(A)-(B).

⁹¹ 15 U.S.C. § 78m(b)(2)(A).

(I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and

(II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.⁹²

Although the accounting provisions were added to the Exchange Act by the FCPA, the provisions are not limited to accounting for questionable payments or bribes. As such, a violation of the accounting provisions need not be related to a violation of the FCPA's anti-bribery provisions.

A. Civil Liability for Issuers, Subsidiaries, and Affiliates

The FCPA's accounting provisions apply to every issuer that has a class of securities registered under Section 12 of the Exchange Act or that is required to file annual or other periodic reports pursuant to Section 15(d) of the Exchange Act.⁹³ These provisions also apply to any issuer with securities traded on a national securities exchange in the United States, including foreign issuers with exchange-traded ADRs.⁹⁴ Additionally, the accounting provisions apply to companies with securities traded in the over-the-counter market in the United States and which file periodic reports with the Commission.⁹⁵ Accordingly, the FCPA accounting provisions will not apply to private equity firms and hedge fund managers unless they are, or

⁹² 15 U.S.C. § 78m(b)(2)(B).

⁹³ FCPA, Pub. L. No. 95-213, § 102, 91 Stat. 1494 (1977).

⁹⁴ See, e.g., *SEC v. Technip*, No. 4:10-cv-2289 (S.D. Tex. June 28, 2010); *United States v. Technip*, No. 10-CR-439 (S.D. Tex. June 28, 2010); see also Admin. Proceeding Order, *In re Diageo plc*, Exchange Act Release No. 64978 (July 27, 2011), <http://www.sec.gov/litigation/admin/2011/34-64978.pdf>; Admin. Proceeding Order, *In re Statoil, ASA*, Exchange Act Release No. 54599 (May 29, 2009) <http://www.sec.gov/litigation/admin/2006/34-54599.pdf>; Criminal Information, *United States v. Statoil, ASA*, No. 06-cr-960 (S.D.N.Y. 2006), <http://www.justice.gov/criminal/fraud/fcpa/cases/statoil-asa-inc/10-13-09statoil-information.pdf>.

⁹⁵ 15 U.S.C. § 78o.

are a subsidiary of, an issuer—even if they are registered with the SEC as an investment adviser.⁹⁶

Although the FCPA’s accounting requirements are directed at “issuers,” an issuer’s books and records include those of its consolidated subsidiaries and affiliates. An issuer’s responsibility thus extends to ensuring that subsidiaries or affiliates under its control, including direct and indirect foreign subsidiaries in which they own a majority interest, comply with the accounting provisions.

Of course, companies may not be able to exercise the same level of control over a minority-owned subsidiary or affiliate as they do over a majority or wholly owned entity. Therefore, if a parent company owns 50% or less of a subsidiary or affiliate, the parent is only required to use its best efforts to cause the minority-owned subsidiary or affiliate to devise and maintain a system of internal accounting controls consistent with the issuer’s own obligations under the FCPA.⁹⁷ In evaluating an issuer’s good faith efforts, all the circumstances—including “the relative degree of the issuer’s ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located”—are taken into account.⁹⁸

B. Civil and Criminal Liability for Individuals

Individuals also face civil liability under the accounting provisions of the FCPA. First, individuals may be held civilly liable for aiding and

⁹⁶ Although private companies typically are not covered by the books and records and internal controls provisions of the FCPA and do not fall within SEC’s jurisdiction, such companies generally are required by federal and state tax laws and state corporation laws to maintain accurate books and records sufficient to properly calculate taxes owed. Further, most large private companies maintain their books and records to facilitate the preparation of financial statements in conformity with GAAP to comply with financial institutions’ lending requirements.

⁹⁷ See Section 13(b)(6) of the Exchange Act, 15 U.S.C. § 78m(b)(6), which provides that where an issuer “holds 50 per centum or less of the voting power with respect to a domestic or foreign firm,” the issuer must “proceed in good faith to use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with [Section 13(b)(2)].”

⁹⁸ See 15 U.S.C. § 78m(b)(6). Congress added the language in sub-section 78m(b)(6) to the FCPA in 1988, recognizing that “it is unrealistic to expect a minority owner to exert a disproportionate degree of influence over the accounting practices of a subsidiary.” H.R. Rep. No. 100-576, at 917 (1988). The Conference Report noted that, with respect to minority owners, “the amount of influence which an issuer may exercise necessarily varies from case to case. While the relative degree of ownership is obviously one factor, other factors may also be important in determining whether an issuer has demonstrated good-faith efforts to use its influence.” *Id.*; see also S. Rep. No. 100-85, at 50 (1987).

abetting or causing an issuer's violation of the accounting provisions.⁹⁹ Second, an issuer's officers and directors may also be held civilly liable for making false statements to a company's auditor. This liability arises in connection with any audit, review, or examination of a company's financial statements or in connection with the filing of any document with SEC. Finally, the principal executive and principal financial officer, or persons performing similar functions, can be held liable for violating Exchange Act Rule 13a-14 by signing false personal certifications required by Sarbanes-Oxley ("SOX").

The DOJ can also hold an individual criminally liable for "knowingly" falsifying any book, records, or account, or circumventing or failing to implement a system of internal accounting controls.⁹³ When Congress amended the FCPA, it indicated that the "knowingly" language was "meant to ensure that criminal penalties would be imposed where acts of commission or omission in keeping books or records or administering accounting controls have the *purpose* of falsifying books, records, or accounts" or of circumventing internal controls.¹⁰⁰ Congress's focus on purposefulness suggests that it meant "knowingly" to be more than an awareness of or reckless disregard for the circumstances. Based on the legislative history, it appears that Congress intended to impose criminal liability only if there was a willful intent to violate the accounting provisions.

IV. FCPA CASES TO DATE INVOLVING THE FINANCIAL INDUSTRY

Legal commentators have increasingly warned the financial services industry that the government would ramp up its scrutiny of banks and other financial institutions.¹⁰¹ While only a handful of concluded FCPA cases to date have involved the industry, the trend is apparent. The SEC brought its first case against a bank in 2015 and around that time SEC and DOJ opened several other investigations into financial institutions.¹⁰² In addition, the government has repeatedly expressed that this industry must comply with the FCPA,⁹⁶ suggesting that banks and financial institutions should remain vigilant of potential FCPA violations and maintain a robust compliance program.

⁹⁹ Section 20(e) of the Exchange Act, titled "Prosecution of Persons Who Aid and Abet Violations," explicitly provides that for purposes of a civil action seeking injunctive relief or a civil penalty, "any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this title, or of any rule or regulation issued under this title, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided." Section 20(e) of the Exchange Act, 15 U.S.C. § 78t(e).

¹⁰⁰ H.R. Rep. No. 100-576, at 916-17 (1988) (emphasis added).

¹⁰¹ See Michael Volkov, 2015: The Year of FCPA Liability for Financial Institutions?, VOLKOV LAW (Feb. 1, 2015), <http://blog.volkovlaw.com/2015/02/2015-year-fcpa-liability-financial-institutions/>; see also Bailey McCann, Financial Firms Can't Ignore the Foreign Corrupt Practices Act, INSTITUTIONAL INVESTOR (Sep. 4, 2015).

¹⁰² *Id.*

A. BNY Mellon & JP Morgan Chase

On August 18, 2015, the Bank of New York Mellon (“BNY Mellon”) settled with the SEC in the government’s first FCPA case against a bank for \$14.8 million.¹⁰³ The SEC found that BNY Mellon gave valuable internships to family members of sovereign wealth fund officials in violation of the FCPA anti-bribery provisions.¹⁰⁴ According to the SEC investigation, sovereign wealth fund officials requested these internship opportunities for their family members.¹⁰⁵ In order to strengthen the company’s business ties with these funds, senior BNY Mellon officials approved hiring the family members outside its existing hiring process.¹⁰⁶ Prospective interns normally face a highly competitive application process, including multiple interviews and a minimum grade point average. However, these relatives were hired separately from this process and failed to meet the internship program’s rigorous criteria.¹⁰⁷

While BNY Mellon had an FCPA compliance policy at the time, the SEC noted the company’s lack of internal controls to protect the integrity of its hiring practices. For instance, top managers had discretion to approve hires requested by foreign officials, without human resources checking for any potentially problematic hires. The SEC concluded that BNY Mellon’s system was “insufficiently tailored to the corruption risks” inherent in the industry.

In a similar vein, in November 2016, JPMorgan Chase & Co. (“JPMorgan”) and its Hong Kong-based subsidiary, JPMorgan Securities (Asia Pacific) Limited (“JPMorgan-APAC”) agreed to pay over \$202 million to settle FCPA charges with the SEC and DOJ related to hiring job applicants who were referred by clients and government officials.¹⁰⁸ The

¹⁰³ Order Instituting Cease and Desist Proceedings, *In the Matter of The Bank of New York Mellon Corporation*, File No. 3-16762 (Aug. 18, 2015), <https://www.sec.gov/litigation/admin/2015/34-75720.pdf>; Press Release, SEC, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015), <https://www.sec.gov/news/pressrelease/2015-170.html>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See Ben Protess & Jessica Silver-Greenberg, *JPMorgan Is Said to Settle Bribery Case Over Hiring in China*, N.Y. TIMES, Nov. 16, 2016; Aruna Wiswanatha, *J.P. Morgan to Pay \$264 Million to End Criminal, Civil Foreign Corruptions Cases*, WALL ST. J., Nov. 17, 2016, <http://www.wsj.com/articles/BT-CO-20161117-707122>.

banks also agreed to pay a \$62 million civil penalty to the Federal Reserve for the same conduct.¹⁰⁹

As part of the DOJ Non-Prosecution Agreement, JPMorgan-APAC admitted to operating a client referral hiring program from 2006 through 2013—the “Sons and Daughters Program”—designed to provide jobs and internships to the relatives and friends of clients and government officials.¹¹⁰ The Agreement described how JP Morgan-APAC employees circumvented the existing compliance screening process by providing false information in questionnaires designed to disclose whether a referred applicant was qualified for the position and whether the bank expected to receive a benefit for the hire.¹¹¹ The DOJ cited communications among bank employees detailing how the referred applicants were less qualified, had poor job performance, but were hired in order to secure certain business opportunities for the bank. The SEC found that JPMorgan-APAC hired approximately 200 interns and full-time employees during this period at the request of its clients, prospective clients, and foreign government officials.¹¹²¹¹³

Besides the settlements with BNY Mellon and JPMorgan, the hiring practices of several other banks have reportedly been the subjects of FCPA investigations. Barclays disclosed in 2016 that it was cooperating with the DOJ and SEC “in relation to an investigation into certain of its hiring practices in Asia.”¹¹⁴ Similarly, Citigroup announced in a February 2017 10-K filing that it was cooperating with a FCPA investigation related “to the hiring of candidates referred by or related to foreign government officials.”¹¹⁵

¹⁰⁹ See Press Release, Board of Governors of the Federal Reserve System (Nov. 17, 2016), <https://www.federalreserve.gov/newsevents/press/enforcement/20161117a.htm>; Cease and Desist Order, In the Matter of: J.P. Morgan Chase & Co., 16-22-B-HC, 16-22-CMP-HC (Nov. 17, 2016), <https://www.federalreserve.gov/newsevents/press/enforcement/enf2016117a1.pdf>. While the Federal Reserve lacks FCPA enforcement authority, it can bring cease-and-desist proceedings against any federally insured depository institutions to halt, among other things, an “unsafe or unsound practice.” 18 U.S.C. § 1818(b)(1).

¹¹⁰ See Non-Prosecution Agreement, JPMorgan Securities (Asia Pacific) Limited Criminal Investigation (Nov. 17, 2016), <https://www.justice.gov/opa/press-release/file/911206/download>.

¹¹¹ *Id.* at A-5.

¹¹² Cease-and-Desist Order, In the Matter of JP Morgan Chase & Co. (Nov. 17, 2016), <https://www.sec.gov/litigation/admin/2016/34-79335.pdf>.

¹¹³ Barclays PLC, Annual Report (Form 10-K) (2015), BARCLAYS PLC at 304, https://www.home.barclays/content/dam/barclayspublic/docs/InvestorRelations/AnnualReports/AR2015/Barclays_PLC_Annual_Report_%202015.pdf.

¹¹⁴ Margot Patrick, *Barclays Falls Under SEC Spotlight for Asian Hiring*, WALL ST. J. Mar. 1, 2016, <https://www.wsj.com/articles/barclays-falls-under-sec-spotlight-for-asian-hiring-1456826347>.

¹¹⁵ Citigroup Inc., Annual Report (Form 10-K) (Feb. 24, 2017), <https://www.sec.gov/Archives/edgar/data/831001/000083100117000038/c-12312016x10k.htm>.

B. Och-Ziff Hedge Fund

In September 2016, the SEC and DOJ settled FCPA charges with Och-Ziff Capital Management related to bribes paid to African government officials for \$412 million.¹¹⁶ The settlement with Och-Ziff, the largest publicly traded U.S. hedge fund with \$39 billion under management, represented the fourth-largest FCPA enforcement action ever.¹¹⁷ Under the settlement, Och-Ziff settled charges with the SEC and entered into a Deferred Prosecution Agreement with the DOJ, while its African subsidiary agreed to plead guilty to criminal charges of conspiring to violate the FCPA.¹¹⁸ The CEO and CFO of the hedge fund also agreed to settle SEC charges that they had caused FCPA violations, while the government is reportedly considering charges against other investors associated with the illicit payments.¹¹⁹

The bribery charges against Och-Ziff stemmed primarily from the misconduct of two senior employees in pursuit of investment opportunities across several African countries from 2005 to 2015, including the Democratic Republic of the Congo (“DRC”), Libya, Guinea, Chad, and Niger. The transactions included an investment by the Libyan Investment Authority (“LIA”) sovereign wealth fund of \$300 million into Och-Ziff funds, a loan used to purchase mining assets in the DRC, and the purchase of shares in an oil exploration company doing business in Guinea.¹²⁰ In these transactions, the government alleged that the relevant Och-Ziff employees knew or were willfully blind to the high probability that the bribes were being paid.

¹¹⁶ Michael Rothfeld & Christopher Matthews, *Och-Ziff to Pay \$412 Million in Bribery Case*, WALL ST. J., Sept. 28, 2016, <https://www.wsj.com/articles/och-ziff-to-settle-civil-bribery-probe-1475176413>.

¹¹⁷ *Id.*

¹¹⁸ Plea Agreement, *United States v. Oz Africa Management GP, LLC*, 16-cr-515 (NGG) (Sept. 29, 2016), <https://www.justice.gov/opa/file/899316/download>; Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Management Group LLC*, 16-cr-516 (NGG) (Sept. 29, 2016), <https://www.justice.gov/opa/file/899306/download>; Press Release, SEC, *Och-Ziff Hedge Fund Settles FCPA Charges* (Sept. 29, 2016), <https://www.sec.gov/news/pressrelease/2016-203.html>; Press Release, DOJ, *Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay \$213 Million Criminal Fine* (Sept. 29, 2016), <https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agreespay-213>.

¹¹⁹ Press Release, SEC (Sept. 29, 2016), *supra* note 118.

¹²⁰ Cease-and-Desist Orders, Securities Exchange Act Release No. 78989, Investment Advisers Act Release No. 4540, Administrative Proceeding File No. 3-17595 at 2–5 (Sept. 29, 2016), <https://www.sec.gov/litigation/admin/2016/34-78989.pdf>.

C. Morgan Stanley

On April 25, 2012, Garth Peterson, a former managing director of Morgan Stanley's real estate business in China, pleaded guilty to criminal charges brought by the DOJ and settled civil charges with the SEC in connection with a bribery and fraud scheme.¹²¹ Peterson was responsible for negotiating, acquiring, managing, and selling real estate investments in China on behalf of Morgan Stanley's advisers and funds.¹²² According to the government, Peterson built Morgan Stanley's real estate investment portfolio by "cultivating a relationship with the Chinese official and taking advantage of his ability to steer opportunities to Morgan Stanley and his influence in helping with needed governmental approvals."¹²³ As a result, Peterson effected a partnership on several investments on behalf of Morgan Stanley with Yongye Enterprise (Group) Co., a Chinese state-owned enterprise.¹²⁴

In particular, prosecutors alleged that Peterson had a personal friendship and secret business relationship with the former Chairman of Yongye Enterprise that contributed to the success of Morgan Stanley's real estate business in China.¹²⁵ For example, Peterson arranged to have \$1.8 million in purported "finders fees" paid to himself and the Chairman of Yongye Enterprise that Morgan Stanley's funds owed to third parties.¹²⁶ In addition, Peterson arranged for a Morgan Stanley fund to sell real estate interests to a shell company owned by Peterson, the Chinese official, and an attorney at a substantial discount from market price, but Peterson had represented to Morgan Stanley that the interests were being sold to Yongye Enterprise.¹²⁷ According to the SEC, in exchange for these offers and payments from Peterson, the Chinese official helped Peterson and Morgan Stanley obtain business while Peterson also personally benefitted from some of these same investments.¹²⁸

Peterson pleaded guilty to a criminal charge of violating the FCPA's internal controls provision. Peterson was sentenced to nine months

¹²¹ Information, *United States v. Garth Peterson*, No. 12-224 (S.D.N.Y. Mar. 26, 2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/04/26/petersong-information.pdf>; Press Release, DOJ, Former Morgan Stanley Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA, (Apr. 25, 2012), <https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required>.

¹²² Press Release, DOJ (Apr. 25, 2012), *supra* note 121; Press Release, SEC, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (Sept. 29, 2016), <https://www.sec.gov/news/press-release/2012-2012-78htm>.

¹²³ Litigation Release No. 22346, SEC, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (Apr. 25, 2012), <http://www.sec.gov/litigation/litreleases/2012/lr22346.htm>.

¹²⁴ *Id.*

¹²⁵ Press Release, SEC (Sept. 29, 2016), *supra* note 118.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

imprisonment.¹²⁹ He also settled SEC charges that he violated the FCPA's anti-bribery provisions and the FCPA's internal controls provision and aided and abetted violations of the anti-fraud provisions of the Investment Advisers Act of 1940.¹³⁰ He was ordered to disgorge \$254,589 and relinquish to a court-appointed receiver the real estate interest he secretly acquired from Morgan Stanley's fund, which was valued at \$3.4 million.¹³¹

Neither the DOJ nor the SEC took action against Morgan Stanley, which had self-reported Peterson's misconduct to the agencies. The DOJ took the unprecedented step of announcing in a press release that "Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct."¹³² In support of this decision, the DOJ noted that Morgan Stanley had voluntarily disclosed the issue, cooperated through the DOJ's investigation, and had maintained an adequate system of internal controls.¹³³

D. Direct Access Partners LLC

In a scheme that Director of the SEC's New York Regional Office, Andrew Calamari, described as "staggering in audacity and scope," several employees of Direct Access Partners LLC ("DAP"), a registered U.S. broker-dealer that provided fixed-income trades in foreign service debt, bribed Maria de los Angeles Gonzalez de Hernandez ("Gonzales"), an official in charge of overseas trading at Banco de Desarrollo Económico y Social de Venezuela ("BANDES").¹³⁴ BANDES is a state economic development bank that is majority-owned by the Venezuelan government.¹³⁵ According to the DOJ, Gonzalez allegedly steered a large number of trades to DAP from early 2009 through 2012, and DAP employees, including Ernesto Lujan, Tomas Clarke Bethancourt ("Clarke"), and Jose Alejandro Hurtado, charged BANDES over \$60 million in mark-ups on purchases and a mark-downs on sales.¹³⁶ The DAP employees split

¹²⁹ Chad Bray, *Morgan Stanley Ex-Official in China Sentenced to 9 Months in Prison*, WALL ST. J., Aug. 16, 2012, at C3.

¹³⁰ Litigation Release, SEC (Apr. 25, 2012), *supra* note 123.

¹³¹ *Id.*

¹³² Press Release, DOJ, (Apr. 25, 2015), *supra* note 121.

¹³³ *Id.*

¹³⁴ Press Release, SEC, SEC Charges Traders in Massive Kickback Scheme Involving Venezuelan Official (May 7, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514248#.UIKyDCSsjTo>; Compl., SEC v. Bethancourt (S.D.N.Y. May 7, 2013) (No. 13-3074), <https://www.sec.gov/litigation/complaints/2013/comp-pr2013-84.pdf>.

¹³⁵ Compl., SEC v. Bethancourt, *supra* note 134, at 2. Press Release, DOJ, Three Former Broker-dealer Employees Plead Guilty in Manhattan Federal Court to Bribery of Foreign Officials, Money Laundering and Conspiracy to Obstruct Justice (Aug. 30, 2013), <http://www.justice.gov/opa/pr/2013/August/13-crm-980.html>.

¹³⁶ Compl., *United States v. Bethancourt* (S.D.N.Y. Mar. 12, 2013) (No. 13-683), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/09/clarke-et-al-complaint.pdf>; Press Release, DOJ (Aug. 30, 2013), *supra* note 135.

the BANDES commissions and allegedly funneled a substantial share to Gonzalez.¹³⁷ According to the SEC, in an effort to conceal the bribery, DAP traders “deceived DAP’s clearing brokers, executed internal wash trades, inter-positioned another broker-dealer in the trades to conceal their role in the transactions, and engaged in massive roundtrip trades to pad their revenue.”¹³⁸

The SEC first discovered the bribery scheme through a series of periodic examinations of DAP that began in November 2010.¹³⁹ In response to the scrutiny, Lujan, Clarke, and Hurtado took steps to conceal their actions, including deleting emails.¹⁴⁰ In addition, Clarke lied, in an interview with the SEC, when asked about alleged payments to BANDES.¹⁴¹

As a result of the BANDES scheme, at the end of August 2013, Lujan, Clarke, and Hurtado pleaded guilty to violating the FCPA and the Travel Act, money laundering, conspiring to commit those violations, and conspiring to obstruct the SEC examination of DAP.¹⁴² The three DAP employees also pleaded guilty to a second charge of conspiring to violate the FCPA that stemmed from a similar bribery scheme involving Banfoandes, another state development bank controlled by the Venezuelan Ministry of Finance.¹⁴³ During 2015, the District Court sentenced the three DAP employees to between two and three years imprisonment.¹⁴⁴ For her alleged role in the scheme, the DOJ charged Gonzalez with money laundering, violating the Travel Act, and conspiring to commit these offenses and she spent more than 16 months in jail, in addition to forfeiting the \$5 million from the scheme.¹⁴⁵

Because DAP was not an issuer, the SEC did not have jurisdiction to charge DAP or its employees under the FCPA. Instead, the SEC charged the DAP employees under the anti-fraud provisions of the Securities Act of 1933 and the Exchange Act of 1934.¹⁴⁶ Thus, the SEC filed civil fraud

¹³⁷ Press Release, DOJ (Aug. 30, 2013), *supra* note 135.

¹³⁸ Press Release, SEC (May 7, 2013), *supra* note 134.

¹³⁹ Press Release, DOJ (Aug. 30, 2013), *supra* note 135.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Press Release, DOJ, Three Former Broker-dealer Employees Plead Guilty in Manhattan Federal Court to Bribery of Foreign Officials, Money Laundering and Conspiracy to Obstruct Justice (Aug. 30, 2013), <https://www.justice.gov/opa/pr/three-former-broker-dealer-employees-plead-guilty-manhattan-federal-court-bribery-foreign/>

¹⁴³ *Id.*

¹⁴⁴ Richard Cassin, *Hurtado Jailed Three Years in Direct Access Partners Bribe Case*, THE FCPA BLOG (Dec. 18, 2015), <http://www.fcpablog.com/blog/2015/12/18/hurtado-jailed-three-years-in-direct-access-partners-bribe-c.html>.

¹⁴⁵ Nate Raymond and Brendan Pierson, *Ex-Venezuela bank official avoids prison time in bribery case*, REUTERS (Jan. 15, 2016), <http://www.reuters.com/article/venezuela-usa-corruption-idUSL2N14Z348>.

¹⁴⁶ Complaint at 3, *SEC v. Bethancourt*, No. 13-3074 (S.D.N.Y. May 7, 2013), <https://www.sec.gov/litigation/complaints/2013/comp-pr2013-84.pdf>.

charges against Clarke, Hurtado, and two others: Iuri Rodolfo Bethancourt and Hurtado's wife, Haydee Leticia Pabon.¹⁴⁷ The SEC's investigation of DAP and the Commission's non-FCPA charges illustrate the potential for several different provisions of the securities laws to cover the same illicit conduct.

V. VICARIOUS LIABILITY RISKS FACING FINANCIAL INSTITUTIONS UNDER THE FCPA

Under U.S. law, corporations can be held criminally or civilly liable for the actions of their agents when the agent is acting within the scope of the principal-agent relationship.¹⁴⁸ This is a form of vicarious—as opposed to direct—liability. It is vital for financial institutions facing increased scrutiny under the FCPA to understand vicarious liability and the scope of persons and entities whose actions they may be liable for. In many circumstances, this will not be a difficult inquiry. For example, employees are typically agents of their employer and, if an employee pays a bribe to a foreign official for the purpose of obtaining business, then the corporation may be liable under the FCPA.¹⁴⁹ But in some areas, the DOJ and SEC have sown confusion by charging corporations for the actions of agents when the basis for the principal-agent relationship is unclear.¹⁵⁰ In this section, we discuss three areas of potential vicarious liability and the implications for financial institutions.

A. Parent-Subsidiary Structures

The government has taken an aggressive view of liability for parent corporations based on the actions of their subsidiaries, one that is out of step with traditional principles of corporate law. As a general matter, U.S. law does not recognize liability for a parent corporation for the acts of its subsidiaries. As the Supreme Court observed, “[i]t is a general principle

¹⁴⁷ Complaint at 1-2, *SEC v. Bethancourt*, No. 13-3074 (S.D.N.Y. May 7, 2013), <https://www.sec.gov/litigation/complaints/2013/comp-pr2013-84.pdf>.

¹⁴⁸ See Restatement (Third) of Agency § 2.04 (Am. Law Inst. 2006); *United States v. Agosto-Vega*, 617 F.3d 541, 552 (1st Cir. 2010) (“[A] corporation may be held liable for the criminal acts of its agents so long as those agents are acting within the scope of employment.”) (quoting *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006)).

¹⁴⁹ *FCPA Guide*, *supra* note 18, at 27 (“[A] company is liable when its directors, officers, employees, or agents, acting within the scope of their employment, commit FCPA violations intended, at least in part, to benefit the company.”); Restatement (Third) Of Agency § 7.07(1) (Am. Law Inst. 2006) (“An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.”).

¹⁵⁰ See, e.g., Gregory M. Williams, *The Alcoa FCPA Settlement: Are We Entering Strict Liability Anti-Bribery*

Regime?, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Feb. 5, 2014), <https://corpgov.law.harvard.edu/2014/02/05/the-alcoa-fcpa-settlement-are-we-entering-strict-liability-antibribery-regime/>.

of corporate law deeply ‘ingrained in our economic and legal systems’ that a parent corporation . . . is not liable for the acts of its subsidiaries.”¹⁵¹

There are two exceptions to this rule. First, parent liability exists when the parent has disregarded the corporate form such that the subsidiary is acting as an alter ego of the parent. In these circumstances, courts will “pierce the corporate veil” and assign liability to the parent.¹⁵² Second, when the subsidiary acts as an agent of the parent corporation for a particular purpose, then the parent corporation will be liable for the actions of the subsidiary just as any principal may be liable for the actions of its agents.¹⁵³ In evaluating whether a subsidiary is acting as an agent of the parent, the key consideration is the degree of control that the parent exercises over the subsidiary for the specific transactions at issue. In other words, the control that a parent corporation exercises over a subsidiary on account of stock ownership—for instance, the election of directors and making of by-laws—is insufficient to create an agency relationship. The parent must exercise a great deal of control over the subsidiary for the subsidiary to be deemed an agent of the parent.¹⁵⁴ Otherwise, all subsidiaries would be the agents of a corporate parent and corporate parents would be liable for everything the subsidiary does.

The FCPA Resource Guide generally tracks the contours of parent-subsubsidiary liability summarized above. In the Guide, the DOJ and SEC

¹⁵¹ *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quoting William Douglas & Carol Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L. J. 193 (1929)).

¹⁵² *Id.* at 62 (“But there is an equally fundamental principle of corporate law, applicable to the parent-subsubsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation’s conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s behalf.”).

¹⁵³ See Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 648 (2005) (arguing that courts applying agency liability to parent-subsubsidiary structures are actually applying a form of veil piercing that the author calls “quasi agency” liability).

¹⁵⁴ *Instrumentality Rule*, 1 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 43 & n.16 (2012); see also *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1028 (E.D. Mo. 2009) (“To establish a principal-agent relationship, a party must adduce evidence that the parent corporation exercised such domination and control over the subsidiary that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal.”); *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177, 1192 (N.D. Cal. 2009) (proving a subsidiary is an agent of the parent “requires a showing that the parent so controls the subsidiary as to cause the subsidiary to be become merely the instrumentality of the parent.”); *Gregory v. EBF & Assoc., L.P.*, 595 F. Supp. 2d 1334, 1340 (S.D. Fla. 2009) (“Even in a parent/subsubsidiary relationship . . . the parent corporation, to be liable for its subsidiary’s acts under the agency theory, must exercise control to the extent the subsidiary manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation.” (internal quotation marks omitted)); *Williams v. Mass. Mut. Life Ins. Co.*, 474 F. Supp. 2d 219, 225 (D. Mass. 2007) (“Under the agency test, a parent company cannot be held liable for its subsidiary’s alleged misdeeds unless there is ‘strong and robust evidence of parental control over the subsidiary, rendering the latter a mere shell.’” (quoting *De Castro v. Sanifill, Inc.*, 198 F.3d 282, 284 (1st Cir. 1999)).

warned that parent corporations may be liable for their subsidiary's conduct under traditional agency principles. The agencies also explained how they would evaluate the parent's control over the subsidiary:

DOJ and SEC evaluate the parent's control—including the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction—when evaluating whether a subsidiary is an agent of the parent. Although the formal relationship between the parent and subsidiary is important in this analysis, so are the practical realities of how the parent subsidiary actually interact.¹⁵⁵

This analysis is sound, as it considers the level of involvement the parent corporation has in the particular transaction that is under review.

In addition, the Guide discussed an example of applying agency liability to a corporate parent where there was evidence that the parent was heavily involved in a wholly-owned subsidiary's conduct. In that case,

The subsidiary's president reported directly to the CEO of the parent issuer, and the issuer routinely identified the president as a member of its senior management in its annual filing with SEC and in annual reports. Additionally, the parent's legal department approved the retention of the third-party agent through whom the bribes were arranged despite a lack of documented due diligence and an agency agreement that violated corporate policy; also, an official of the parent approved one of the payments to the third-party agent.¹⁵⁶

In these circumstances, the SEC took the position that the parent had sufficient knowledge and control to be liable for bribery by the subsidiary.

Despite the language in the FCPA Resource Guide, the government has not uniformly applied the requirements for alleging an agency relationship.¹⁵⁷ For example, in several recent enforcement actions, the SEC has charged U.S. issuers for bribes paid by their foreign subsidiaries, without alleging the issuers authorized or even knew about the bribes.¹⁵⁸ And in a 2013 Non-Prosecution Agreement with Ralph Lauren, the DOJ alleged bribes paid by Ralph Lauren's Argentinean subsidiary without any allegation that the parent company authorized, directed, or

¹⁵⁵ *FCPA Guide*, *supra* note 18, at 27.

¹⁵⁶ *Id.*

¹⁵⁷ See Alexander Avery, *Foreign Corrupt Practices Act: Pleading Parent-Subsidiary Liability*, 35 J. NAT'L ASS'N ADMIN. L. JUDICIARY 131, 133 (2015).

¹⁵⁸ Laurence A. Urgenson et. al, *FCPA Anti-Bribery Liability for a Subsidiary's Conduct*, 20 BUSINESS CRIMES BULLETIN 5 (Jan. 2013).

controlled the offending conduct of its subsidiary.¹⁵⁹ These enforcement patterns have led some to question whether parent corporations are effectively being held strictly liable for the conduct of their subsidiaries.¹⁶⁰ As a consequence, financial firms should pay careful attention to the FCPA risks associated with their corporate subsidiaries. The corporate parent should implement a healthy compliance program that includes overview of the operation of their subsidiaries.

B. Joint Ventures

There is similar uncertainty over the liability stemming from joint ventures under the FCPA. Under an agency theory of liability, a business may be held vicariously liable under the FCPA for actions taken by joint venture partners, the joint venture itself, or agents acting on behalf of the joint venture.¹⁶¹ As with the parent-subsidiary relationship, the key determinant for agency liability in joint ventures will be the level of control the alleged parent exercised over the transactions at issue. But given the variety of options for structuring joint ventures, the lines between sufficient and insufficient control will be difficult to reliably draw.

Compounding this uncertainty, the DOJ and SEC have not clearly communicated their expectations when evaluating joint venture liability. The Resource Guide does not address joint venture liability, other than to note that an issuer's responsibility "extends to ensuring that subsidiaries or affiliates under its control, including . . . joint ventures, comply with the accounting provisions."¹⁶² And while the agencies have brought

¹⁵⁹ Philip Urofsky, *The Ralph Lauren FCPA Case: Are There Any Limits to Parent Corporation Liability?*, BLOOMBERGBNA (May 13, 2013), <https://www.bna.com/the-ralph-lauren-fcpa-case-are-there-any-limits-to-parent-corporation-liability/>; DOJ, Ralph Lauren Corporation Non-Prosecution Agreement, (Apr. 22, 2013), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/04/23/Ralph-Lauren-NPA-Executed.pdf>.

¹⁶⁰ See, e.g., Gregory M. Williams, *The Alcoa FCPA Settlement: Are We Entering Strict Liability Anti-Bribery Regime?*, HARV. L. SCH. F. ON CORP. GOV'NCE AND FIN. REG. (Feb. 5, 2014), <https://corpgov.law.harvard.edu/2014/02/05/the-alcoa-fcpa-settlement-are-we-entering-strict-liability-antibribery-regime/>

¹⁶¹ Daniel J. Grimm, *Traversing the Minefield: Joint Ventures and the Foreign Corrupt Practices Act*, 9 VA. L. & BUS. REV. 91, 94, 126-27 (2014); Rebecca Hughes Parker, *FCPA Compliance in Non-Controlled Joint Ventures*, 3 FCPA REPORTS 10 (2014), <http://www.fcpareport.com/article/1879>.

¹⁶² *FCPA Guide*, *supra* note 18, at 43. Joint venture partners may thus be liable under the books and record keeping provisions of the FCPA for incorporating falsified records from the joint venture. For example, in September 2016, Anheuser-Busch InBev ("AB InBev") settled FCPA charges with the SEC related to the conduct of a joint venture in India, InBev India International Private Limited. AB InBev was not directly charged, but the SEC alleged that its books, which were consolidated with the books from the joint venture, did not accurately portray certain transactions. Order Instituting Cease-and-Desist Proceedings, *In the Matter of Anheuser-Busch Inbev SA/NV*, 2 (Sec. & Exch. Comm'n Sept. 28, 2016), <https://www.sec.gov/litigation/admin/2016/34-78957.pdf>.

enforcement proceedings against joint ventures, the settlements to date have not included detailed allegations about the level of control the charged party exercised over the venture. For example, in 2015, BristolMyers Squibb (China) Investment Co. Limited (“BMS China”) settled FCPA charges related to bribes paid by a joint venture, Sino-American Shanghai Squibb Pharmaceuticals Limited (“SASS”).¹⁶³ BMS China was the majority owner of SASS since 1982, but the SEC Order cryptically alleged that BMS China gained “operational control” over SASS in 2009 when “it obtained the right to name the President of SASS and a majority of the members of SASS’s Board of Directors.”¹⁶⁴

The takeaway for investors pursuing joint ventures abroad is that majority and minority participants alike should be concerned about the risks of FCPA liability based on the activities of the joint venture. Financial institutions negotiating joint ventures should exercise sufficient pre-agreement diligence and might consider incorporating compliance procedures into the joint venture agreement, including audit rights, termination rights, and recurring representations and warranties related to anti-bribery compliance.¹⁶⁵

C. Placement Agents

Finally, the use of placement agents, third-party marketers, or other intermediaries in dealing with sovereign wealth funds and other foreign government entities by private equity firms and hedge funds also creates vicarious FCPA risks. Investment funds that solicit investment abroad should proceed cautiously when considering partnering with local individuals or entities that claim they can expedite or cut through red tape because of their relationships with local bureaucracy, especially if the funds are unable to adequately supervise the placement agents’ actions. The DOJ’s 2014 investigation into potential FCPA violations in Libya illustrates this risk. It was reported that “a group of middlemen, known as ‘fixers,’ [which] establish connections between investment firms and individuals with ties to leaders in developing markets” are at the heart of the DOJ’s probe.¹⁶⁶ Firms also should be aware of the potential FCPA risk when dealing with other entities that have received funding from a SWF and are, to some extent, controlled by the SWF. Regulators could treat such an entity as an agent of the SWF and impose FCPA liability on a firm that makes an improper payment to an employee of the non-state owned entity.

¹⁶³ Order Instituting Cease-and-Desist Proceeding, *Bristol-Myers Squibb Co.*, 1 (Sec. & Exch. Comm’n Oct. 5, 2015), <https://www.sec.gov/litigation/admin/2015/34-76073.pdf>.

¹⁶⁴ *Id.* at 2.

¹⁶⁵ See Leslie Shubert, *The Risks of FCPA Joint Venture Liability*, LAW360 (July 15, 2012), <https://www.law360.com/articles/361936/the-risks-of-fcpa-joint-venture-liability>.

¹⁶⁶ Joe Palazzolo, Michael Rothfeld & Justin Baer, *Probe Widens Into Dealings Between Finance Firms, Libya*, WALL ST. J. (Feb. 3, 2014), <http://online.wsj.com/news/articles/SB10001424052702303743604579355162160100456>.

When a private equity firm employs a placement agent to solicit investment from sovereign wealth funds or state-owned pension plans, the intermediary's actions may be imputed to the fund if the government determines that the fund or manager had knowledge that the agent intended to violate the Act or if sufficient "red flags" were present such that proceeding with the relationship was reckless. Indeed, the fact that a placement agent requests a large discretionary fund may be a sufficient red flag to cause liability to the U.S. fund if the placement agent makes improper payments. If the agent is seeking to operate in a country that is considered "high risk," the fund's chances of avoiding liability should the agent proceed to make unlawful payments will be diminished.

Private investment funds that use placement agents should consider taking certain steps to mitigate the fund's FCPA risk, including conducting pre-retention due diligence of third-party intermediaries to ensure that the intermediary is legitimate and reputable and that there are no red flags indicating that the intermediary would be prepared to pay bribes to foreign officials. In addition, funds should consider obtaining appropriate contractual representations with third-party intermediaries relating to compliance with the FCPA and relevant foreign anti-corruption laws, including provisions that confirm that no foreign official is an owner of or otherwise has a financial interest in the intermediary and provide for termination as a result of any breach of applicable anti-corruption laws. Finally, funds could require periodic certifications from the third-party intermediary attesting to the intermediary's compliance with the FCPA and all other relevant foreign anti-corruption laws.

VI. HALLMARKS OF AN EFFECTIVE COMPLIANCE PROGRAM

Long time guidance and recent U.S. enforcement cases confirm that the strength of company's anti-corruption compliance program (as measured by compliance program criteria identified by enforcement authorities themselves) is a significant factor affecting the outcome of an FCPA investigation. Recently, the DOJ hired its own compliance expert to help FCPA prosecutors evaluate corporate compliance programs.¹⁶⁷ As Assistant Attorney General for the Criminal Division Leslie Caldwell put it, "A well-designed and fully implemented compliance program is key."¹⁶⁸ In particular, Caldwell emphasized that a compliance program must be "thoughtfully designed and sufficiently resourced to address the company's compliance risks."¹⁶⁹

¹⁶⁷ Press Release, DOJ, New Compliance Counsel Expert Retained by the DOJ Fraud Section, (Nov. 3, 2015), <https://www.justice.gov/criminal-fraud/file/790236/download>.

¹⁶⁸ Assistant Attorney Gen. Leslie Caldwell, Prepared Remarks for Address at the American Conference Institute's 32nd Annual International Conference on the Foreign Corrupt Practices Act (Nov. 17, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-american-conference>.

¹⁶⁹ *Id.*

Along those same lines, the SEC and DOJ conveyed the need for a compliance program to be “tailored to the company’s specific business and to the risks associated with that business.”¹⁷⁰

An effective compliance program is particularly important for private equity firms and hedge funds. These firms must implement a compliance program internally and, under certain circumstances, also direct their portfolio companies to implement one. It is important for private equity and hedge funds to have internal compliance program to ensure that they do not violate the FCPA when they solicit investors or when they invest managed capital. Hedge funds and private equity funds, particularly if they are U.S. issuers, should require portfolio companies they control to implement a risk-based compliance program.

A. Tone From the Top

A strong formal compliance policy must be accompanied by the “strong, explicit, and visible support and commitment from senior management”¹⁷¹ because “[t]hose at the top of an organization are in the best position to foster a culture integrity where bribery is unacceptable.”¹⁷² Moreover, in evaluating a company’s compliance program, the SEC and DOJ look for evidence that senior management has “clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization.”¹⁷³ Leaders should not be ambivalent to FCPA compliance, let alone “tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.”¹⁷⁴ Where corporate managers have failed to set the

¹⁷⁰ *FCPA Guide*, *supra* note 18, at 56.

¹⁷¹ See Deferred Prosecution Agreement, *United States v. Tyson Foods, Inc.*, 20, (D.D.C. 2011), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/06/02-10-11tyson_foods_dpa.pdf (“*Tyson Foods* DPA”); Non-Prosecution Agreement, *Comverse Tech., Inc.*, App’x B, para. 1 (E.D.N.Y. 2011), <http://www.justice.gov/criminal/fraud/fcpa/cases/rae-comverse/04-06-11comverse-npa.pdf> (“*Comverse* NPA”); Deferred Prosecution Agreement, *United States v. Maxwell Tech., Inc.*, 30 (S.D. Cal. 2011), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/01-31-11maxwell-tech-dpa.pdf> (“*Maxwell* DPA”); Deferred Prosecution Agreement, *United States v. Alcatel-Lucent S.A.*, App’x C, para. 2 (S.D. Fla. 2010), ECF No. 10, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/07/29/02-22-11alcatel-dpa.pdf> (“*Alcatel-Lucent* DPA”); see also, *Good Practice Guidance on Internal Controls, Ethic and Compliance*, OECD COUNCIL, 1, <http://www.oecd.org/investment/antibribery/anti-briberyconvention/44884389.pdf> (calling for “strong, explicit and visible support and commitment from senior management to the company’s internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery”).

¹⁷² U.K. Ministry of Justice, *The Bribery Act 2010: Guidance About Procedures Which Relevant Commercial Organisations Can Put Into Place to Prevent Persons Associated With Them From Bribing*, 23 (2010), <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> (“2010 UK Bribery Act Guidance”).

¹⁷³ *FCPA Guide*, *supra* note 18, at 57.

¹⁷⁴ UNITED STATES ATTORNEYS’ MANUAL § 9-28.800, para.2 (2010) (“USAM”).

proper “tone at the top,” the government has specifically noted executive tolerance for non-compliance.¹⁷⁵ Additionally, it should be clear that the company’s anti-corruption policy applies to everyone within the company, from the CEO to the mailroom.¹⁷⁶

Thus, the company and its “top level management” should “take appropriate measures to encourage and support the observance of ethics and compliance standards and procedures against foreign bribery at all levels of the company.”¹⁷⁷ Such measures would include regular statements from senior management and policies that clearly and regularly communicate that the company has a zero tolerance policy towards bribery and that violators will face serious consequences.¹⁷⁸

Enforcement authorities have strongly criticized “paper programs”¹⁷⁹ that are left on a shelf and are not effective in practice. An effective compliance program must therefore “assign responsibility to one or more senior corporate executives . . . for the implementation and oversight of compliance with policies, standards, and procedures regarding the anti-corruption laws.”¹⁸⁰

B. Code of Conduct and Compliance Policies and Procedures

Corporations that do business outside of the U.S. must have a clear written corporate policy statement prohibiting the giving or offering of things of value to foreign officials for the corrupt purpose of obtaining or retaining business. In their *FCPA Guide*, the DOJ and SEC reiterated that “the most effective codes [of conduct] are clear, concise, and accessible to all employees and to those conducting business on the company’s behalf.”¹⁸¹ For example, the *Guide* pointed out the need to make the code available in the relevant local languages.¹⁸²

¹⁷⁵ See, e.g., Complaint, *U.S. Sec. & Exch. Comm’n v. Siemens AG*, 10 (D.D.C. 2008), ECF No. 1, available at <https://www.sec.gov/litigation/complaints/2008/comp20829.pdf> (“[A] tone at the top of Siemens that was inconsistent with an effective FPCA compliance program and created a corporate culture in which bribery was tolerated and even rewarded at the highest levels”) (“*Siemens AG Complaint*”); Plea Agreement, *United States v. Kellogg Brown & Root LLC*, 10 (S.D. Tex. 2009), available at <https://www.courtlistener.com/docket/4397263/12/united-states-v-kellogg-brown-root-llc/> (finding “tolerance of the [FCPA] offense by substantial authority personnel was pervasive throughout the organization”).

¹⁷⁶ *Comverse NPA* at App’x B, para. 2; *Tyson Foods DPA* at 20; *Maxwell DPA* at 30; *Alcatel-Lucent DPA* at App’x C, para. 3.

¹⁷⁷ *Comverse NPA App’x B*, para. 5; *Tyson Foods DPA* at 20; *Maxwell DPA* at 30; *Alcatel-Lucent DPA* at App’x C, para. 3.

¹⁷⁸ See 2010 UK Bribery Act Guidance at 23.

¹⁷⁹ USAM § 9-28.800, para. 3.

¹⁸⁰ *Comverse NPA* at App’x B, para. 5; *Tyson Foods DPA* at 21; *Maxwell DPA* at 31; *Alcatel-Lucent DPA* at App’x C, para. 6.

¹⁸¹ *FCPA Guide*, *supra* note 18, at 57.

¹⁸² *Id.*

Policies should include prohibitions against violating anti-corruption laws, including violations of “books and records, and internal controls provisions, and other applicable [foreign law] counterparts.”¹⁸³ Corporate policies should clearly communicate the strong message that the company “would rather lose business than obtain it illegally.”¹⁸⁴ The policy should “apply to all directors, officers, and employees, and where necessary and appropriate, outside parties acting on behalf of [the company].”¹⁸⁵ It should not be a “‘cookie cutter’ . . . program without any real substance to it.”¹⁸⁶

Enforcement authorities have specifically noted the importance of having core standards and/or procedures governing: (1) general anti-corruption issues; (2) gifts; hospitality, entertainment, and expenses; customer travel; (3) political contributions and charitable donations; (4) facilitation payments; (5) solicitation and extortion;¹⁸⁷ and (6) third-party and pre- and post-acquisition due diligence.¹⁸⁸

An effective anti-corruption program also, “ensure[s] that it has a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts and to ensure that they cannot be used for the purpose of foreign bribery or concealing such bribery.”¹⁸⁹ Controls should require management approval for the disposition of company assets and should require documentation to back-up approved expenditures. Regular checks should be performed to ensure that records entries reflect the actual disposition of assets.

The company’s legal department should circulate a hotline contact number or similar mechanism to address employee questions on the FCPA and to investigate employee concerns of possible violations. The reporting system should provide an easy way to seek guidance on FCPA questions

¹⁸³ Deferred Prosecution Agreement, *United States v. Johnson & Johnson (Deputy)*, 31 (D.D.C. 2011), ECF No. 1-1 (“J&J DPA”).

¹⁸⁴ Information, *United States v. Siemens AG*, 15, para. 64 (D.D.C. 2008), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/02/12-12-08siemensakt-info.pdf> (“Siemens Information”).

¹⁸⁵ *J&J DPA*, *supra* note 183, at 31.

¹⁸⁶ Alice S. Fisher, Assistant Att’y Gen., U.S. Dep’t of Justice, Prepared Remarks at the American Bar Association’s National Institute on the Foreign Corrupt Practices Act 7 (Oct. 16, 2006), available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/10-16-06AAGFCPASpeech.pdf>.

¹⁸⁷ See, e.g., *Tyson Foods DPA*, *supra* note 171, at 20-21; *Maxwell DPA*, *supra* note 171, at 30; Plea Agreement at 23, *United States v. ABB Inc.*, No. 4:10-cr-00664 (S.D. Tex. Sept. 29, 2010) (“*ABB Plea Agreement*”).

¹⁸⁸ See *J&J DPA*, *supra* note 183, at 35-36; *ABB Plea Agreement*, *supra* note 187, at 31-32.

¹⁸⁹ *ABB Plea Agreement*, *supra* note 187, at 25; see also *J&J DPA*, *supra* note 183, at 31 (requiring “a system of internal accounting controls designed to ensure that J&J makes and keeps fair and accurate books, records, and accounts”).

and a streamlined mechanism for reporting potential violations.¹⁹⁰ The reporting system should include “mechanisms that allow for anonymity or confidentiality,” whereby the employees and agents/business partners may also “seek guidance regarding potential or actual criminal conduct without fear of retaliation.”¹⁹¹ Compliance systems should be designed to ensure that senior management and the corporate board receive timely, accurate information sufficient to allow management and the board to reach informed judgments on their compliance with the law.

Although they are not mandatory, the United States Sentencing Commission Guidelines provide for a sentencing reduction for well-functioning corporate compliance programs as long as the corporation’s compliance program “detected the offense before discovery outside the organization or before such discovery was reasonably likely” and the organization “promptly reported the offense to appropriate governmental authorities.”¹⁹² Once the corporation has detected criminal conduct, it must “take reasonable steps to respond appropriately”¹⁹³ and to “prevent further similar criminal conduct, including making any necessary modifications to the organization’s compliance and ethics program.”¹⁹⁴

C. Oversight, Autonomy, and Resources

The corporation should assign overall responsibility for a compliance program to one or more senior corporate executives to one or more senior corporate executives.¹⁹⁵ Often, a corporation will designate a compliance officer who will be in charge of “implementation and oversight

¹⁹⁰ The corporation should have an effective system for “internal” reporting of for “directors, officers, employees, and . . . agents and business partners” to report: “breaches of the law or professional standards or ethics concerning anti-corruption occurring within the company, suspected criminal conduct, and/or violations of the compliance policies, standards, and procedures regarding anti-corruption.” *Alcatel-Lucent DPA*, *supra* note 171, at C-4.

¹⁹¹ U.S. SENTENCING GUIDELINES MANUAL [hereinafter USSG] § 8B2.1(b)(5)(C) (2016).

¹⁹² *Id.* § 8.C2.5(f)(3)(C)(ii)–(iii).

¹⁹³ *Id.* § 8B2.1(b)(7); cmt. n.6 (“These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.”).

¹⁹⁴ *Id.* § 8B2.1(b)(7). To prevent further similar conduct, the corporation may need to assess its program, and that “may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.” *Id.* § 8B2.1, cmt. n.6.

¹⁹⁵ *Alcatel-Lucent DPA*, *supra* note 171, at C-3; USSG, *supra* note 191, § 8B2.1(b)(2)(B); *see also FCPA Guide*, *supra* note 18, at 58.

of [a company's] anti-corruption policies, standards, and procedures."¹⁹⁶ Compliance officers should be of management stature and have a respected reputation within the company.¹⁹⁷ Compliance officers should report directly to appropriate board committees, including audit or the board of directors and should have sufficient independence and resources.¹⁹⁸ Compliance standards should be the subject of, at the very least, an annual review that will look at developing compliance standards.¹⁹⁹ This review may involve company surveys, feedback from trainings, management reviews, and the retention of outside counsel.²⁰⁰ Finally, a corporation should provide sufficient time for reviewing and auditing the results of its compliance efforts.²⁰¹

If a potential FCPA issue comes to light during the compliance process, the corporation should conduct an internal investigation by either inside or outside counsel to evaluate the scope of the concern. The corporation should also implement appropriate remedial compliance steps to address the issue. Compliance officers must not have "participated in, condoned, or [been found to be] willfully ignorant of the offense."²⁰²

¹⁹⁶ *Alcatel-Lucent DPA*, *supra* note 171, at C-3; *see also* MINISTRY OF JUSTICE, CONSULTATION ON GUIDANCE ABOUT COMMERCIAL ORGANISATIONS PREVENTING BRIBERY (SECTION 9 OF THE BRIBERY ACT 2010) 14 (2010), *available at* http://files.dorsey.com/files/upload/MP_CCS2010_Consultation_On_Guidance.pdf [hereinafter *The UK Draft Guidance*] ("Maintenance of a clear top-level commitment to anti-bribery policies may be assisted by the appointment of a senior manager to oversee the development of an anti-bribery programme and to ensure its effective implementation throughout the organisation.").

¹⁹⁷ *FCPA Guide*, *supra* note 18, at 59.

¹⁹⁸ *Alcatel-Lucent DPA*, *supra* note 171, at C-3; *see also* USSG, *supra* note 191, § 8B2.1(b)(2)(C) ("To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority."); OECD Council, *Good Practice Guidance*, *supra* note 171, at A(4) ("[O]versight of ethics and compliance programmes . . . is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority."); *FCPA Guide*, *supra* note 18, at 58 ("The individuals must have . . . adequate autonomy from management, and sufficient resources to ensure that the company's compliance program is implemented effectively.").

¹⁹⁹ *Comverse NPA*, *supra* note 171, at app. B, 2; *see also* *Tyson Foods DPA*, *supra* note 171, at 21; *Maxwell DPA*, *supra* note 171, at 31; *Alcatel-Lucent DPA* at C-3; C-6 ("[The corporation shall] conduct periodic review and testing of its anti-corruption compliance code, standards, and procedures . . . taking into account relevant developments in the field and evolving and industry standards.").

²⁰⁰ *ABB Plea Agreement*, *supra* note 187, at 30.

²⁰¹ USAM, *supra* note 174, § 9-28.800, cmt. n.3; *see also* *FCPA Guide*, *supra* note 18, at 58.

²⁰² USSG, *supra* note 191, § 8.C2.5(f)(3)(C)(iv).

D. Risk Assessment

Companies should develop compliance standards and procedures on the basis of a “risk assessment” that addresses the “individual circumstances of the company.”²⁰³ These circumstances include:

[G]eographical organization, interactions with various types of and levels of government officials, industrial sectors of operation, involvement in joint venture arrangements, importance of licenses and permits in the company’s operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration.²⁰⁴

Other considerations relevant to the developing of standards and procedures through a risk assessment may include internal factors like “deficiencies in employee training, skills and knowledge, bonus culture, . . . lack of clarity in the organisation’s policies, . . . [and] lack of clear financial controls.”²⁰⁵

Practically, companies should consider conducting a comprehensive survey of employees to identify business offices and practices that may raise heightened FCPA concerns. They should analyze results and determine which business units, if any, should be targeted for more focused training and monitoring, as a prophylactic measure. Companies should consider how they allocate resources and focus on the type of high-risk transactions in high-risk regions. In their *FCPA Guide*, the SEC and DOJ stated that they “will give meaningful credit to a company that implements in good faith a comprehensive, risk-based compliance program, even if that program does not prevent an infraction in a low risk area because greater attention and resources had been devoted to a higher risk area.”²⁰⁶

In short, “the fuller the understanding of the bribery risks an organisation faces the more effective its efforts to prevent bribery are likely

²⁰³ *Alcatel-Lucent DPA*, *supra* note 171, at C-3.

²⁰⁴ *Id.* The UK Draft Guidance lists three “external” risk factors:
 (1) “Country Risk” based on a “reputable” corruption index and “factors such as absence of anti-bribery legislation and implementation and a perceived lack of capacity of the government, media, local business community, and civil society to effectively promote transparent procurement and investment policies;”
 (2) “Transaction Risk” depending on the nature of the payment; for example, “charitable or political contributions, licenses and permits, public procurement, high value or projects with many contractors or involvement of intermediaries or agents;”
 (3) “Partnership Risk” based on the connections of business partners to “prominent public office holders,” or the “insufficient knowledge or transparency of third party processes and controls.” UK Draft Guidance, *supra* note 196, at 12-13.

²⁰⁵ 2010 UK Bribery Act Guidance, *supra* note 172, at 26.

²⁰⁶ *FCPA Guide*, *supra* note 18, at 59.

to be.”²⁰⁷ Conducting a thorough risk assessment allows a company to make its “procedures to prevent bribery . . . proportionate to the bribery risks it faces and to the nature, scale, and complexity of the commercial organisation’s activities.”²⁰⁸

E. Employee and Agent Training

A company’s anti-corruption policies and procedures should be circulated to all employees, particularly those conducting business with government officials and publicly owned entities. Policy publication is most effective when done at regular intervals (annually or biannually) and preferably in conjunction with FCPA training. Employees should certify in some fashion that they have read the policy, understand its terms, and are acting in compliance with it.

Regular training to create employee awareness of FCPA corporate policies and further promote compliance is an important element of an effective compliance program. The company should also conduct periodic training for “agents and business partners” where necessary and appropriate.²⁰⁹ To track the periodic training, a corporation shall issue “annual certifications” that certify compliance with the training requirements.²¹⁰ While online and video training are alternative training vehicles that are less expensive for a company, in-person training programs for relevant, high-risk employees are the most effective because they allow for discussion of FCPA application. The trainings should involve interactive discussions with examples from hotline reported activity and the use of hypotheticals to test comprehension. Additionally, companies may benefit from tailoring their training to the roles played by different groups of personnel.²¹¹

F. Incentives and Disciplinary Measures

Companies must encourage a “culture of compliance” that rewards ethical behavior and establishes whistleblower mechanisms while also providing “appropriate disciplinary mechanisms” for violations of anti-corruption laws and its compliance code, policies, and procedures.²¹²

²⁰⁷ 2010 UK Bribery Act Guidance, *supra* note 172, at 25.

²⁰⁸ *Id.* at 21.

²⁰⁹ *Alcatel-Lucent DPA*, *supra* note 171, at C-4.

²¹⁰ *Id.*

²¹¹ *FCPA Guide*, *supra* note 18, at 59.

²¹² Lanny A. Breuer, Assistant Att’y Gen. of Criminal Div., U.S. Dep’t of Justice, Prepared Remarks to *Compliance Week 2010 - 5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance Officers 5* (May 26, 2010), *available at* <http://legaltimes.typepad.com/files/lanny-a-breuer-compliance-week-speech---may-26-2010.pdf>; *Alcatel-Lucent DPA*, *supra* note 171, at C-5; *see also FCPA Guide*, *supra* note 18, at 59.

G. Third-Party Due Diligence

Finally, companies must conduct due diligence, including extensive background checks, before entering into contractual arrangements with third parties, such as agents and business partners that are likely to interact with foreign officials. As part of the due diligence, companies should require third parties to fill out due diligence questionnaires which will identify relationships to government officials, services for which an agent is being paid, and whether any fees would be passed on to government officials. Any red flags should be investigated prior to formalizing the agency relationship and fully documented.

A corporation should inform agents and business partners of its “commitment to abiding by laws on the prohibitions against foreign bribery, and [its] ethics and compliance standards and procedures and other measures for preventing and detecting such bribery.”²¹³ Corporations should seek “a reciprocal commitment from business partners.”²¹⁴

Contracts with third parties should contain FCPA representations and warranties with termination provisions. These representations and warranties should go beyond ensuring generic compliance with “applicable U.S. law” and instead certify an understanding of the substance of the FCPA and their obligation to abide by it. Contracts should contain representations that an agent will implement its own compliance program and guarantee compliance from subcontractors. Contracts should include the ability to terminate the agreement in the event of a breach of this warranty regarding the FCPA.

Before entering an agreement with a third party agent or consultant, companies should consider:

- Conducting due diligence on the consultant prior to engagement to ascertain the consultant’s experience, capability, reputation, character and educational and work background. This due diligence should be documented.
- Confirming in writing all relationships with consultants specifying the services to be performed and any compensation or commission to be paid.
- Requiring each consultant to confirm in writing that it is aware of the FCPA, will take no action in violation thereof, and will make no payment or transfer anything of value, directly or indirectly, to any foreign official, political candidate or political party or official thereof, to influence any decision to obtain or retain business.

²¹³ *Alcatel-Lucent DPA*, *supra* note 171, at C-5.

²¹⁴ OECD Council, *Good Practice Guidance*, *supra* note 171, at (A)(6)(iii).

- Paying only commissions or other compensation in amounts that are reasonable and customary in relationship to the services provided.
- Properly accounting for and reflect all commissions and other compensation to the consultant in the corporation's records and financial statements.
- Including a statement in all consulting agreements that the corporation's auditors and accountants will be granted access to the consultants' books and records.
- Obtaining a signed statement of continuing compliance with the FCPA from each consultant upon payment of a commission or other type of compensation, or at regular intervals.

Corporations should also “[p]roperly documented risk-based due diligence pertaining to the hiring and appropriate and regular oversight of agents and business partners.”²¹⁵ Due diligence findings should be documented and maintained for at least five years after the termination of the agent relationship.

²¹⁵ *Alcatel-Lucent DPA*, *supra* note 171, at C-5; OECD Council, *Good Practice Guidance*, *supra* note 171, at (A)(6)(i).

THE BRICS IN GLOBAL MERGER REVIEW: DIVERGING GOALS, CONVERGING METHODS

*Katarina Resar Krasulova**

Abstract: The impact of fast-growing developing countries on international merger control became apparent in the past fifty years. These years in the international antitrust arena were marked with globalization and internationalization of merger control. With the transnational expansion of businesses, each country became empowered to realize the benefits of antitrust locally or to deny them globally. Convergence became a hot topic for critics of cross-jurisdictional disagreement in merger control: a panacea with the theoretical potential to solve the discord brought by the transnational enforcement of antitrust law. In a direct response, this Article explores the apparent dilemma of this situation—how do we effectuate antitrust convergence in the increasingly diverse world? The answer is two-fold. First, subject to a critical assessment of the scope, the practicable definition of convergence must be narrower, restricted to convergence in analytical methods and in the use of economic evidence at the agency level. Second, the developing countries must have a say—herein this Article introduces the BRICS country group as an important player in antitrust globally, and presents an empirical study of the latest BRICS’ global merger decisions. The study confirms that the concept of “convergence within divergence” is not only attainable, but already underway.

I. INTRODUCTION

The Introductory Section of this Article will outline the approach and methodology used to answer the central question of how to effectuate a regulatory antitrust convergence in an increasingly diverse world followed by an overview of the important developments in global antitrust and some of the inherent problems that resulted. In the backdrop of these events, this Section recognizes and analyzes several variables that will provide a direction for the questions posed later. First, there is a need to talk about the nature and characteristics of economics and antitrust law and regulation because of their complicated and not always symbiotic relationship throughout history. Second, it is important to identify and reiterate the role that Brazil, Russia, India, China, and South Africa (BRICS) have in shaping global antitrust and to review their capacity to do so.

A. Approach

This Article is motivated by two developments in global antitrust law: the spread of economic approaches in the application of antitrust law

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and the joining of emerging, and economically powerful, antitrust regimes from around the world. In this global system, there has been a trend towards increased use of economic analysis and evidence by antitrust agencies. The trend comes hand-on-hand with a similar preference in the field of jurisprudence that favors the economic approach to antitrust law over the purely legal-formalistic approach. These developments have been clearly demonstrated by the growing presence of economic experts at all levels: in the administrative agencies tasked with merger review, as counsel to businesses, and at the judicial level. Thus, keeping in mind that the latest developments in antitrust law and theory have been driven by and entangled with economics, this Article assumes a multidisciplinary approach in analyzing its central questions that draws on knowledge in law, economics, and governance.

The primary focus of this Article lies in the role of the BRICS and their antitrust policy experience as a crucial piece in understanding how global antitrust systems work and develop. The central question this Article attempts to answer is: how can diverse antitrust regimes focused on divergent goals achieve substantial convergence? Through the abstract overview offered in Sections I and II, this Article determines that a vital degree of convergence is possible through standardizing of the merger review process with the use of economic evidence and data.

This Article assumes that improvements in economic analysis methods improve antitrust law by making it less error prone and thus more reliable, predictable, and transparent, and argues that economic evidence is essential for convergence in substantive methods of antitrust worldwide. To this end, Section I discusses the theoretical underpinnings of antitrust convergence, developments in the use of economic evidence in this context, and the importance of the BRICS in this process. Section II, following an overview of the current policies and goals in the global antitrust, tackles some of the outstanding theoretical and practical problems. Importantly, Section II attempts to reconcile the concurrent application of economic tools in regimes with diverging economic and non-economic antitrust goals. Then, Section III directly answers the research question through offering an empirical proof. This proof consists of a survey of the BRICS decision in global merger cases as compared to the same decisions in their Western antitrust counterparts—the US and the EU— with an emphasis on analyzing the use and application of various economic tools and evidence in the agencies' review. Finally, Section IV sums up the results of the surveys and offers recommendations that could aid further study and dissemination of analytical methods in the global merger review.

There are a few limitations regarding the scope and sources used in this Article. With respect to the scope, the research focuses primarily on horizontal mergers, leaving the theory and practice of vertical mergers on the margin, even though their relationship is often complementary. Horizontal mergers are the most frequent and most examined transactions

and thus a cross-comparison between the effects and analyses of horizontal transactions globally yields more reliable results. Also, in regard to the scope, the research part of this work focuses primarily on global mergers, which are usually transactions between large supranational conglomerates in different markets. Because of their transnational nature and attendant benefits for economic growth, global mergers became the centerpiece of economic news and an area where governments cooperate the most in order to materialize the benefits for consumers worldwide, or prevent local harms. They are also the best available benchmark for comparing the ability and the potential of regimes to apply economic evidence in decision-making, offering a side-by-side comparison of decisions on the same transactions carried out by different antitrust regimes. The downside of such analysis is that it does not capture the local decision-making of a particular antitrust regime, which likely constitutes the majority of that antitrust regime's focus. This defect, however, will be mitigated in part by the analysis offered in Section III, which offers a short overview of the regimes in addition to case analyses.

The last limitation of the research concerns sources, and is not an unusual one in the academic world. A large section of this work discusses developments and contributions to antitrust law and economics that were largely driven by the US and the EU, and contributions of European and American scholars. This development logically follows from the comparatively long history of law, economics, and enforcement in these countries, and these very same countries are also used as a benchmark for judging the merger decisions in the research section. Yet, the overarching aim of this work is not to demonstrate that the Western standards and knowledge are infallible, but rather to show that the BRICS regimes are also willing and capable of adopting and testing the methods and knowledge created by the Western antitrust regimes and contribute to the evolution of a global antitrust regime.

B. *Global Antitrust Trends—A Mindful Convergence?*

*“The life of the antitrust law . . . is . . . neither logic nor experience but bad . . . jurisprudence.”*¹ The disenchanted Robert Bork, one of the greatest antitrust scholars of the 20th century, pointedly criticized the unresponsiveness of the United States' antitrust law in circa 1960s to economics and empirical evidence.² Although modern antitrust is about 125

¹ Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 242 (1967).

² ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 7 (2d ed. 1993) (criticizing antitrust policy as “at war with itself” because of conflicting principles and anomalous outcomes).

years old,³ it has been barely 50 years since the US antitrust legislation and practitioners began to utilize and standardize antitrust economics. But it has been only a few decades since these developments in the United States and, later, the European Union, spurred debates on a global scale about cooperation, legal convergence, and substantive analytical methods for merger review amongst leading academics and in international fora.⁴ These recent developments unfolded before a backdrop of the rapid spread of antitrust regimes worldwide,⁵ which brought significant benefits to countries and businesses, but also significant costs. Whilst twenty years ago a multinational merger would likely require just the review of the US and the EU, a transnational merger today may require notifications in dozens or more jurisdictions,⁶ which continuously enlarges the system's issue of the "lowest common denominator."⁷ Additionally, the proliferating regimes distinguished themselves with a variety of often divergent competition goals and analytical methods applied in antitrust, which added a layer of complexity to the global antitrust governance reaching beyond Bork's concerns. While Bork and his successors focused on the question of how to

³ The oldest is the Canadian antitrust regime, which came to existence by passing of the Canadian Anti-Combines Act of 1889, followed by the US regime founded after the enacting of the Sherman Act year later. J. Mark Gidley & Maxwell J. Hyman, *The Emergence of Due Process Following the Growth of International Antitrust Enforcement*, in ANTITRUST IN DEVELOPING AND EMERGING COUNTRIES-CONFERENCE PAPERS (2d ed. 2016), http://awa2016.concurrences.com/IMG/pdf/international_antitrust_due_process.pdf.

⁴ This question was first raised in The Organization for Economic Co-operation and Development's (OECD) Competition Committee in May 1992 and subsequently discussed in the OECD Global Forum on Competition in February 2003 and it was raised in a recent debate on institutional change at OECD in December 2014. The 2003 OECD Secretariat note summarized that "the basic objectives of competition authorities were to maintain and encourage the process of competition in order to promote efficient use of resources while protecting the freedom of economic action of various market participants," but the Secretariat also noted there are numbers of other, economic and non-economic goals, promoted in parallel. Frederic Jenny, *The Institutional Design of Competition Authorities: Debates and Trends*, in COMPETITION LAW ENFORCEMENT IN THE BRICS AND IN DEVELOPING COUNTRIES 3 (2016).

⁵ More than 120 countries now have antitrust laws, which means that an ever-growing percentage of transnational merger transactions are being reviewed in several different antitrust jurisdictions. Frederic Jenny, *Substantive convergence in merger control: An assessment*, 1 REVUE DES DROITS DE LA CONCURRENCE N^o. 1-2015, 22 (2015).

⁶ *Challenges of International Co-operation in Competition Law Enforcement*, OECD, 24, 53 (2014), <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf>.

⁷ George Cary rightfully pointed out that the merger control differs from other areas of antitrust policy. For example, prosecution of cartels can be carried out by each jurisdiction independently and it does not usually affect consumers abroad. In a case of a global merger review, several jurisdictions review this global transaction, which means that a single decision can prevent a realization of benefits (or harms) for consumers abroad, referred to as the lowest common denominator problem. George S. Cary, et al., *Too Many Gatekeepers? The Cost of Globalized Merger Control*, in ANTITRUST IN EMERGING AND DEVELOPING COUNTRIES: AFRICA, BRAZIL CHINA, INDIA, MEXICO 109, 111 (Eleanor M. Fox et al., eds., 2d ed. 2015).

make the law more evidence or effects-based,⁸ the modern antitrust regime additionally needs to understand how to transmit or inspire such reforms around the world and in jurisdictions governed by diverging antitrust goals and vastly different economic, political, and social contexts.

A host of scholars and practitioners assessed that there is a “generally convergent state of merger policy around the world.”⁹ Almost in parallel, there has been a perception shift away from the historical view that mergers are neutral at best and anticompetitive at worst.¹⁰ The majority of the antitrust newcomers in the past decade have been developing countries¹¹ which embraced the benefits of antitrust enforcement, including the potential to prevent localized harms, while also reaping the benefits of economic growth.¹² Such benefits are delivered by the globalization of businesses, which often make investment decisions based on an antitrust regime’s predictability and reliability. This connection between a sound merger control policy and economic growth and development has been long recognized¹³ and substantiated by studies that show that antitrust regimes bring about a correlational increase in per capita GDP and economic growth,¹⁴ increase foreign investment and participation at international

⁸ BORK, *supra* note 2. Bork’s vision of incoherency and clashes subsequently created by the incoherent and non-economic principles included in the antitrust policy in the US in the 70s spurred an evolution away from noneconomic considerations. See Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405, 2406 (2013); see also William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 *J. ECON. PERSP.* 43, 53 (2000).

⁹ Rachel Brandenburger & Joseph Matelis, *The 2010 U.S. Horizontal Merger Guidelines: A Historical and International Perspective*, U.S. DEP’T OF JUST., <https://www.justice.gov/atr/2010-us-horizontal-merger-guidelines-historical-and-international-perspective> (last visited Oct. 7, 2017); see also Jenny, *supra* note 4.

¹⁰ Cary, *supra* note 7, at 110.

¹¹ Diane R. Hazel, *Competition in Context: The Limitations of Using Competition Law as a Vehicle for Social Policy in the Developing World*, 37 *HOUS. J. INT’L L.* 275, 276, n.1 (2015).

¹² For example, see Kathryn McMahon, *Competition law and developing economies: between ‘informed divergence’ and international convergence*, in *RESEARCH HANDBOOK ON INT’L COMP. LAW* 209, 210 (Ariel Ezrachi ed., 1st ed. 2012); see also Simon J. Evenett, *Links between Development and Competition Law in Developing Countries*, in *CASE STUDIES FOR THE WORLD DEVELOPMENT REPORT 2005: INVESTMENT CLIMATE, GROWTH AND POVERTY* 24 (2003), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.476.2511&rep=rep1&type=pdf>.

¹³ Already in 2000, the former EC Commissioner for Competition, Peter Sutherland, urged the competition agencies to adopt a number of best practices to reduce the time, cost and uncertainty of international merger review. Sutherland said that:

[t]he M&A trends . . . and the development of the capital markets present tremendous opportunities for economic growth and development. This suggests the need for forward looking merger control policy and a closer coordination among competition authorities on a bilateral, multi-regional and even global scale, working toward a harmonised approach and procedures.

Peter D. Sutherland, *Global Consolidation: Views on Future Market Dynamics*, in *EC MERGER CONTROL: TEN YEARS ON* 65, 71 (Int’l Bar Assoc. ed., 2000).

¹⁴ McMahon, *supra* note 12, at 209.

markets, as well more tangible benefits such as membership in international organizations,¹⁵ or even strengthening of a state's legal institutions.¹⁶

Despite the growth and increased cooperation between global regimes,¹⁷ the OECD report noted that while the “complexity of cooperation has increased 20 times or more [from 1990 to 2001], the legal mechanisms for cooperation have hardly evolved.”¹⁸ The proliferation of antitrust did not provide a panacea for the many economic problems with which the regimes inevitably continue to struggle, and it is not a secret that many of the developing regimes continue to remain under-resourced and thus perform poorly relative to their Western counterparts.¹⁹ Unsurprisingly, the regimes became a hurdle to global transactions, requiring notifications that are not only lengthy, but also costly.

The concept of antitrust convergence directly addresses the problems of regime proliferation and bureaucratic costs. However, the term in its definitional broadness encompasses a wide host of processes and thus does not apply to all parts of antitrust policy evenly, which is why this Article only focuses on a limited part of the convergence process. As explored later, the application of neoclassical economics effectuated limited convergence in economic goals and theories of competition, but also a significant convergence in the legal standards that rely upon the effects-based economic analysis. For this reason, this Article deems openness to economic analysis as the primary and most important factor that can yield reliable and predictable results in merger control, and one that can occur despite larger discrepancies.

Such openness does not imply universal adoption of any particular economic tool or school of thought, but it requires a regime to be well-equipped economically and open to examining empirical evidence presented in the merger review. This Article acknowledges that decreasing merger control costs worldwide is an ambitious and demanding process that would require establishing clear and thoughtful thresholds, speeding up the review processes or decreasing the fees.²⁰ Further, this Article also does not deny that the developing regimes require certain substantial procedural reforms

¹⁵ Examples include the World Trade Organization membership such as the case of China; the EU candidate member accession such as the case of Croatia or Turkey; or the membership in the Organization for Economic Co-operation and Development in the case of Chile. *Id.* For a broader discussion on the challenges and benefits of developing competition regimes in developing countries. See Maher M. Dabbah, *Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime*, 33 *WORLD COMP.* 457, 463 (2010).

¹⁶ See Gidley, *supra* note 3.

¹⁷ There is significant cooperation between the regimes, as discussed in the case law later. For example, the Department of Justice (DOJ) reported that it cooperated with other agencies for 40% of its merger caseload in the past five years. *Challenges of International Co-operation in Competition Law Enforcement*, *supra* note 6, at 35.

¹⁸ *Id.* at 53.

¹⁹ McMahon, *supra* note 12, at 210.

²⁰ Cary, *supra* note 7, at 117.

or resources to achieve such homogeneous convergence and greatest possible cost-savings for global business. Instead, it argues that a degree of convergence, beneficial for all parties involved, is possible in the current conditions. Very few studies pay attention to the agency processes in application of economic analysis, especially at the comparative level. This Article attempts to fill in the gap because it is assured in the importance of monitoring and comparing the experiences from antitrust enforcement worldwide in order to produce more advanced, predictable, and all-encompassing standards for antitrust practice worldwide.

Critics may argue that such understanding of convergence will not guarantee absolute uniformity of outcomes or norms. This Article argues that absolute uniformity is not as imperative for establishing reliable and transparent antitrust regimes that maximize the benefits of globalized business for customers worldwide. Convergence in antitrust economics is a dynamic term that denotes a process in which a jurisdiction adopts a set of widely accepted norms and the regime comes to an imaginary rest until the set of standards is challenged and accepted by each member again.²¹ The process, however, does not guarantee a uniform adoption of standards because experimentation with different practices that will best suit the different jurisdictions is central to any antitrust regime. Convergence inevitably begets divergence and it is only the experimentation in standards, tools and procedures that will allow us to see which procedures are more effective than others. Herein, this Article argues that the BRICS country group is an important player and representative of the countries on the forefront of this dynamic global antitrust convergence process, and that the BRICS are uniquely situated to advance the antitrust law and spread its benefits in their respective regions.

C. Economic Evidence and Antitrust as We Know Them

This section will analyze the history, nature, and characteristics of economic evidence in antitrust, an indispensable part of every step of the analysis required to assess the current practices in merger review. Kovacic and Shapiro captured the co-dependent nature of the relationship between antitrust law and economics throughout history in noting that they have evolved together and influenced each other's development of concepts and doctrines in the light of new evidence and experiences.²² The main principles and doctrines of antitrust law have evolved under the influence of economic theory: the antitrust regimes frequently incorporated new

²¹ For example, a widely accepted definition of convergence is the one of the International Competition Network's, which describes convergence as, "the voluntary adoption of widely-accepted . . . standards, procedures and levels of institutional capability." ICN, *The ICN's Vision for its Second Decade: Presented at the 10th Annual Conference for the ICN* (May 17-20, 2011), <http://www.internationalcompetitionnetwork.org/uploads/library/doc755.pdf>.

²² Kovacic & Shapiro, *supra* note 8, at 43.

concepts into guidelines and laws, while the courts have interpreted the evolving doctrines, and the soft law has expanded proportionally to the new interpretations of the antitrust statutes.²³ The antitrust analysis has undergone a radical revolution; after all we can note that just a hundred years ago, the American Judge Taft likened the application of the “rule of reason” to “set[ting] sail on a sea of doubt”,²⁴ and the use of empirical methods in law as a method faced substantive criticism in the courts because of their perceived uncertainties and error-rate.²⁵ The economic analysis in antitrust law has since gained global prominence, which propelled the doctrinal establishment of the “rule of reason analysis”²⁶ in the US courts and the “effects-based approach” in the EU antitrust regime.²⁷ This evolution marked a trend that emphasizes moving away from the rules of reason and the traditional approach in agencies’ decision-making, which often involved the “categorization” of types of firm conduct followed by condemnation or exoneration.²⁸ With some time lag, the transition to a more evidence-based approach reached the European antitrust policy: the European Commission intensified its efforts to build an in-house economic capacity and further the development of analytical procedures that incorporated results-based analysis.²⁹ As a result of this process, the European law has been increasingly interpreted using economics, and the

²³ See generally William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J. L. & ECON. 385 (1993) (a study of the influence of economics on law based on an analysis of economic scholars’ citations in academic legal articles).

²⁴ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898).

²⁵ Frank H. Easterbrook, *The Limits of Antitrust*, 21 OCCASIONAL PAPERS L. SCH. U. CHI. 1, 11, 14 (1985).

²⁶ Very broadly, we distinguish between two types of legal standards: effects-based and object-based (in the US terminology, these are the rule-of reason and the Per Se rules). In a court or agency, application of per se rules means that the conduct in question was unreasonably anticompetitive and the presumption was irrefutable. The application of the rule selects the winner. The rule-of-reason analysis requires a detailed inquiry into effects and heightens the burden of proof for plaintiffs, providing no clear answers before the analysis. See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 735 (2012) (a discussion and historical record of the doctrinal development of the rule of the reason analysis). For a further discussion of the rule of the reason and the economic analysis in antitrust, see Jesse W. Markham, *The Per Se Doctrine and the New Rule of Reason*, 22 SOUTH. ECON. J. 22, 24 (1955); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL. STUD. 257, 257-58 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557 (1992).

²⁷ Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of “Per Re Rules Versus Rule of Reason,”* 2 J. COMPETITION L. & ECON. 215, 235 (2006).

²⁸ Gavil, *supra* note 26, at 736 (on practical consequences of applying the rules in the courts).

²⁹ OECD, Market Studies 186 (Nov. 21, 2008), www.oecd.org/regreform/sectors/41721965.pdf; Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank — Conclusions of the Fifth Report on Economic, Social and Territorial Cohesion — The Future of Cohesion Policy, at 70, COM (2010) 642 final (Aug. 25, 2011).

number of economists and lawyers with understanding of both antitrust law and economics grew.³⁰

The evolution described above led to the development of the general theory and practice in which merger control regimes nowadays operate. On a theoretical level, the economic and empirical evidence are expected to provide the agency with (i) an understanding of how markets in question operate and how competition interactions take place, which in turn allows an agency to (ii) formulate credible theories of harm, and (iii) predict their magnitude and direction.³¹ Once the agency solidifies an understanding of a market, the agency proceeds to a theory of harm that is consistent with the acquired understanding of the market.³² Very broadly, there are two categories of economic theories of harm applied to horizontal mergers: (1) unilateral effects and (2) coordinated effects.³³ Both theories can be used concurrently, although the analytical foundations for predicting coordinated effects remain comparatively underdeveloped,³⁴ which makes the counseling regarding the harms of coordinated effects more difficult and litigable.³⁵

During the initial review stage, the agency can concurrently apply a selection of economic tools of varying complexity to predict the features of the market and scope of the harms.³⁶ The particular choices that the agency makes in selecting the analytical instruments often depends on the available data and resources, features of the markets, and the available economic expertise.³⁷ It is of vital importance to mention to at least briefly

³⁰ See Damien J. Neven, *Competition Economics and Antitrust in Europe*, 21 ECON. POL'Y 741, 780 (2006) (on the progress in utilizing economic evidence in the EC decision-making).

³¹ Eur. Comm'n, *Best practices for the submission of economic evidence and data collection in cases concerning the application of articles 101 and 102 TFEU and in merger cases*, D.G. COMPETITION (2010), http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_submissions.pdf.

³² THE MERGER WORKING GROUP, *The Role of Economists and Economic Evidence in Merger Analysis*, INTERNATIONAL COMPETITION NETWORK 1-2 (Apr. 24-26, 2013), <http://internationalcompetitionnetwork.org/uploads/library/doc903.pdf> [hereinafter ICN Merger Working Group].

³³ EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL COMPETITION LAW AND ECONOMICS*, 922-23 (2d ed., 2011).

³⁴ The U.S. Horizontal Merger Guidelines from 1992 first incorporated the economic theory that moved the analysis of coordinated effects beyond the structural presumption by emphasizing the relative likelihood of a coordinated conduct in the relevant market and inquiring about the effects of a transaction on the incentives to coordinate. Jith Jayaratne & Janusz Ordover, *Coordinated Effects: Evolution of Practice and Theory*, in 21.1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 509 (Roger D. Blair & D. Daniel Sokol eds., 2015).

³⁵ *Id.* at 510.

³⁶ ICN Merger Working Group, *supra* note 32, at 3.

³⁷ Tembinkosi Bonakele, *The Nature and Use of Economic Evidence in Competition Enforcement (with Special Emphasis to the Case of South Africa)*, in *COMPETITION LAW ENFORCEMENT IN THE BRICS AND IN DEVELOPING COUNTRIES* 187, 189 (Frederich Jenny & Yannis Katsoulacos, eds., 2016).

the outlines of the analytical sequence in the merger review processes as applied by the antitrust agencies because it provides the very same framework under which are the decisions in Section III scrutinized.

At the very outset, and before the substantive analysis, agencies often apply economic screens to conduct the initial determination of whether a given combination raises competitive concerns or requires further analysis.³⁸ The agency may also additionally apply indices that estimate post-merger incentives to raise prices.³⁹ To grasp the functioning of the market, the antitrust authority inspects the characteristics of a given industry such as ease of entry, presence of capacity constraints, product differentiation, types of customer negotiations, degree of innovation, or presence of network effects.⁴⁰ The theory of harm is then formulated with the help of agencies guidelines, case precedent, or other available expert resources.⁴¹ Usually, the agency also explores questions and conditions related to one or more elements of merger analysis such as market definition, competitive effects, entry, or efficiencies in order to decide whether to block a merger or impose remedies.

The availability of the data and the likelihood of competitive harm should influence the choice of analysis. It is not unusual, however, that an agency's decision-making will often be less dependent on such holistic evaluation of theories and resources and more dependent on practicalities such as time, resources or the ease of applying the already established practices. Regardless of the vigor or precision with which a government applies economic tools, it can be said that the agencies world-wide generally welcome their presence and attempt to refine the methods by expanding their in-house expertise or participating in professional networks.

D. Establishing the Role of the BRICS

This Article sees the BRICS country group as a vital force influencing the outcomes of global merger review with a great potential to add to and shape the body of antitrust practice and procedure. There are two proofs of this claim discussed below. The first revolves around the general importance of the BRICS in the world's economy. The second is built on its already-existing capacities for economic analysis in antitrust that the BRICS group built up in the few years of their antitrust regimes' existence.⁴²

There is a host of political and economic examples attesting to the BRICS global importance. The BRICS all played a major role in the

³⁸ ICN Merger Working Group, *supra* note 32, at 2.

³⁹ Such screens are for example the Upward Pricing Index (UPP) or the Gross Upward Pricing Pressure Index (GUPPI). *Id.* at 30, 58.

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 4-5.

⁴² See COMPETITION LAW IN THE BRICS COUNTRIES 3-4 (Adrian Emch, et al. eds., 2012).

globalization of the world's markets. The BRICS countries together account for more than 40% of the global population, nearly 30% of the landmass, and a share in world GDP that increased from 16% in 2000 to nearly 23% in 2010, and is expected to rise further in near future.⁴³ Lastly, the sheer economic power of the respective countries is well-known: China is the world's second largest and the fastest growing economy, while both India and Brazil are in the top ten.⁴⁴ Giving the BRICS countries' sheer economic and trade power, it would be imprudent, to say the least, not to consider their impact and on the development of global antitrust law and practice. Each of the competition regimes commenced their activity at different points in the past two decades,⁴⁵ and, as of now, each of the countries has an administrative body with jurisdiction to review mergers.⁴⁶ The rapid growth of antitrust regimes and expertise frames the story of these countries' shared commonalities in their experiences with economic development and in their potential to become trend-setters in global antitrust, not just followers of the EU and US regimes.

The table below serves as a primer concerning the merger control systems in the BRICS and their Western counterparts. This table also

⁴³ Suresh P. Singh & Memory Dube, *BRICS and the World Order: A Beginner's Guide*, at 8 (BRICS-Trade & Economics Research Network, 2013), available at http://cuts-international.org/BRICS-TERN/pdf/BRICS_and_the_World_Order-A_Beginners_Guide.pdf (citing *The BRICS Report 2012*. India: Oxford University Press, 2012).

⁴⁴ Alex Gray, *The World's 10 Biggest Economies in 2017*, WORLD ECONOMIC FORUM (Mar. 9, 2017), <https://www.weforum.org/agenda/2017/03/worlds-biggest-economies-in-2017/>.

⁴⁵ The Russian antitrust regime is the oldest one, dating back to 1991, followed by the Brazilian one which was established in 1994, and the South African regime created by the Competition Act in 1998. The relatively newer regimes of India that commenced its modern practices by the Competition Act 2002. China has the youngest competition institution, which was established by the Anti-Monopoly Law in 2008. Karen Aldermann & Terry Calvani, *BRIC in the International Merger Review Edifice*, 43 CORNELL INT'L L. J. 73, 74–75 (2010); KASTURI MOODALIYAR & SIMON ROBERTS, *THE DEVELOPMENT OF COMPETITION LAW AND ECONOMICS IN SOUTH AFRICA* ix (1st ed., 2012).

⁴⁶ Antitrust in Brazil is governed by the newly enacted Law No 12,529 of 2011, which entered into force in 2012 and replaced the older Law No 8,884/94. COMPETITION LAW IN THE BRICS COUNTRIES, *supra* note 42, at 4. The new competition law consolidated investigative, prosecutorial and adjudicative functions of the three previous competition authorities (CADE, SDE and SEAE) into one agency: The (new) Administrative Council for Economic Defense (CADE). *Id.* Merger control in China is enforced by the MOFCOM's Anti-Monopoly Bureau. In merger review, MOFCOM must consult the other two antitrust bodies—National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC)—, the primary responsibilities of which are other competition issues. *Id.* at 151. The Federal Anti-Monopoly of the Russian Federation (FAS) enforces the Russian competition law in its central or regional offices and through 23 departments responsible for different industries. *Id.* at 89. The Competition Act, 2002, was amended by the Competition Act of 2007, which established the Competition Commission of India (CCI) on March 1, 2009 to enforce the antitrust law in India. *Id.* at 102. The decisions of the CCI can be appealed at the Competition Appellate Tribunal (CAT). *Id.* at 117. Finally, in South Africa, the Competition Act of 1998 created the Competition Commission (CC), the Competition Tribunal (CT), and the Competition Appeal Court (SACAT). *Id.* at 208. The CC is the administrative body governing the merger control while the CT is the primary adjudicatory body for competition matters. *Id.*

summarizes some vital statistics about the agencies' resources and capacities linked to the use economic evidence. Although this Article does not focus on the agencies' institutional design and capacities, they pose unquestionable limits and provide valuable background for the case law analysis carried out in Section III. It is obvious that the US and the EU have robust enforcement regimes with budgets many times greater than those available to the BRICS. But we also know that, historically, this had not always been the case in the EU. Similarly, to the European Union's experience, the BRICS jurisdictions experienced significant growth from nascent regimes to solid foundations of merger control. Based on the developments in the BRICS' antitrust agencies discussed later, there is a strong reason to believe that this growth will continue.

Surely enough, one could point out to significant disparities in the institutional settings, legislation, and outcomes amongst the BRICS and between the BRICS and the Western countries. But such a myopic comparison would not account for the short existence and comparatively fewer initial resources available to the BRICS. Instead, it is better to focus on the similarities that can be derived from the summary table below. The similarities are quite astounding given the countries' differing resources, economies, and starting points. The most significant point from the summary table is that a majority of the BRICS antitrust regimes employ a significant number of PhD economists, which is something that took years for the EU and the US to achieve in their respective regimes.⁴⁷ The second point is that the BRICS jurisdictions routinely involve outside economic counsel and actively continue to build up their resources in-house.

A notable downside is that the regimes still suffer from high caseloads—for example the Russian Federation, that to some degree, compensates with the employed manpower.⁴⁸ It is questionable that in such high case turnaround, an increased number of staff, compared to a relatively standard number of economists,⁴⁹ can lead to an improvement in the quality and inclusion of the economic evidence in merger review. These caseloads reflect that each jurisdiction's notification thresholds for filings are often too low.⁵⁰ Yet low notifications are not completely unknown in some developed countries either. For example, Germany receives around 1,000 notifications a year because of its low notification threshold of 25 million EUR.⁵¹ Because of that we can conclude that these structural constraints are an impediment that requires careful workarounds and greater resources,

⁴⁷ See *infra* Table I.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Over 80 nations, that compose 80% of the world output, have some form of a notification law, but they differ widely on their notification thresholds (i.e. a legally set boundary in turnover/asset/market share of the combined entity required to be notified to the respective antitrust authority). See ELHAUGE & GERADIN, *supra* note 33, at 923.

⁵¹ ANTITRUST IN EMERGING AND DEVELOPING COUNTRIES 112 (Eleanor M. Fox et al. eds., 2d ed. 2016).

rather than a barrier to a well-functioning regime. This is confirmed first-hand by the global antitrust trend in which the agencies are increasing the overall depth of merger review, as outlined in Section III, slowly giving way to an in-depth, reliable, and evidence-based review. It is then reasonable to conclude that far from being underdeveloped, the BRICS have built up solid regimes with growing economic analytical power.

Table I: Overview of the merger control in the BRICS, the EU and the US and their capacities in economic analysis⁵²

	US	EU	Brazil	Russian Federation	India	China	South Africa
Regulatory Body Responsible for Merger	Antitrust Division of the Department of Justice (DOJ); The Federal Trade Commission (FTC)	The European Commission (EC)	The Administrative Council for Economic Defense (CADE)	The Federal Antimonopoly Service (FAS)	The Competition Commission of India (CCI); the Competition Appellate Tribunal (COMPAT)	Ministry of Commerce MOFCOM	The Competition Committee of South Africa (CCSA); the Competition Tribunal of South Africa (CTSA)
Economic Body	Economic Analysis Group (EAG) at the DOJ; Bureau of Economic at the FTC	The Office of Chief Economist	Department of Economic Studies (DES)	The Analytical Department of FAS	The Economic Division of CCI	The Economic Division of the Anti-Monopoly Bureau	CCSA level: The Policy and Research Division; CTSA level: a general Research Division
Number of Economists	50 economists at EAG (almost all are PhDs); about 80 PhD economists at the Bureau (2015)	130 industrial economists overall (20% PhD) and 34 in the DG Comp (mostly PhDs) (2015)	23 economists (the entire Board) in CADE out of which 5 have a PhD, 10 in DES (2015)	467 economists in the regional and national offices: 44 have a PhD in economics (2015)	20 economists at the CCI and at the Director General's Office (including the DG), none with PhD (2015)	Several case handlers allegedly have economic background, but outside economic advisory is increasingly preferred ⁵³	CCSA has 24 economists (no PhDs); CTSA 4 economists: 1 full-time Tribunal member and 3 part-time (2 have PhD in Economics) (2015)
Chief Economist	Yes	Yes	Yes	Yes	No	No	Yes, on CCSA level. No on CTSA. Currently vacant position of in-house-

⁵² See generally COMPETITION LAW ENFORCEMENT IN THE BRICS AND IN DEVELOPING COUNTRIES (Frederic Jenny & Yannis Katsoulacos, eds., 2016); Alexandr Svetlicinii & Juan-Juan Zhang, *The Competition Law Institutions in the BRICS Countries: Developing Better Institutional Models for the Protection of Market Competition*, 2 CHINESE POL. SCI. REV. 85, 95 (2017); Global Competition Review & Berkeley Research Group, *A Global Competition Review Special Report: United States in THE HANDBOOK OF COMPETITION ECONOMICS* (2016).

⁵³ San Sau Fung et al., *The Use of Economics in the Anti-Monopoly Law of China*, 6 J. OF EUR. COMPETITION L. & PRAC. 268, 270.

							economist
Chief economist power to hire outside counsel/staff?	Yes, subject to the review of the Chairperson	Yes, in agreement with the DG	Yes	Yes	No	N/A (presumably yes as MOFCOM has done this in several cases)	Yes
Is an economist included on every case?	Yes	Yes, in cases requiring economic analysis	No, usually DES provides general assistance in complex cases	Yes, AD takes part in all meetings and take part on any consideration	Yes	N/A	CCSA: yes, in complex cases. CTSA: no, the Chairperson decides the composition before the case
Use of outside economic counsel	Yes: the Bureau also independent	Yes	No	Yes	No, but considering it (privacy concerns)	Yes	Yes
Total staff number/ case handlers	FTC 538 full-time staff/ cca 302 attorneys, cca 100 other investigators, merger analysts, etc. (2015); DOJ 615/301 attorneys and 148 other professional staff (2015)	757 officials DG COMP/ N.A. (2015)	366 total staff/ 96 case handlers (2014)	3,038 total staff/ 1,777 case handlers (2014)	151 total staff/ 91 case handlers (2014)	Approx. 100 (central office staff) / 165 case handlers (2014)	188 total staff / 115 case handlers
Merger control caseload	FTC investigates 28 transaction out of 1,618 notified and challenged 17; DOJ investigated 80 mergers, challenged 7 (2014)	337 notifications, 15 2 nd phase reviews (2015) / N.A.	423 (2014)	2,246 (2014)	94 (2014)	246 (2014)	358 (2014)
Avg. length of an in-depth review	9.7 months (2015)	Up to 8 months not including pre-notification (2015)	77 days (2014)	45 days (2014)	168 days	300 days (2014) (in-depth)	64 days (2014)
Budget	FTC: \$129 million (2014); DOJ Division: \$163.2 million (2014)	101.7 million EUR (2016)	10.2 million EUR (2014)	35.8 million EUR (2014)	5.5 million EUR (2014)	320.25 (for MOFCOM, SAIC, NDRC) million EUR (2014) ⁵⁴	22 million EUR (2014)

⁵⁴ The total budget of the three anti-monopoly authorities is large, but the antimonopoly enforcement is carried out by relatively small singular departments within these, which means in reality that the MOFCOM's budget may be in reality more similar to its BRICS' counterparts. Svetlicinii & Zhang, *supra* note 52, at 95.

Applicable Economic Guidelines	Horizontal Merger Guidelines 2010, Non-horizontal Merger Guidelines 1997	Guidelines on the Assessment of Horizontal Mergers 2004, Non-horizontal Guidelines 2008, Best Practices on the Submission of Economic Evidence 2011	Horizontal Merger Guidelines 2016, working papers by the DES	Guidelines for Market Assessment 2010	A number of primers on different economic concepts by the Dedicated Research Unit	Guidelines Concerning the Definition of Relevant Markets (2009); Provision Rules on the Assessment of the Competitive Effects of a Concentration of Business Operators 2011	No formal guidelines, but CAC guidelines on expert presentation of economic evidence (<i>Sasol Chemicals</i> 131/CAC/Ju n14, para181)
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II. ECONOMICS AND ANTITRUST'S GOALS: WHAT DOES IT MEAN FOR CONVERGENCE?

This section aims to resolve the conflict between the non-economic goals and policies of antitrust regimes and application of economic evidence in such settings in order to resolve theoretical hurdles to the practicability of exploring convergence in such settings. It will do so in three steps. First, it will provide an overview of the current antitrust goals as adopted by the BRICS and the US/EU and outline their differences. Second, it will discuss economic and non-economic goals of antitrust on the abstract level to explain the inherent trade-offs and establish the existence of a degree of normative decision-making. These two parts will subsequently aid the resolution of the central question answered in theory as the third point of the analysis, which is how the methods of economic analysis can aid convergence amidst a diverse body of antitrust regimes such as the BRICS.

A. Overview of the Global Antitrust Goals and Policy Setting

The antitrust goals were for a long time seen as inseparable from the antitrust policy and perhaps also from the methods used in the agency review process. Bork wrote in his oft-cited work, *The Antitrust Paradox*, that the “[a]ntitrust policy cannot be made rational until we are able to give a firm answer to one question: ‘what is the point of the law-what are its goals? Everything else follows from the answer we give.’”⁵⁵ The global convergence of antitrust regimes seems to have, to the contrary, produced more diverse goals, and perhaps even stifled the vision of convergence in analytical methods seen as contingent upon the goals. Presently, global antitrust goals vary greatly in type and focus. For example, the *Competition Act of South Africa* declares a wide degree of economic and non-economic goals such as promotion of efficiency, adaptability and development of the economy as well as the provision of consumers with competitive prices and product choices. The Act additionally strives to promote employment and advancement of the social and economic welfare, and social goals such as

⁵⁵ BORK, *supra* note 2, at 50.

greater spread of ownership for historically disadvantaged persons.⁵⁶ The Chinese competition goals include not only the protection of fair competition in the market and the interests of consumers, but also the promotion of the healthy development of the socialist market economy.⁵⁷ The *Indian Competition Act* stipulates the aim of its policies are to: “prevent practices having adverse effect on competition. . . to protect interests of consumers and to insure freedom of trade,”⁵⁸ while “. . . keeping in view the economic development of the country.”⁵⁹ The merger control in Russia, on the surface, focuses only on competition,⁶⁰ though, in reality, the laws and government subject the system to the Federation’s economic and policy goals. For example, the *Foreign Investments Law*, requiring special clearance for foreign companies, is active in one of the forty-two spheres of strategic importance for the national security and defense.⁶¹ It is worth noting that this special clearance also necessitates an approval of the Governmental Commission chaired by the President, a condition that does

⁵⁶ Additional goals are the expansion of opportunities for South African participation in world markets while ensuring equitable opportunity for small- and medium-sized businesses to participate in the economy. Jenny, *supra* note 4, at 5.

⁵⁷ *Id.* at 6.

⁵⁸ Recent research suggests that there is a tendency in the Indian competition policy to adopt the efficiency-based model of developed countries, in particular with the European Union rather than the United States, with some weight given to domestic goals. Poonam Singh, *Convergence in Emerging Markets: The Case of Abuse of Dominant Position in Competition Policy*, 25 J. INTERDISC. ECON. 41, 51 (2013).

⁵⁹ The Competition Act, 2002, No. 12 of 2003, INDIA CODE (2003).

⁶⁰ Article 34(2) of the *Constitution of the Russia Federation* stipulates that “[t]he economic activity aimed at monopolization and unfair competition shall not be allowed,” that is, the protection of the competitive process is considered to be the primary goal of the competition legislation. Crucially, the antimonopoly body understands this as a precondition for maximizing consumer welfare and efficiency allocation (understood as an approximation of the total welfare standard) and use of national resources. INTERNATIONAL COMPETITION NETWORK, *Unilateral Conduct Working Group Questionnaire: Answers Prepared by Federal Antimonopoly Service of Russia* (2006), <http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20objectives/russia%20response.pdf>. Other sources also attest to the similarity of the Russian competition regime to the one promulgated by the Chicago school and applied by the US by expressing their belief that consumer welfare (not in the Borkean view of total welfare) is best served by non-enforcement means, primarily enforcing competition programs and advocating competition principles, including liberalization of the former monopolies with the aim of creating competitive environment across the sectors that would result in an increase of consumer welfare. INTERNATIONAL COMPETITION NETWORK, *Competition Enforcement and Consumer Welfare, Setting the Agenda* 74 (May 17-20, 2011), <http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf>.

⁶¹ E.g. nuclear or radioactive materials, aviation and space, natural resources, etc. *The Law on Foreign Investments in Russian Strategic Companies*, at 3-4 (Hogan Lovells, 2012) (explaining Russia’s “Procedure for Foreign investments in Companies of Strategic Significance for the Defense and Security of the State,” No. 57-FZ (April 2008)).

not add to the law's credibility.⁶² Second, the regime is also full of various industry restrictions,⁶³ which invariably lengthen and complicate the merger review and bring a variety of unwelcome government interference. On the other side of the spectrum stands Brazil, which built much of its new antitrust agency based on the American Federal Trade Commission's (FTC's) model,⁶⁴ and which also follows the American example in declaring its antitrust goals only in economic terms.⁶⁵

To add a layer of complexity to the overview, it is known that the antitrust goals differ amongst the most developed countries too. The United States and the European Union have achieved a significant convergence in the past decade,⁶⁶ yet there are several persistent fundamental differences. The United States currently focuses on strictly economic goals.⁶⁷ In the

⁶² Recently, the law has been amended by the Federal Law No. 165-FZ, further tightening the government control over investments by widening the definition of foreign investor (which now includes nationals holding any other citizenship and Russian companies controlled by foreign investors), increasing the punishment for not notifying the FAS, expanding the list of "strategic activities," and requiring notification about investments in the Crimea and Sevastopol. Igot Ostapets & Ksenia Tyunik, *Amendments to the Foreign Investment Law: A Means to Tighten Control*, at 1-2 (White & Case, 2017).

⁶³ For example, under the *Russian Law on Natural Monopolies*, an acquisition of more than 10% of shares in a company operating in natural monopolies sphere requires a post-transaction notification to FAS. Within the banking sector, an acquisition of 20% or more of the shares in a Russian credit organization is subject to the Central Bank of Russia's prior approval. In the mass media, foreign companies have perhaps the most limited rights to acquire mass media outlets. A foreign company or a Russian company with a foreign share is not allowed to establish or acquire a TV or video channel; such an entity may not be a founder of a company broadcasting to an area that constitutes more than half of the territory of the Russian Federation and/or where more than half of Russian population resides. COMPETITION LAWS IN THE BRICS COUNTRIES, *supra* note 42, at 98.

⁶⁴ See Fiona Schaeffer & Michael C. Harper, *A Fundamental Shift: Brazil's New Merger Control Regime and Its Likely Impact on Cross-Border Transactions* in THE ANTITRUST SOURCE, at 2 (American Bar Association, 2012), available at <http://www.jonesday.com/files/Publication/ee7ed7df-d4fd-4ff4-bf7655a933c7cf49/Presentation/PublicationAttachment/f4ef687d-1c40-4ffc-a1e9-5ae02b69463f/ABA%20Antitrust%20Source%20Article%20-%20A%20Fundamental%20Shift.pdf> (providing an overview of Brazil's antitrust administrative history).

⁶⁵ The Brazilian Antitrust Law requires that the policy and law are guided by constitutional principles which provide that "[t]he law shall repress abuse of economic power that aims at the dominance of markets, the elimination of competition and the arbitrary increase of profits." The Brazilian Constitution of 1988, art. 173. Article 170 provides a more general guidance which suggests that the consumer welfare principle is an integral consideration of the competition regime because the Article contemplates that the "economic order" of Brazil shall be "founded on the appreciation of the value of human work and on free enterprise," and "shall operate with due regard" for certain principles, including "free competition," "the social role of property," "consumer protection," and "private property." INTERNATIONAL COMPETITION NETWORK, *Unilateral Conduct Working Group Questionnaire* (2006), <http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20objectives/brazil%20response.pdf>

⁶⁶ See also Ionnis Kokkoris, *Introduction: EU and US Competition Enforcement: Convergence or Divergence*, 59 THE ANTITRUST BULL. 1, 1-2 (2014) (reviewing in detail the convergence and divergence of competition policy between the US and the EU).

⁶⁷ See Wright & Ginsburg, *supra* note 8, at 2407-2408.

European Union, the economic goals⁶⁸ have to be balanced with broader concerns such as integration of the common market or the protection of the “freedom to compete,” known from the German Ordoliberal tradition.⁶⁹ It is quite obvious that these different economic and non-economic goals in the BRICS and in the developed regimes have been compelled by the different historic, political, social, and economic experiences and prescriptions and if the examples of the EU and the US are any indication of the future of the BRICS and their goals, these differences might be here to stay.

This apparent divergence in goals begs the question: how can we seek convergence across jurisdictions that are by design of its aims so fundamentally different? Can economic and non-economic goals coexist? Some scholars indeed view the inclusion of non-economic goals as disruptive and a source of divergence.⁷⁰ From the neoclassical perspective, the antitrust regimes align in a gradually developing spectrum: on the “developed side,” there is the US, Brazil, and similarly organized regimes which have policies centered solely on economic efficiency, whereas on the “less developed side,” there are regimes that are inclusive of non-economic goals and often also regimes in which the state policy, not the market force intervenes. This seemingly immutable arrangement creates an expectation that the countries will at some point in their development be expected to “free” themselves from their “underdeveloped state” and reach the pinnacle of a singular economic goal in antitrust policy-making. Yet we cannot claim with certainty that all of the developing countries are inexorably moving towards economic efficiency as their exclusive antitrust goals or whether any of the regimes will retain antitrust instruments as reliable means to achieve non-economic goals. The only way to track the path of convergence of goals and to subsequently calibrate the greatest possible degree of convergence in antitrust methods is to involve the newly emerging regimes in the process. The BRICS should be marshaled on the forefront of this effort as important a leader and a source of a diverse antitrust experience, both of which are of paramount importance in tailoring the global convergence to the diverse needs of its participants.⁷¹

⁶⁸ Economic goals in the EU are understood to be enhancing consumer welfare and increasing total welfare. Jingyuan Ma, *Comparative Analysis of Merger Control Policy: Lessons for China*, at 95 (Ph.D. dissertation, Erasmus Universiteit Rotterdam) (2014); see The Lisbon Treaty, art. 3.

⁶⁹ MA, *supra* note 68, at 95.

⁷⁰ Roger Van Den Bergh, *The More Economic Approach in European Competition Law: Is More Too Much or Not Enough?*, in *ECONOMIC EVIDENCE IN EU COMPARATIVE LAW 19-20* (Mitja Kovacic, Ann-Sophie Vandenberghe, eds., 2016).

⁷¹ *Id.*

B. *The Conflict: The Economic and Non-Economic Goals of Antitrust*

The functioning and directing of an antitrust regime consists of many complex choices and decisions that are to some extent influenced by the available and accepted economic theory. As outlined earlier, much of the discussion about global antitrust regimes revolves around their individual goal setting in terms of economic and non-economic goals. The discussion, although appreciably important, is at times so complex and abstract that it is almost impossible to apprise the relative importance of the academic debate for convergence of regimes in analytical methods next to it. This section argues that the economic goals not only do not guarantee a regime that is free from a degree of normative decision-making, but it also postulates that the extent of the conflict between economic and non-economic goals might in practice be overstated and overshadowing important convergence processes on a much more fundamental level.

The history and economic theory connected to the economic goal setting of an antitrust regime dates back to the emergence of antitrust as an academic field.⁷² Theoretical understanding of the economic approaches, their conflicts, and uncertainties are indivisible from understanding to what degree they influence antitrust convergence. These three prominent economic approaches are defined by their highest-priority outcome: the total welfare or the “consumer welfare” as understood in the work of Robert Bork,⁷³ the consumer welfare goal, and the protection of the individual economic freedom approach.⁷⁴ As touched upon earlier, the approaches are vastly different and often conflicting. The first approach, the total welfare standard, originated in the powerful American school of thought in the 1970s—the Chicago school led by, amongst others, Robert Bork, Frank Easterbrook, Richard Posner and George Stigler.⁷⁵ As opposed to their predecessors from the Harvard school,⁷⁶ the proponents of the Chicago

⁷² See generally James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L. 1214 (1977); See also, e.g., Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust*, 125 U. PENN. L.R. 1214 (1977).

⁷³BORK, *supra* note 2, at 430 (Bork argued that antitrust should adopt what he coined as a “consumer welfare” standard, but then functionally equated this term to total welfare standard, which has started an ongoing and voluminous debate about Bork’s intention, the intentions of the legislators who enacted the *Sherman Act*, as well as a general normative debate about which one should be the goal of antitrust).

⁷⁴ See Van Den Bergh, *supra* note 70, 19-20.

⁷⁵ POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 65 (Antonio Cucinotta, Roberto Pardolesi, Roger J. Van Den Bergh, eds., 2002).

⁷⁶ The Harvard and the Chicago school share a joint belief about the primacy of the total welfare goal in antitrust with the difference about how to go about achieving it. The Harvard school believes that an acceptable way to do so is a robust governmental intervention, whereas the Chicago school’s approach is “laissez-faire,” believing the governmental intervention is not beneficial. For more on the schools of thought, See e.g., CARL KAYSEN & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* (1st. ed., 1958).

school believed that antitrust should only achieve economic goals as measured by the impact on the total welfare, while ignoring any distributional concerns.⁷⁷ The Chicago school's approach revolutionized the economic approach to antitrust law,⁷⁸ moving away from the market concentrations that were used as the primary merger assessment tool in the days of the Harvard school's theory of structure-conduct-performance (SCP).⁷⁹ Defined in economic terms, the total welfare goals referred to the maximization of productive and allocative efficiency or the maximization of wealth or consumer want satisfaction and the aggregate efficiency in the economy.⁸⁰ Bork named this result a "consumer welfare" out of belief that the Pareto-optimal state ultimately benefits the consumer the most while preserving competition.⁸¹ But this approach does not correlate with what its name suggests—maximizing the consumer welfare—as the consumer welfare is a desired outcome central to the second theory, also named after consumer welfare, discussed. Bork instead referred to the concept of total welfare, which is the term that is used in this Article to denote the economic efficiency goal preferred by the Chicago school.⁸² Unsurprisingly, the misleading names and concepts of the "Borkean consumer welfare," "consumer welfare" as applied by the European Union, and the "total welfare" are sources of frequent confusion and are often dubbed the "Chicago trap"⁸³ or the "Borkean trap."

The second economic approach is consumer welfare, which has recently experienced a surge in popularity amongst the world's competition authorities.⁸⁴ The main difference between the total welfare and consumer welfare approaches is that, for the consumer welfare proponents, it matters where the gains in welfare go.⁸⁵ In other words, this approach stresses that

⁷⁷ Herbert J. Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 215-216 (1985). For an overview of the goals and policies of the Chicago school and relevant economic and judicial debates see RICHARD POSNER, *ANTITRUST LAW* (2d ed. 2001); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981) [hereinafter Posner, *Per Se Legality*]; Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1 (1984).

⁷⁸ Herbert J. Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 214, 223 (1985).

⁷⁹ MA, *supra* note 68, at 71 (The SCP approach put focus on a structural approach to antitrust and merger analysis and postulated that market power, as measured by underlying market shares and structure, should be kept under certain thresholds which necessitated government intervention).

⁸⁰ BORK, *supra* note 2, at 10.

⁸¹ BORK, *supra* note 2, at 242 ("My thesis is that existing statutes can be legitimately interpreted only according to the canons of consumer welfare, defined as minimizing restrictions of output and permitting efficiency, however gained, to have its way.")

⁸² Posner, *Per Se Legality*, *supra* note 77, at 21.

⁸³ EUROPEAN ECONOMIC & MARKETING CONSULTANTS, *Differences in Schools of Thought on Protecting Competition: Chicago School vs. European School, Competition Competence Report*, at 5 (2016/2), http://www.ee-mc.com/uploads/media/Differences_in_schools_of_thought_01.pdf.

⁸⁴ Van Den Bergh, *supra* note 70, at 16.

⁸⁵ Herbert J. Hovenkamp, *Distributive Justice and Consumer Welfare in Antitrust*, at 6 (July 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873463.

the pursuit of consumer welfare, expressed through price effects, is the primary aim of a competition policy.⁸⁶ Projecting the view on cases of consumer loss when deciding where to intervene, the consumer welfare approach puts more weight on a potential monopoly or anti-competitive concentration's price effect over the overall deadweight loss or decreased production.⁸⁷ The last, and most distinctive view that is rooted in the German Ordoliberal tradition, advances the protection of individual economic freedom, or consumer choice⁸⁸ at the consumer or distributor level as the central goal of antitrust law.⁸⁹

Leaving aside the Ordoliberal tradition, the total and consumer welfare goals generate the most known clashes and confusion. The productive efficiency and the allocative efficiency of the total and consumer welfare standards produce a well-known trade-off between the goals they aim to achieve. This trade-off also appears as the Williamson's trade-off,⁹⁰ named after Oliver Williamson, who identified the trade-off between the productive efficiency⁹¹ and allocative efficiency.⁹² In a merger situation, this trade-off refers to a combination that can lower the average production costs and thus create price efficiencies for consumers, but that can also create a concurrent increase in the market power, enabling the newly-merged entity to charge supra-competitive prices leading to allocative inefficiencies in the form of a deadweight loss.⁹³

The balancing on an agency level is even more complex when considering the impact of the dynamic efficiencies relative to the gains and losses from the static ones. Economists such as Arrow and Schumpeter have opposing views about whether monopoly fosters or stifles innovation.⁹⁴ This dynamic efficiency produces a tension in the short-term and long-term with

⁸⁶ Hovencamp, *supra* note 85, at 6-8.

⁸⁷ *Id.*

⁸⁸ Used primarily in the US and based on the Neil Averitt and Robert Lande's works. See Wright & Ginsburg, *supra* note 8, at 2407-8; see also, Neil W. Averitt & Robert H. Lande, *Consumer Choice: Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44 (1998); Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PI. L. REV. 503 (2001).

⁸⁹ Wright & Ginsburg, *supra* note 8.

⁹⁰ Named after the Nobel-prize winning economist Oliver Williamson who identified the phenomenon. See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. R. 18, 18-36 (1968).

⁹¹ Productive efficiency emerges in a situation where sellers maximize output by using the socially optimal number and quality of inputs. Merger achieves productive efficiency if it can reduce costs more efficiently than alone in concentrations that facilitate economies of scale. See Mark N. Berry, *Efficiencies and Horizontal Mergers: In Search of a Defense*, 33 SAN DIEGO L. REV. 515, 532-33 (1996).

⁹² The allocative efficiency, refers to a situation where both consumer and producer welfares are maximized. See Van Den Bergh, *supra* note 70, at 16.

⁹³ Hovencamp, *supra* note 85, at 19.

⁹⁴ See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 81-86 (3rd ed., 2008) (claiming that competition is the best way to promote innovation); Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST LAW JOURNAL 575, 578-579 (2007) (on the incentives of a monopolist to innovate).

both the productive and allocative efficiencies because a low consumer welfare in either in the short-term may increase innovation and welfare in the long-term.⁹⁵ Needless to say, the law quantifying the dynamic is in flux,⁹⁶ adding to the difficulty of quantifying the effects.⁹⁷

It is obvious from the analysis above that it is not only the non-economic goals, but also the economic goals, that often contain inherent tensions and thus require a degree of normative decision-making in application. Because of the inherent subjectivity of an antitrust policy, regardless of whether the goals are purely economic or not, this Article argues that despite the significant attention that has been devoted to the divergence in antitrust goals in academic writing, the difference should not be taken to the extreme when contemplating the convergence in analytical methods. As Professor Herbert Hovencamp observed: “the volume and complexity of the academic debate on the antitrust welfare definition creates an impression of policy significance that is completely belittled by the case law, and largely by government enforcement policy.”⁹⁸ Additionally, to confirm the applicability of this hypothesis in practice, Hovencamp stated that few, if any, court decisions have turned on this difference.⁹⁹ This Article agrees with Hovencamp’s position and will proceed with explaining in practical terms and examples how the symbiotic existence between the divergent goals and converging analytical methods can occur.

C. *The Resolution: Antitrust within the Multiplicity of Goals*

The practice of delimiting and applying the antitrust goals seems to be no less complex and in tension than their aforementioned conflicting theoretical bases. This section provides an example of such controversies in general, as well as a specific example from US antitrust law to demonstrate that the antitrust goals are often just impermanent tools, with an aim to provide certain criteria for decision-making, which do not preclude the application of economic analysis and openness towards empirical evidence at the agency level.

⁹⁵ For a detailed overview of dynamic efficiencies and their use in different regimes, see OECD, *Dynamic Efficiencies in Merger Analysis* 97 (May 15, 2008), <http://www.oecd.org/competition/mergers/40623561.pdf>.

⁹⁶ Ilene K. Gots & Calvin S. Goldman, *The Role of Efficiencies in M&A Global Antitrust in Review: Still in Flux*, 29 *Int’l Antitrust Law & Policy: Annual proceedings of the Fordham Corporate Law Institute* 230-42 (Barry E. Hawk ed., 2003).

⁹⁷ See Christian R. Fackelmann, *Dynamic Efficiency Considerations in EC Merger Control: An Intractable Subject or Promising Chance for Innovation* 25-26 (The University of Oxford Center for Competition Law and Policy, Working Paper No L-09, 2006), <http://ssrn.com/abstract=910465> (a discussion on whether and how could dynamic efficiency enter the current European efficiency practice).

⁹⁸ Hovencamp, *supra* note 85, at 9.

⁹⁹ *Id.*

The ambiguity of antitrust goals seems to be inevitable and present on political and academic levels, currently and historically.¹⁰⁰ Although all the global regimes at present seem to subscribe to varying degrees of consumer surplus protection,¹⁰¹ it is unclear to what extent this is a result their policy, as opposed to an underlying aim of their policy, and whether the regimes aim for, or simply accept, the existence of non-economic goals alongside the economic.¹⁰² The declarations of antitrust officials on such subjects may not be helpful in ascertaining the priorities in goals setting, because the oft-changing statements of the officials are more often political non-binding declarations than anything else. For example, the European Commissioners for Competition¹⁰³ often listed the goals of consumer welfare and efficient allocation of resources alongside each other.¹⁰⁴ On the account of dogmas changing over time, the FTC Commissioner quipped that “forty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases,”¹⁰⁵ interpreting the Sherman¹⁰⁶ and Clayton Acts¹⁰⁷ as “a hodgepodge of social and political goals, many with an explicitly anticompetitive bent”.¹⁰⁸ Lastly, on the academic level, as established earlier, it also seems that, despite the fact that consumer and total welfare have a clearly defined meaning in economics, the academics and the practitioners struggle to find a consensus about what exactly do they mean in practice because of the inherent trade-offs and ambiguities that the standards bring.¹⁰⁹

Nevertheless, this impermanence and ambiguity in antitrust goal policy might on their own be sufficient to answer the question of how could the practical co-existence of divergent goals and convergent methods function. A real world example is helpful in showing this. The United States

¹⁰⁰ See Wright & Ginsburg, *supra* note 8, at 2405. (“The failure of antitrust law to promote competition and further consumer welfare over this period is unsurprising and inevitable, for the courts and agencies were operating without a coherent answer to the question: ‘What are the goals of antitrust?’”).

¹⁰¹ Jenny, *supra* note 4, at 4.

¹⁰² *Id.*

¹⁰³ An example of such a statement is the former EC Commissioner Kroes’s in which he said that “. . . [o]ur [European Commission’s] aim is simple, to protect competition as a means of enhancing consumer welfare and ensuring efficient allocation of resources. As effects based approach grounded in solid economics, ensures that citizens enjoy the benefits of a competitive dynamic market economics.” Van Den Bergh, *supra* note 70, at 18.

¹⁰⁴ *Id.*

¹⁰⁵ Wright & Ginsburg, *supra* note 8, at 2405; see also Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL’Y 215, 217 (2010).

¹⁰⁶ 15 U.S.C. §§ 1–7 (2006).

¹⁰⁷ *Id.* §§ 12–27; 29 U.S.C. §§ 52–53 (2006).

¹⁰⁸ Wright & Ginsburg, *supra* note 8, at 2405.

¹⁰⁹ “Efficiency and consumer welfare have become the dominant terms of antitrust discourse without any clear consensus as to what they exactly mean.” Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020 (1987); see also William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Trans-Formation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413 (1990) (regarding the different policy focus of U.S. antitrust throughout history).

is one of the few countries to declare the maximization of economic efficiency—or the total welfare standard—as their sole enforcement goal.¹¹⁰ This policy statement is true at the agency level, but the agency decisions are inevitably subject to review, whether it is by another agency, the Executive, or the Judiciary.¹¹¹ It is not unusual that the goals and priorities of the reviewing bodies are often at odds with the goals set by the antitrust agency.¹¹² What happens in the case of such divergent goals in the United States is that the regime, as whole, ends up pursuing both the economic goals of total welfare at the agency level and the consumer welfare standard, which adjusts the agencies' decisions at the court level.

A study of the US antitrust goals that takes into account the entire enforcement effect—that is, both the agency and the courts—was outlined by Kirkwood and Lande in 2008,¹¹³ and decisively confirmed by Hovencamp in 2013.¹¹⁴ Surprisingly, and against the prevalent view that sees the US regime as a purely total welfare maximizing one,¹¹⁵ recent research suggests that the ultimate consideration, according to the US case law, is the protection of consumers and not total welfare.¹¹⁶ To an even

¹¹⁰ “‘Almost everyone professionally involved in antitrust today - whether as litigator, prosecutor, judge, academic, or informed observer . . . agrees that the only goal of the antitrust laws should be to promote economic welfare’). By economic welfare, Posner means ‘the economist’s concept of efficiency.’ Posner further asserts that the ‘wealth-redistribution argument . . . has no implications for the content of antitrust policy.’” Jack Kirkwood & Robert Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 194 n.7 (2008) (citation omitted) (citing RICHARD A. POSNER, ANTITRUST LAW 24 (2d ed. 2001)).

¹¹¹ See EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS, ch. 1, B (2d ed. 2011).

¹¹² Antitrust law favors competition policy. The economic goal of such a policy is to promote consumer welfare through the efficient use and allocation of resources, the development of new and improved products, and the introduction of new production, distribution, and organizational techniques for putting economic resources to beneficial use. . . . The legislative history of the Sherman Act and other antitrust laws also suggests ‘populist’ goals - social and political reasons for limiting business size and preserving large numbers of small businesses and business opportunities. . . . [T]here is no reasonable basis for presuming that courts must give priority or even weight to populist goals where the pursuit of such goals might injure consumer welfare by interfering with competitive pricing, efficiency, or innovation. The pursuit of these goals would broaden antitrust’s proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognized or proved. Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 798 (1987).

¹¹³ Kirkwood & Lande, *supra* note 110.

¹¹⁴ Hovencamp, *supra* note 85.

¹¹⁵ See generally Wright & Ginsburg, *supra* note 8.

¹¹⁶ Charles S. Dameron, *Present at Antitrust’s Creation: Consumer Welfare in the Sherman Act’s State Statutory Forerunners*, 125 YALE L.J. 1072, 1076 (“The Supreme Court has not grappled with the total welfare theory since it explicitly adopted a consumer-welfare policy in *Reiter v. Sonotone Corp.*, and federal courts have resisted the “naïve tradeoff” offered by Williamson and other advocates of the total-welfare approach. Instead, courts have maintained consumer welfare (allocative efficiency) as the ultimate criterion of the antitrust laws.”) (footnote omitted).

greater surprise, it appears that when the courts use the term “consumer welfare,” they do not refer to economic efficiency,¹¹⁷ but, instead, the courts operate with a vision of (i) a clear preference for the welfare of consumers, (ii) the consumer impact rather than efficiency, and (iii) do not state that efficiency is the primary goal of antitrust as a sum of balances, but rather treat the allocative efficiencies as a correlate of consumer impact.¹¹⁸ Despite this divergence, the United States’ regime is advanced through the extensive use of economic evidence and data. In a similar fashion, the EU, with an even more apparent multiplicity of competition goals present already on the agency level, also disposes of a merger review system that is deemed reliable, transparent, and quantifiable to a great extent.¹¹⁹ Both of the regimes operate within certain divergences in externally or internally imposed goals that create uncertainties in outcome. Yet, as noted at the very outset of this Article, we speak of the US and the EU antitrust as converging to a large degree. This is because we predict the likely uncertainties, communicate differences, and quantify their decisions as a result of their convergence in substantive merger review methods.

Thus, the existence of economic and non-economic goals set within and outside the antitrust agency is compatible with the existence of an antitrust regime that heeds to economic evidence and applies reliable and transparent analytical methods in the merger review. The symbiosis is possible because the goals merely provide “a key” to ordering the results of the review, which often change according to changing state policies and developments in law and economics. Such ordering operates separately from the use and dissemination of economic tools and empirical evidence. After all, even the former Chairman of the FTC William Kovacic noted, “the concept of ‘consumer welfare’ and the principle of protecting ‘competition, not competitors’ are so” broad and open-ended that at the end of the day, “their true meaning” will depend on how they are applied.¹²⁰ This Article concurs and stresses that the best application of the goals is one based on predictable, reliable, and transparent methods that, even if at times providing divergent outcomes, in and of itself have a potential to reduce the costs of global business-making, substantiate the benefits of antitrust, and build-up a foundation cooperation and development.

III. THE LATEST BRICS’ DECISIONS IN GLOBAL MERGER CASES

The last Section of this Article is devoted to analyzing the examples of current global merger cases produced by the BRICS, as compared to the

¹¹⁷ Kirkwood & Lande, *supra* note 110, at 212.

¹¹⁸ See generally Kirkwood & Lande, *supra* note 110.

¹¹⁹ See Table I; see also Neven, *supra* note 30, at 2–3.

¹²⁰ William E. Kovacic, *Competition Policy in the European Union and the United States: Convergence or Divergence*, Bates White Fifth Annual Antitrust Conference, 9 (June 2, 2008), https://www.ftc.gov/sites/default/files/documents/public_statements/competition-european-union-and-united-states-convergence-or-divergence/080602bateswhite.pdf.

equivalent decisions in either the US or the EU. These decisions are important and informative. It is not uncommon for a truly global merger to require a review from dozens of the world's jurisdictions. The record of transnational mergers from the past decade attests to the growth of the notification duty in global jurisdictions. These sample transactions were obligated to file merger notifications in the following counts: GSK/Novartis (required notifications in 21 jurisdictions), "Lafarge/Holcim (20), Microsoft/Nokia (17), TRW Automotive/ZF Friedrichshafen (14), Nestlé/Pfizer Nutrition (13), Medtronic/Covidien (13), Lenovo/IBM (13), DuPont/Mitsui/DKK (13), Continental/Veyance (11), Eaton/Cooper (10), and Baxter/Gambro (10)."¹²¹ While many smaller or developing regimes may at times just "rubber-stamped" the merger decisions, and others aligned with the Western block and achieved reasonable predictability, the emerged BRICS in the middle of the spectrum as a powerful group of countries each of which developed its own set of standards and practices that fit into neither of the two categories, as demonstrated by the case analyses in this Part. These analyses show that although the agencies' antitrust reviews are often carried out with sophisticated analytical tools, there are shortcomings present because of the lack of experience or resources. The selected cases of global merger cases, analyzed side-by-side with similar decisions from the US and the EU, will further elucidate on the commonalities and differences in their decision-making. The Table below provides an overview of which recent cases were selected and what countries' decisions were included in the analysis.

Table III: An overview of the cases and jurisdictions selected for the analysis

	EU	US	Brazil	Russia	India	China	South Africa
Anheuser-Busch InBev/ SABMiller (2016)		×					×
Continental/Veyance (2014)		×	×				
Holcim/Lafarge (2015)	×	×	×	×			
Life Tech./Thermo Fisher (2014)	×					×	
Rosenft/TNK-BP (2016)	×			×			
Seagate/Samsung (2011)	×					×	

¹²¹ Cary, *supra* note 7, at 111.

Sun Pharmaceuticals/ Rabaxay Laboratories (2015)	×	×			×		
Unilever/ Sarah Lee (2012)	×						×
Western Digital/ Hitachi (2011)		×				×	

The discussion of divergence is important on several fronts. It is widely understood that the existing divergence amongst the antitrust regimes has a potential to hurt consumers worldwide because, if one jurisdiction blocks a deal, it falls apart and none of the customers worldwide are thus able to enjoy the benefits and efficiency of the transaction.¹²² Yet, in recent years, another set of threats came into the forefront of business concerns. As the number of decisions where countries decisively block a deal declines, the number of transactions on which various restrictive remedies and requirements were imposed by the global regimes increases.¹²³ This divergence, which is often just a rouse for governments' nationalist and protectionist companies, imposes large costs on global businesses and, in certain cases, even deters companies from pursuing a deal.¹²⁴ We can see examples of such divergence in many forms worldwide that go beyond outrightly blocking the deal. The most costly and criticized divergence nowadays comes from unilateral imposition of behavioral remedies, especially in cases where no other nation imposed any remedies.¹²⁵ An example of such divergence is the merger between Glencore and Xstrata, where the Chinese MOFCOM decided to impose remedies contrary to the European Commission's (EC) decision, despite both regimes identifying the market as global and despite the fact that the combined shares in China and globally were far below 20%.¹²⁶ The use and overuse of behavioral remedies often lacking any economic rationale, to the

¹²² Cary, *supra* note 7, at 110-11, 114.

¹²³ *Id.* at 114-16.

¹²⁴ George S. Cary et al., likened the risk to an additional tax on otherwise pro-competitive companies. They cite the former General Counsel of Oracle, who explained that Whether delay results from procedural overload or duplication, or from the sincere regulatory pursuit of an aggressive but unverifiable theory of competition, the additional time spent in the regulatory process may be the largest and most important transactions cost of all—and the one that thwarts the most potentially procompetitive transactions.

Id. at 115, 116.

¹²⁵ *Id.* at 113-14.

¹²⁶ Georgy S. Cary & Elaine Ewing, *Divergence Then and Now: What Does the US/EU Experience Tell US about Convergence with MOFCOM?* 160, 1612 (Nicholas Charbit & Elisa Ramundo, eds., 2014), <https://www.clearygottlieb.com/news-and-insights/publication-listing/divergence-then-and-now-what-does-the-us-eu-experience-tell-us-about-convergence-with-mofcom10>.

great dismay of the West, remains a widely criticized staple of both the Chinese and Russian antitrust regimes.

Predicting, perhaps more than hindering, the exact size and forms of the ever-evolving divergence is of utmost importance for global business growth. It has been ascertained that the divergence presents itself in the form of divergent outcomes, normative and policy goals, and procedural and analytical methods of agencies.¹²⁷ But not all of the differences are amenable to change. This Article argues that, because the BRICS countries are equipped with resources and manpower needed for economic analytical methods and willing to cooperate, this openness towards economic evidence provides us with the greatest opportunity window for convergence and thus for the decrease of the costs that global antitrust imposes on business. In this manner, even if we cannot change the outcomes of the divergence, we can improve our chances at predicting the likely behavior of agencies through making the agencies' decision-making more predictable, reliable, and transparent with the use of economic evidence. The extent to which the BRICS are already applying the economic evidence is analyzed in a selection of current cases below.

A. India

The Holcim/Lafarge and Ranbaxy mergers were the first Phase II mergers reviewed in this relatively young antitrust regime that commenced its merger control activity in 2011. The assessment of these large combinations has been a learning experience for the new regime, but it has also been one where the agency discernibly attempted to follow the Western example and standards in antitrust decision-making. Certain practices of the Competition Commission of India (CCI) in the application of economic evidence and relevant standards suffer from gaps in understanding and uncertainties. For example, based on the analysis below, the CCI has not sufficiently clarified relevant thresholds for the use of the E-H tests,¹²⁸ Herfindahl-Hirschman Index (HHI),¹²⁹ or market shares.¹³⁰ On the other hand, some other practice—efficiencies—received sufficient clarification.¹³¹ To provide clarity and stability for investors, the CCI will have to be creative and to enforce numerous standards and rules needed for the predictability and reliability of the economic tools the agency applies. Some improvements will come naturally from the growing years of experience of this young regime, while some others can be added through

¹²⁷ See generally, Cary, *supra* note 7; see also Bonakele, *supra* note 37.

¹²⁸ See generally ICN Merger Working Group, *supra* note 32.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Competition Commission of India (CCI), Combination Registration No. C-2014/07/190 at 11 (Mar. 30, 2015) http://www.cci.gov.in/sites/default/files/C-2014-07-190_0.pdf.

building expert knowledge through actions such as hiring outside economic counsels or employing graduate degree economists in-house.

1. Holcim/Lafarge

The merger between Holcim and Lafarge, the French and Swiss world leaders in manufacturing and sale of cement and construction material, occurred in 2015.¹³² The companies operated in India through their subsidiaries. The CCI undertook to investigate the combination's two product overlaps: cement and ready-mixed concrete (RMC).¹³³ In order to determine the relevant product market, the Commission considered the demand side substitutability between various types of cement.¹³⁴ For the determination of the geographic market, CCI conducted a structural analysis whereby they judged the cements physical properties and transportation costs using empirical data to create clusters of geographic markets.¹³⁵ The CCI applied¹³⁶ a well-known economic tool for geographic market determination—the Elzinga-Hogarty test¹³⁷—while giving due consideration¹³⁸ to the LIFO/LOFI thresholds.¹³⁹ The Commission did this in response to the Party's submission of its own calculation that relied, according to the Commission, on too-wide threshold levels. But, in its own application, the CCI itself did not rely on any specific thresholds that could

¹³² Competition Commission of India (CCI), *supra* note 131, at 1.

¹³³ *Id.* at 5.

¹³⁴ *Id.* at 6, 12.

¹³⁵ *Id.* at 6-9, 12.

¹³⁶ Competition Commission of India, *supra* note 131, at 7.

¹³⁷ The Elzinga-Hogarty test assess whether significant product flows are present between two regions (in the Holcim/Lafarge case, the CCI determined presence of two geographic regions). In a merger setting, the test usually analyzes patterns of consumer origin and destination using for example shipment data to determine how many people leave an area to get services (outflow) and how many people come to an area to get services (inflow) using a percentage threshold. See ICN Merger Working Group, *supra* note 32, at 56. The test was similarly applied to cement producers in Turkey on soju distributors in Korea. See Organization for Economic Co-operation and Development (OECD), *Economic Evidence in Merger Analysis, Policy Roundtables* 171, 215 (2011), <http://www.oecd.org/daf/competition/EconomicEvidenceInMergerAnalysis2011.pdf>.

¹³⁸ Competition Commission of India, *supra* note 131, at 8.

¹³⁹ LIFO (little in from outside) and LOFI (little out from inside) indicators measure the importance of imports and exports relative to the domestic consumption and production respectively. It is given that if both LIFO and LOFI exceed a prescribed threshold, a region constitutes a geographic market. ICN Merger Working Group, *supra* note 32, at 56. Catchment area is another tool that helps to delineate geographic product definition. Various consumer and sales information can be used to determine the distance where the consumers buy cement, but the test has been used in variety of industries from groceries to health care facilities. The geographic radius around the cement production/distribution facility is usually determined within a fixed radius or a drive time from the catchment area. The main criticism of the tool is that the cut-off point for the percentage of consumers that should be included in a given area is subjective and lacks economic underpinnings. See Lola Makhkamova, *Techniques for Geographic Market Definition in Hospitals*, <http://www.compcom.co.za/wp-content/uploads/2014/09/Techniques-for-geographic-market-definition-in-hospitals.pdf> (last visited Oct. 24, 2017).

clarify which thresholds are suitable,¹⁴⁰ leaving open a space for applying discretion in determining whether a region should be included in the relevant market, creating an ambiguity in the application of the method.¹⁴¹ For the relevant product determination, the Commission considered demand-side substitutability¹⁴² for concrete and supply-side substitutability for RMC¹⁴³ to ascertain that all grades of cement and RMC constitute the same market.

To assess the concentration, the CCI then used the concentration ratios (CR)¹⁴⁴ of the four largest companies and the HHI.¹⁴⁵ In both instances of the relevant markets, the combination significantly increased the entity's concentration,¹⁴⁶ but the Commission did not provide any guidance on thresholds leading to the conclusion.¹⁴⁷ The analysis was complemented by the relevant considerations of the countervailing buying power based on data submitted by the Parties, competitive constraints, barriers to entry, as well as pre-combination competition assessment based on prices.¹⁴⁸ These conditions in the relevant oligopolistic market were deemed to substantially increase the likelihood of coordinated effects.¹⁴⁹ A deeper analysis of the coordinated effects and incentives was lacking.¹⁵⁰ The CCI deemed the efficiencies submitted by the Parties insufficiently specific and the party submissions lacking quantification and verifiability,¹⁵¹ in which the commission effectively created clear, albeit not easy to prove, standards for efficiency defense. The CCI concluded that the

¹⁴⁰ 75% or 90% are the standard thresholds used for the E-H tests. The CCI instead stated, "regardless of the choice of the threshold level for the purpose of E-H test and catchment area tests, there should be sufficient cause in terms of the competitive constraints for the inclusion of additional state/area in the relevant geographic market." Competition Commission of India, *supra* note 131, at 8.

¹⁴¹ GLOBAL COMPETITION REVIEW (GCR), THE HANDBOOK OF COMPETITION ECONOMICS 65 (1st ed. 2016).

¹⁴² Competition Commission of India, *supra* note 131, at 6.

¹⁴³ *Id.* at 12.

¹⁴⁴ CR4 is the sum of the shares of the largest four firms. Both CR and HHI served as the basis for the predictions of the effects of proposed mergers for much of the second half of the twentieth century as tools of the SCP paradigm that was the dominant analytical approach in economics at that time. See United Nations Conference on Trade and Development (UNCTAD), *The Use of Economic Analysis in Competition Cases* 10 n.28 (2009), http://unctad.org/en/Docs/ciclpd4_en.pdf.

¹⁴⁵ HHI is a market concentration index calculated as the sum of the squares of the market shares of all the firms in the market. The index has been first introduced by the U.S. Merger Guidelines 1982. The measure is also related to Stigler's oligopoly theory, serving as the foundation of the DOJ's collusion analysis. Mark A. Jamison & Janice A. Hauge, *Lessons from the Evolution of Merger Guidelines in the United States*, J. CONTEMP. MGMT. 9 (2014).

¹⁴⁶ Competition Commission of India, *supra* note 131, at 9-10.

¹⁴⁷ GCR, *supra* note 141, at 66.

¹⁴⁸ Competition Commission of India, *supra* note 131, at 6, 13.

¹⁴⁹ *Id.* at 11.

¹⁵⁰ GCR, *supra* note 141, at 66.

¹⁵¹ Competition Commission of India, *supra* note 131, at 11.

transaction would have appreciable adverse effects on the competition in India in the relevant market for grey cement in the Eastern region.¹⁵²

The EC released its decision on this case before India's CCI,¹⁵³ and the FTC published its decision last;¹⁵⁴ the three commissions merger analysis followed broadly similar logical lines, but with appreciable analytical differences. The EC's relevant geographic market definition did not use the Elzinga-Hogarty test, but instead it built on its long-standing decision history in the cement industry cases,¹⁵⁵ which demonstrates the benefits of having case expertise at one's own disposal. The Commission ascertained the scope by using isochrones,¹⁵⁶ which represents a shift away from the Commission's earlier and less precise practice that based the geographic market on the Member States.¹⁵⁷ The EC's approach was more nuanced in acknowledging the setbacks of the method, which lay in the arbitrariness of the radius drawing exercise.¹⁵⁸ Further, the Commission determined the sales and capacity market shares at the national and the catchment level,¹⁵⁹ arriving at incompatibility with the internal market in several areas.¹⁶⁰ In the RMC product analysis, the EC did not carry out its own supply side substitutability analysis, but instead based its analysis on survey responses, arriving at the same conclusion as the CCI.¹⁶¹ The geographic market definition was based on isochrones as well.¹⁶² The calculation of market shares was based on the radii determined earlier,

¹⁵² Competition Commission of India, *supra* note 131, at 14.

¹⁵³ European Commission (EC), Case No. COMP/M.7252 *Holcim/Lafarge* (Dec. 12, 2014).

¹⁵⁴ *Federal Trade Commission* (F.T.C.), *Holcim/Lafarge*, Docket No. C-4519 (June 3, 2015).

¹⁵⁵ See e.g., European Commission (EC), Case M.7054 – *Cemex/Holcim Assets*, 9 September 2014; EC, Case M.7009 – *Holcim / Cemex West*, 5 June 2014; EC, Case M.460 – *Holdercim/Cedest*, 6 July 1994; EC, M.1030 – *Lafarge/Redland*, 16 December 1997; EC, Case M.1157 – *Skanska/Scancem*, 11 November 1998; EC, Case M.2317 – *Lafarge/Blue Circle* (II), 1 March 2001; and EC, Case M.3572 – *Cemex/RMC*, 8 December 2004.

¹⁵⁶ In this case, isochrone represents the distance from the plant where the grey cement can be sold. See EC, *supra* note 153, ¶¶ 57, 58. In general, isochrones, as a tool to determine catchment area, came to be known in retail and healthcare cases. Isochrones are often set driving-distances (e.g. 5min, 10min, etc., depending on the population density) that represent the area within which customers generate most of the business. See also OECD, *supra* note 137, at 224. For an example discussing the method, see generally Office of Fair Trading (OFT), Case No. ME/1456/04 (Mar. 23, 2005), available at <https://www.gov.uk/cma-cases/somerfield-plc-wm-morrison-supermarkets-plc-of-t> (last visited Oct. 25, 2017).

¹⁵⁷ See Amelia Fletcher & Bruce Lyons, *Geographic Market Definition in European Commission Merger Control* 19, 37 (Jan. 2016), http://ec.europa.eu/competition/publications/reports/study_gmd.pdf.

¹⁵⁸ The geographic market definition as a circle around supplier's plant inevitably leads to the inclusion of customers who may face different supply curves, particularly as an effect of alternative suppliers and to mitigate the impact, the Commission assessed circles with different radii to capture most of actual and potential customers. See EC, *supra* note 153, ¶ 62.

¹⁵⁹ *Id.* ¶¶ 73-76.

¹⁶⁰ *Id.* ¶ 275.

¹⁶¹ *Id.* ¶ 280.

¹⁶² *Id.* ¶ 282.

whereby the assumption and calculations were stated,¹⁶³ arriving at incompatibilities with the internal market in several catchment areas.¹⁶⁴ Additional incompatibilities with the EC internal market rose in other product areas, which led to Commission's imposition of structural remedies that required divestiture of the combination's assets in the relevant catchment areas.¹⁶⁵

The FTC's decision requiring *Holcim/Lafarge* to divest subsidiaries in seventeen locations was based on a structural market analysis with similar assumptions as those touched upon by the EC and the CCI. The U.S. analysis, however, focused solely on the most concentrated markets in the geographic areas in which the merged entity would become the dominant supplier of cement.¹⁶⁶ Using the supply substitutability, the FTC determined that the relevant product market is homogenous and that the geographic market local in nature.¹⁶⁷ The Commission ascertained presence of likely unilateral and coordinate effects,¹⁶⁸ followed by a remedial order to divest.¹⁶⁹ The evidence presented to support the FTC's case was, however, underwhelming: the analysis of unilateral effects was based on the reduced number of competitors¹⁷⁰ and there was and no evidence whatsoever to substantiate the coordinate effects. FTC Commissioner Wright filed a complaint commenting on the apparent insufficiency of the empirical analysis to support the stated harms. The Commissioner bitingly remarked that the Merger Guidelines are meant to insure against reverting to naked structural analysis by making clear that the role of market shares and market concentration is "not an end in itself," but rather "one useful indicator of likely anticompetitive effects," and that "there is no basis in modern economics to conclude with any modicum of reliability that increased concentration—without more—will increase post-merger incentives to coordinate."¹⁷¹

2. Sun Pharmaceuticals/Rabaxy Laboratories

Sun Pharmaceuticals/Rabaxy Laboratories (Ranbaxy) was a 2015 merger of the India's largest pharmaceutical companies, the business of

¹⁶³ EC, *supra* note 153, ¶ 289.

¹⁶⁴ *Id.* ¶ 319.

¹⁶⁵ *Id.*

¹⁶⁶ Federal Trade Commission (F.T.C.), *Analysis of Agreement Containing Consent Orders to Aid Public Comment* [in the Matter of Holcim Ltd. And Lafarge S.A., File No. 141-0129.] (May 14, 2015), at 2.

<https://www.ftc.gov/system/files/documents/cases/150504holcimanalysis.pdf>.

¹⁶⁷ *Id.* at 2-3.

¹⁶⁸ *Id.* at 3.

¹⁶⁹ *Id.* at 3-4.

¹⁷⁰ *Id.* at 2.

¹⁷¹ Holcim Ltd. and Lafarge S.A.; *Analysis of Proposed Consent Orders to Aid Public Comment*, 80 FED. REG. 27961, 27967 (May 15, 2015), <https://www.federalregister.gov/documents/2015/05/15/2015-11724/holcim-ltd-and-lafarge-sa-analysis-of-proposed-consent-orders-to-aid-public-comment>.

which focused mostly on the generic manufacturing, sale and marketing of pharmaceutical formulations and medicines.¹⁷² This domestic merger led to the creation of the fifth largest specialty generics company in the world.¹⁷³ In the competitive analysis, the CCI defined the relevant market at the molecular level, not the broader therapeutic level,¹⁷⁴ which is in line with the European Commission's approach that is deemed appropriate for cases where an originator acquires a generic manufacturer.¹⁷⁵ The concentration assessment differed from *Holcim/Lafarge* because it relied purely on market shares.¹⁷⁶ The CCI arrived at the final seven relevant markets with appreciably adverse effects based on an analysis combining the combination's market share, number of competitors in the market, and their current and past market shares.¹⁷⁷ Unfortunately, in this case too, the Commission did not provide any helpful guidance on what constitutes acceptable market shares. CCI approved the merger in December 2014 on the condition that the seven brand products deemed to have adverse effects would be divested.¹⁷⁸

The FTC's decision was released a month after the Indian decision, and focused solely on adverse effects in the markets for generic

¹⁷² See Nishi Dessai Associates (NDA), *Sun Pharma - Ranbaxy: A Panacea for Ranbaxy's ills?*, 5 (Dec. 2014), available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Ma%20Lab/Sun_Pharma_-_Ranbaxy.pdf.

¹⁷³ Press Release, Sun Pharma to Acquire Ranbaxy in a US\$ 4 Billion Landmark Transaction (Apr. 6, 2014) available at <https://tinyurl.com/ycmbu4xw>.

¹⁷⁴ GCR, *supra* note 141, at 65.

¹⁷⁵ The product market differentiation in pharmaceuticals is a complex topic. For example, in the Case COMP/M.5530 *GSK/Stiefel* (17 July 2009), the European Commission classified the drugs using the diagnosis for which they were prescribed and in Case COMP/3354 *Sanofi-Synthelabo/Aventis* (26 April 2004) the EC even considered the different stages of cancer for which the drugs were prescribed. The prescription and over-the-counter medications are deemed separate markets as well. When it comes to the differentiation on the molecule level, the case law suggests that molecule level is important for genericized markets where the competition might be between drugs based on the same molecule, which is especially important in the case drugs against severe illnesses purchased by hospitals procuring these drugs based on competitive tenders. In several cases, however, the molecule was explicitly excluded from the relevant market when it could have established that drugs based on other molecules were substitutable (e.g. Case COMP/M.5253; *Sanofi-Aventis/Zentiva* excluded the molecule level for certain beta-blockers, osteoporosis drugs and antihistamines). Susanne Zuehlke & Jan Komossa, A Review of Recent Pharmaceutical Mergers, *Mlex Magazine* (Jan.–Mar. 2011), <https://www.lw.com/thoughtLeadership/review-of-recent-pharmamergers-january-2011>; Sean Greenaway, et al, Recent Commission Merger Control Decisions in the Pharmaceutical Sector: *Sanofi-Aventis/Zentiva*, (2009), http://ec.europa.eu/competition/publications/cpn/2009_2_15.pdf.

¹⁷⁶ The CCI ascertained that the combined entity would have a cumulative market share of 9.2 percent and a significant horizontal overlap in 37 combinations of molecules offered by the new entity where the combined market share would exceed 15 percent, 2 molecule combinations where the market share would exceed 90 percent, and 10 others with the market share would be above 50 percent. Nishi Dessai Associates, *supra* note 172, at 20.

¹⁷⁷ *Id.* at 19-20.

¹⁷⁸ See generally Competition Commission of India, *supra* note 131.

minocycline tablets.¹⁷⁹ The FTC argued that the combination would decrease the potential entry of Sun into the market where Ranbaxy is one of the three current competitors and this would deprive consumers of the increased competition and likely price reductions resulting from potential future competition.¹⁸⁰ Because the combination of drug development timeframes and regulatory requirements is lengthy and time-consuming, the FTC also ascertained that another entry that could counter the adverse effects is unlikely and ordered divestiture.¹⁸¹

The Indian review completed a much broader and complex analysis because of the difference between the geographic, and thus, relevant markets.¹⁸² The CCI analysis here distinguished itself in using the small but significant and non-transitory increase in price (SSNIP)¹⁸³ and the critical loss analysis¹⁸⁴ to arrive at the final seven relevant markets out of the forty-nine initially examined, which required a lengthy and analytically demanding assessment.¹⁸⁵ The FTC routinely applies the SNNIP test to assess relevant markets, as delineated in the merger guidelines.¹⁸⁶ The CCI's remaining analysis, focusing on the structural factors such as the number of competitors and probability of entry,¹⁸⁷ resembled in logic and order the US analysis.¹⁸⁸ Both reviews led to an imposition of similar structural remedies.¹⁸⁹

¹⁷⁹ See generally *Federal Trade Commission (F.T.C.) [Analysis of Agreement Containing Consent Orders to Aid Public Comment]*, *In the Matter of Sun Pharmaceutical Industries Ltd., Ranbaxy Laboratories Ltd., and Daiichi Sankyo Co., Ltd.*, File No. 141-0134, 1-2, available at <https://www.ftc.gov/system/files/documents/cases/150130sunranbaxyanalysis.pdf>

¹⁸⁰ See *Id.*

¹⁸¹ *Id.* at 2.

¹⁸² See Nishi Dessai Associates, *supra* note 172, at 11 (discussing analysis of the relevant market).

¹⁸³ The most frequently used test for market delimiting is the hypothetical monopolist test [hereinafter HMT] that shows whether a profit-maximizing monopolist in a given market would likely impose at least a small but significant and non-transitory increase in price, but there is a great variation amongst jurisdictions in how empirical data is used to apply the SSNIP test. UNCTAD, *supra* note 144, at 8.

¹⁸⁴ "Critical loss analysis" or "critical elasticity of demand" is a popular way to implement the SSNIP test. *Id.* at 9.

¹⁸⁵ See Bonakele, *supra* note 37, at 194.

¹⁸⁶ The U.S. Horizontal Guidelines require the use of the SSNIP as a part of the Hypothetical Monopolist test; see *Federal Trade Commission (F.T.C.), Horizontal Merger Guidelines* 8-9 (Aug. 19, 2010); see also John D. Harkrider, *Operationalizing the Hypothetical Monopolist Test*, Axinn, Veltrop & Harkrider, LLP (June 25, 2017), <https://www.justice.gov/atr/operationalizing-hypothetical-monopolist-test> ("The hypothetical monopolist test is one of the organizing principles of the Horizontal Merger Guidelines, and it is a test increasingly applied to define markets, not just in merger cases, but throughout antitrust, and not just in the U.S., but throughout the world").

¹⁸⁷ See Competition Commission of India, *supra* note 131, at 7.

¹⁸⁸ See generally F.T.C., *supra* note 179.

¹⁸⁹ See Competition Commission of India, *supra* note 131, at 32-33; see also F.T.C., *supra* note 179, at 2-3.

B. South Africa

The Competition Commission of South Africa (CCSA) is responsible for the adjudication of small and medium mergers, and the Competition Tribunal of South Africa (CTSA) handles large mergers and prohibited practices.¹⁹⁰ The enforcement powers of the CCSA are robust, including recent amendments of section six of the *Competition Amendment Act* from April 2013 which allows the Commission to initiate an inquiry if it has reason to believe that market outcomes indicate a lack of effective competition.¹⁹¹ The consideration of supply-side effects at the market definition stage are well-established through the case precedent, though some more advanced issues such as self-supply in vertically integrated firms is still in discussion.¹⁹² Some criticism in the geographic market policy was directed towards the adoption of the national pricing policy as opposed to delineating boundaries of the territory that can be reached by the consumers.¹⁹³

Overall, the South African regime disposes with a significant in-house economic power. In all complex cases, the Competition Commission constitutes internal teams of economists that are part of the investigation. Often, it appoints independent external economic experts to present evidence before the Tribunal and there is a statutory requirement for several members of the Tribunal to possess high education economics training.¹⁹⁴ The standards for the admission of economic evidence and expert economic testimonies have been reformed recently in the *Sasol Chemical Industries* case,¹⁹⁵ which, to an extent, restricted the areas to which economic experts can speak, subject to the court's deference.¹⁹⁶ Practitioners acknowledge that a more open approach towards the standards of acceptability of economic evidence than *Sasol* would be better suited to the interdisciplinary nature of antitrust investigations.¹⁹⁷

¹⁹⁰ See generally CTSA, *Mandate and Role*, <http://www.comptrib.co.za/about/mandate-and-role/>; see also Global Legal Institute, *South Africa: Merger Control 2017* (2017), <https://www.globallegalinsights.com/practice-areas/merger-control/global-legal-insights---merger-control-6th-ed./south-africa>.

¹⁹¹ GLOBAL COMPETITION REVIEW, *THE HANDBOOK OF COMPETITION ECONOMICS* 2015, 134 (1st ed. 2015).

¹⁹² Robert Lipschitz, Fatima Fiandeiro, & Paul Anderson, *Self-Supply and Indirect Constraints within Competition Analysis*, in *The Development of Competition Law and Economics in South Africa* 30, 36 (Kasturi Moodalyiar & Simon Roberts eds., 2012).

¹⁹³ See *Id.* at 56 (adjudication of *Holcim/Lafarge*).

¹⁹⁴ See Bonakele, *supra* note 37, at 198.

¹⁹⁵ Competition Appeal Court of South Africa (CASA), *Sasol Chemical Inds. Ltd. v. Competition Comm'n*, Case No. 131/CAC/Jun14 (June 17, 2015), available at http://www.comptrib.co.za/cases/appeal/retrieve_case/1925.

¹⁹⁶ See Bonakele, *supra* note 37, at 204.

¹⁹⁷ *Id.*

1. Unilever/Sarah Lee

The European Commission determined that of all the product categories where the proposed combination overlapped, the deodorant category had the highest degree of differentiation.¹⁹⁸ The Parties contended that there was only one product market for deodorants, whereas the EC estimated that there were separate male and female product markets.¹⁹⁹ The estimation of the relevant market was based on both demand- and supply-side factors: consumer surveys, firms' sales and advertising, and difficulty with which a competitor can enter a market or switch from one segment to another.²⁰⁰ On the quantitative side, the Commission applied the hypothetical monopolist test to assess the substitutability between the two types of deodorants using the scanner data submitted by Unilever.²⁰¹ Since both companies were very close competitors in a differentiated market for deodorants and both had strong brands, the EC decided to use a merger simulation approach that is often used in markets where product differentiation plays an important role.²⁰² The underlying nested logit model of demand estimation relied on several assumptions. First, all the products were grouped in "nests" and within the nests, the substitution of the products was based entirely on market share.²⁰³ To estimate the model, the Commission used the supermarket scanner data on retail prices and volumes to arrive at estimates of demand elasticities and compute the potential increase in price post-merger which was estimated at 2-5 percent.²⁰⁴ To remedy the anticompetitive effects, the Commission ordered the entity to divest Sara Lee's strongest brand and related business in Europe.²⁰⁵

Even though the model was tested for robustness, it relied on several problematic assumptions. The above-mentioned reliance on market shares does not remedy the underlying assumption based on brand-dominance. In other words, the model assumed customers switched to

¹⁹⁸ See European Commission (EC), Case No. COMP/M5.5658 *Unilever/Sarah Lee* ¶¶ 14-15 (Nov. 17, 2011), http://ec.europa.eu/competition/mergers/cases/decisions/m5658_20101117_20600_2193231_EN.pdf (the submission of *Unilever/Sarah Lee* introduced seven overlapping economic activities: deodorant, skin cleansing, skin care, fabric care, aftershave, oral care, hair care and household cleaning products).

¹⁹⁹ See *Id.* ¶¶ 28-21, 82-91. *But cf. id.* ¶¶ 48, 107.

²⁰⁰ See *Id.* ¶¶ 114-36.

²⁰¹ See *Id.* ¶¶ 92-94.

²⁰² See *Id.* ¶¶ 175-84.

²⁰³ The first group of nests was made of the female and male deodorants. An additional, second nest, made of the skin-sensitivity feature was added to reduce the relying on the market shares. *Id.* ¶ 32. See also RBB Economics, *Roll on Demand Estimation: The EC's Empirical Analysis in Unilever/Sara Lee 2* (May 2012), http://www.rbbecon.com/downloads/2012/11/RBB_B39_COL.pdf, 2. ("By adding a second level of characteristics, the 'two-level' model reduces the reliance on market shares.")

²⁰⁴ *Id.* at 3.

²⁰⁵ EC, *supra* note 198, ¶ 1414.

larger brands at a higher degree than to smaller ones.²⁰⁶ While this assumption may hold for strongly branded products such as the ones produced by Unilever and Sarah Lee, it was founded on nothing more than consumer surveys, which means that there was a potential for misrepresentation of the actual competitive constraints resulting from the lack of quantifiable empirical calculations. Moreover, several other dynamic aspects of competition such as entry, supply side substitution, or product repositioning were also to a large extent based on surveys,²⁰⁷ which casts doubt on the reliability of the evidence presented by the Commission.²⁰⁸ An erroneous estimation of supply side-factors factors, such as the ease of switching production or a new entry, influence the modeling predictions. In such a model, any incorrect assumption would overstate any price increase or, on the contrary, if the firms are competing vigorously for example in innovation, such miscalculations could lead to a significantly underestimated price increase.²⁰⁹

The South African Competition Tribunal, issuing its decision after the European Commission, also found several product overlaps in its review of the merger, and ascertained, similarly to the EC, that the deodorant market might raise the strongest competition concerns.²¹⁰ Yet despite the objections of the Parties,²¹¹ and contrary to the EC judgment, the CTSA postulated that it was not appropriate to further differentiate the relevant market for deodorants by gender, functionality, etc., but did not state why.²¹² Based on the CCSA's findings, which makes recommendation to the CTSA,²¹³ the CTSA concluded that the high concentration of the combined entity would result in potential unilateral effects.²¹⁴ In its analysis, the Commission (CCSA) used the parties submissions to show that their strong brands were very close competitors and carried out its own calculations of diversion ratios and post-merger price increase and the Tribunal (CTSA) concurred with the methods.²¹⁵ The transaction was conditionally approved with an order to divest.²¹⁶

²⁰⁶ See RBB Economics, *supra* note 203, at 2.

²⁰⁷ EC, *supra* note 198, ¶¶ 306-25 (entry, including responses from competitors), ¶ 123 (on supply-side substitution, including responses from competitors), and ¶¶ 492-95 (on product repositioning, including responses from retailers).

²⁰⁸ RBB Economics, *supra* note 203, at 2. (“[T]he Commission cited some survey evidence supporting such findings. But there remains a risk that this assumption may misrepresent actual competitive constraints.”).

²⁰⁹ *Id.* at 4.

²¹⁰ Competition Tribunal of South Africa (CTSA), Case No. 14/LM/Mar10 at 11, available at <http://www.saflii.org/za/cases/ZACT/2010/86.pdf>.

²¹¹ OECD, *supra* note 137, at 284.

²¹² *Id.*

²¹³ See CTSA, *supra* note 190.

²¹⁴ CTSA, *supra* note 210, at ¶¶ 13-15.

²¹⁵ It is acknowledged, however, that even though the calculations were a helpful guidance, they relied heavily on the assumptions made just as in the EC's analysis of the case. *Id.* at 284-85.

²¹⁶ CTSA, *supra* note 210, at ¶ 21.

2. Anheuser-Busch InBev/SABMiller

Anheuser-Busch InBev (A-B InBev) and *SABMiller* were two brewers that collectively controlled 28% of the global beer market,²¹⁷ and 70% of the US market.²¹⁸ The merger between the companies drew strict scrutiny of the American Department of Justice (DOJ) which filed a complaint to stop the transaction in July 2016 alleging that the merger would lead to higher prices, fewer choices, and less innovation in the US beer market.²¹⁹ To remedy the situation, the DOJ ordered A-B InBev to divest itself of the stakes in Miller's entire US business and included several conduct conditions.²²⁰ The DOJ determined the relevant market for beer to be grouped by price while acknowledging overlaps in adjacent segments.²²¹ Using the SSNIP and demand substitution, the DOJ determined that beer does not compete with other alcoholic beverages in the same relevant market.²²²

The competitive analysis predicted that even a divestiture of the SABMiller would not compensate for the price increases in the enormously concentrated beer markets as it would still leave A-B InBev governance rights in SABMiller and open doors to collusions.²²³ In its analysis, the DOJ included HHI analysis of the transaction on the national and local level, which deemed the combination presumptively anticompetitive.²²⁴ In the downstream market, the DOJ acknowledged a presence of a growing segment of independent and craft breweries despite the dominance of low-cost beer brands nationally.²²⁵ The DOJ also ascertained that A-B InBev exerts a considerable influence in A-B InBev-affiliated distribution and the incentives they provide that promote the sales of A-B InBev brands or prohibit wholesalers from compensating salespeople for carrying the competitors' brands (SAB Miller) and brands of craft breweries.²²⁶ SAB Miller operates distribution on a similar principle and in similar force without incentives.²²⁷ The DOJ was concerned about the loss of distribution

²¹⁷ See Lisa Brown, *A-B InBev Finalizes Acquisition of SABMiller*, ST. LOUIS POST-DISPATCH (Oct. 10, 2016), http://www.stltoday.com/business/local/a-b-inbev-finalizes-acquisition-of-sabmiller/article_b89c5f50-9431-56e6-a187-f820ce5f3cf9.html

²¹⁸ See *Id.*

²¹⁹ See DOJ, Complaint, *United States v. Anheuser-Busch InBev SA/NV*, No. 16-1483 (D.D.C. filed July 20, 2016), ¶¶ 45-47, <https://www.justice.gov/atr/file/877581/download>.

²²⁰ Competitive Impact Statement, *United States v. Anheuser-Busch*, No. 1:16-cv-01483 (D.D.C. Jul. 20, 2016), at 2, <https://www.justice.gov/opa/file/877511/download>.

²²¹ See *Id.* at 6.

²²² Proposed Final Judgment and Competitive Impact, *United States v. Anheuser-Busch InBev SA/NV*, 81 FED. REG. 51465, ¶ 31, available at <https://www.federalregister.gov/documents/2016/08/04/2016-18504/united-states-v-anheuser-busch-inbev-sanv-et-al-proposed-final-judgment-and-competitive-impact>.

²²³ Competitive Impact Statement, *supra* note 220, at 8.

²²⁴ Proposed Final Judgment and Competitive Impact Statement, *supra* note 222, ¶ 41.

²²⁵ *Id.* ¶¶ 19-20.

²²⁶ Proposed Final Judgment and Competitive Impact Statement, *supra* note 222, ¶ 28.

²²⁷ Competitive Impact Statement, *supra* note 220, at 9-10.

options and prices currently offered by A-B InBev to local craft breweries as a result of the merger.²²⁸ The analysis of the effects was based on structural factors, though several parties submitting comments to the court at a later stage included economic analysis and studies that attempted to substantiate the price effects of collusion in the highly concentrated beer market.²²⁹

The South African Competition Tribunal and Commission investigation ended shortly before the US one in May 2016.²³⁰ The South African market was different because of the absence of A-B InBev and the presence of SABMiller was so strong that it was almost difficult to conceive how could the combination strengthen its position.²³¹ The Commission identified potential for unilateral effects in the beer and cider market with the highest share of market shares of the merged entity, establishing these as the relevant markets.²³² The Commission analyzed the supply-side substitution, concluding low substitutability and demand side substitution and examined the firms' internal marketing strategies and manufacturers' surveys, but it did not carry out an assessment of the efficiencies submitted by the merging Parties.²³³ Further, the Commission used price differentials to conclude that beer and ciders constitute a separate segment,²³⁴ but did not calculate the diversion ratios to indicate the level of substitution. The analysis of unilateral effects seems to have relied merely on descriptive factors such as the companies' strong presence in the market. The analysis of the coordinate effects relied on removing one firm from the market and hypothesizing about possibility of exchanging sensitive information.²³⁵

C. China

There are a limited number of resources concerning the use of empirical evidence by the Ministry of Commerce of the Government of China (MOFCOM), largely owing to the fact that MOFCOM used to rarely

²²⁸ Proposed Final Judgment and Competitive Impact, *supra* note 222, ¶¶ 45-47.

²²⁹ *Ensuring Competition Remains on Tap: The AB InBev/SABMiller Merger and the State of Competition in the Beer Industry, Hearings Before the Senate Judiciary Committee: Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 2-3; 8-9 (2015) (testimony of Diana L. Moss, Ph.D. President, American Antitrust Institute), available at <https://www.judiciary.senate.gov/imo/media/doc/12-08-15%20Moss%20Testimony.pdf>.

²³⁰ Anheuser-Busch InBev SA/NV and SABMiller plc, Case No. LM211, Competition Tribunal of South Africa Decision, ¶ 3 (Aug. 4, 2016), available at <http://www.comptrib.co.za/assets/Uploads/LM211Jan16-public-version.pdf>.

²³¹ *Id.* ¶ 2.

²³² Competition Commission South Africa, Mergers and Acquisitions' Report: *Anheuser-Busch InBev SA/NV and SABMiller plc Report*, ¶¶ 12-14 (May 3, 2016), available at <http://www.comptrib.co.za/assets/Uploads/INBEV/SABMiller-Report-31-May-2016-Non-confidential-report-8-June-2016Reda....pdf>.

²³³ *Id.* ¶¶ 74-82, 85, 101, 338.

²³⁴ *Id.* ¶¶ 88-100.

²³⁵ *Id.* ¶¶ 125-26.

publish its full-length decisions.²³⁶ In 2012, MOFCOM sought to improve the situation and increase the transparency when it released all cases approved without conditions since 2008, and promised to continue releasing such data quarterly.²³⁷ Some of these cases from the years past as well as secondary sources suggest that there is an evolution underway in the use of economic evidence in antitrust. For example, in the 2011 *Seagate/Samsung and Western Digital/Hitachi* cases, MOFCOM conducted a bare structural analysis with unsubstantiated claims. But in 2013, the Ministry hired external economic experts to aid in review of the proposed UPS/TNT Express merger.²³⁸ Finally, in 2014, MOFCOM not only conducted its own margin-HHI regression analysis to predict price increases, and also published the results of the analysis.²³⁹ Further, in the recent review of the global merger between SABMiller and A-B InBev, MOFCOM distinguished for the first time between high-end and low-end products based on price in order to arrive at the market definition²⁴⁰ and published the bilingual decision online.²⁴¹

The first antitrust guidance issued by MOFCOM is from 2009, and it provided guidelines on the definition of the relevant market and introduced the use of the SSNIP test for determination of the relevant market.²⁴² This guideline was supplemented by a new one in 2011 in which MOFCOM endorsed the main methodologies of the EU and the US such as “unilateral effects,” “coordinated effects” and “foreclosure effects,” and recognized the importance of the HHI and CR as measurements for concentration.²⁴³ In 2014, MOFCOM even attempted to reduce its average

²³⁶ MA, *supra* note 68, at 202.

²³⁷ *China Antitrust Update*, DAVISPOLK §2A (Jan. 31, 2013), available at <https://www.davispolk.com/files/files/Publication/a9f2e192-88c5-4751-a60f-01865b33596b/Preview/PublicationAttachment/59619c87-a860-4d65-a947-01bfd5195157/013113.China.Antitrust.Update.pdf>.

²³⁸ Kara Gorski, *Drs. Deng and Leonard Consulted for MOFCOM on the UPS-TNT Merger*, BUSINESSWIRE (April 9, 2013, 9:00 AM), <http://www.businesswire.com/news/home/20130409005564/en/Drs.-Deng-Leonard-Consulted-MOFCOM-UPS-TNT-Merger>.

²³⁹ See discussion *infra* Section III., Part 3b: *Life Technologies/Thermo Fisher*.

²⁴⁰ Peter J. Wang, Yizhe Zhang & Lawrence Wang, *China MOFCOM Uses New Market Definition in AB InBev's Acquisition of SABMiller*, JONES DAY (Aug. 8, 2016), <http://www.lexology.com/library/detail.aspx?g=13454f92-868f-4e14-8c50-486263999c29>.

²⁴¹ Ministry of Commerce of the People's Republic of China, *MOFCOM 2016 No. 38 Announcement – Announcement of the Anti-Monopoly Review Decision to Approve, with Restrictive Conditions, the Concentration of Undertakings in respect of the Acquisition of Shares of SABMiller Plc. By AB InBev S.A./N.V.*, AB-INBEV (July 29, 2016), available at <http://www.ab-inbev.com/content/dam/universaltemplate/abinbev/pdf/investors/201607/20160729/English%20translation%20MOFCOM%20announcement%20.pdf>.

²⁴² MA, *supra* note 68, at 203.

²⁴³ *China Antitrust Review 2011*, DAVISPOLK §2A (Feb. 1, 2012), available at https://www.davispolk.com/files/files/Publication/96100535-04cf-491a-8e3d-9392f4d09164/Preview/PublicationAttachment/f7ab9474-d68a-4919-8ded-95c3e186632a/020112_China.Antitrust.Review.2011.pdf.

review duration by introducing regulations that speed review for cases that raise no substantive antitrust issues.²⁴⁴

Although MOFCOM's overall numbers of mergers it reviewed in 2015 were up, MOFCOM imposed remedies on only two transactions, which is notably lower than the transaction numbers in the past years.²⁴⁵ Nevertheless, some of the decisions in those years attracted a lot of attention and criticism because of a lack of apparent economic rationale or unusual remedies. For example, in *Gavilon/Marubeni*, *Glencore/Xstrata*, *ThermoFisher/Life*, and *Merck/AZ Electronics*, MOFCOM imposed behavioral remedies, which are not preferable instruments in the Western jurisdictions, but rather tools that the government used for ensuring that Chinese customers receive products on favorable terms.²⁴⁶ In *Western Digital/Hitachi* and *Samsung/Seagate* MOFCOM again applied the highly unusual and heavily criticized behavioral remedies, which required the companies to hold their business separate.²⁴⁷ In a similar fashion, MOFCOM required *Merck/AZ Electronic* and *Microsoft/Nokia*, which were unconditionally cleared in other countries, to license patents in China on favorable terms.²⁴⁸ In 2014, MOFCOM infamously blocked a merger between the shipping companies Moller-Maersk, Mediterranean Shipping Company, and CMA CGM.²⁴⁹

1. Seagate/Samsung and Western Digital/Hitachi Cases

All of the four companies implicated in these two 2011 mergers are global hard disk drives (HDD) manufacturers.²⁵⁰ Both mergers were notified to MOFCOM, the EC, and the FTC.²⁵¹ MOFCOM's decisions were almost identical in both of the mergers, which is why the cases are analyzed together. MOFCOM defined the relevant market based on the product

²⁴⁴ However, even if a transaction has been qualified as "simple," MOFCOM retains broad powers to conduct an in-depth merger review if either a. it is difficult to define the relevant market; b. where there is harm to consumers; or c. in cases of harm to "national economic development." *China Antitrust Review 2014*, DAVISPOLK § 1A (Jan. 28, 2015), available at https://www.davispolk.com/files/2015_01_27_China_Antitrust_Review_2014.pdf.

²⁴⁵ MOFCOM received notifications for 352 transactions, up by 34.4% from 2014. In 2014, conditions were imposed on five transactions; on 4 in 2013; and on 6 in 2012. *China Antitrust Review 2015*, DAVISPOLK § 1A (Jan. 19, 2016), available at <https://www.davispolk.com/files/2016-01-19-china-antitrust-review-2015.pdf>.

²⁴⁶ Cary, *supra* note 7, at 113.

²⁴⁷ *Id.* at 114.

²⁴⁸ *Id.* at 113.

²⁴⁹ China Antitrust Review 2015, *supra* note 245.

²⁵⁰ See Edith Ramirez, *Building Effective Global Antitrust Enforcement BRIC by BRIC*, FTC (July 7, 2012), available at https://www.ftc.gov/sites/default/files/documents/public_statements/building-effective-global-antitrust-enforcement-bric-bric/120607chicagointlforum.pdf.

²⁵¹ The FTC did not publish the decision in *Seagate/Samsung* and the EU did not publish *Western Digital/Hitachi*. However, given the similarities between the two cases, one can assume that the decision and the analysis of the EC in *Western Digital/Hitachi* case would be similar to its *Samsung/Seagate* decisions and vice versa in the FTC. MA, *supra* note 68, at 215.

characteristics—volume, price and utilities—and the geographic market as global.²⁵² The FTC also defined the geographic market as global and the relevant market as the HDDs used for desktop computers.²⁵³ FTC initially conducted an SSNIP test which showed that consumers are unwilling to switch to another product after a 5-10% price increase.²⁵⁴ The European Commission's approach towards the market definition was more comprehensive with a very detailed analysis of the product characteristics.²⁵⁵ The EC examined the purpose of HDDs, components and manufacturing, its end-users, upstream for HDDs, customers, and trends in innovation.²⁵⁶ The Commission did not find any demand- or supply-side substitutability, arguably due to the specific technical characteristics of different HDDs,²⁵⁷ which contradicted the findings of the FTC, which excluded all but the desktop HDDs²⁵⁸ from the relevant market and did not consider the supply side substitution.

In its analysis of the anticompetitive effects, MOFCOM concluded that the market was highly concentrated and dominated by five major producers: Seagate, Western Digital, Hitachi, Toshiba, and Samsung.²⁵⁹ MOFCOM analyzed the effects on the downstream market by looking at the bidding patterns that the major computer manufacturers negotiate with HDD producers. The producers compete with each other and MOFCOM concluded that the mergers would reduce the head-to-head competition in an already highly concentrated market and potentially increase the risk for coordination.²⁶⁰ MOFCOM further claimed that as a country with the largest consumption of personal computers, the consumers would have no power to against the potential price increase resulting from the mergers and they would thus negatively impact their welfare.²⁶¹ This approach, and the focus on the responses from the manufacturers, came as a surprise in MOFCOM's analysis, especially because it contradicted its statements that HDDs can serve various end-users and because the market definition MOFCOM selected earlier was wider than just the manufacturers.²⁶² Such an unusual shift in focus and a strong motivation to protect domestic

²⁵² MA, *supra* note 68, at 216.

²⁵³ Federal Trade Commission, *Analysis of Agreement Containing Consent Order to Aid Public Comment in the Matter of Western Digital Corporation*, File No. 111-0122, at 2, available at <https://www.ftc.gov/sites/default/files/documents/cases/2012/03/120305westerndigitalanal.pdf>.

²⁵⁴ MA, *supra* note 68, at 219.

²⁵⁵ *Commission Decision Seagate/HDD Business of Samsung*, EC Case No. COMP/M.6214, EC.EUROPA § 5.1 (Oct. 19, 2011), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6214_3520_2.pdf.

²⁵⁶ *Id.* § 5.1.2.

²⁵⁷ *Id.* ¶¶ 32, 89, 153.

²⁵⁸ F.T.C., *supra* note 253, at 2.

²⁵⁹ MA, *supra* note 68, at 217.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 216-17.

²⁶² *Id.* at 218.

manufacturers from the impact of competition certainly raised questions about whether the analysis was done with state policy goals in mind.

Just as the FTC, MOFCOM concluded that the products were very homogeneous and that it was possible to predict the price and output of another competitor, increasing the risk for unilateral and coordinate effects.²⁶³ The FTC's analysis, however, focused on the HDD customers who were identified as having a preference for multiple HDD suppliers and the fact that this choice would be eliminated by the merger.²⁶⁴ In contrast, the EC did not detect that any competitive constraints would be removed as a result of the Seagate/Samsung merger,²⁶⁵ and thus concluded that coordinate effects in an oligopoly situation would be unlikely.²⁶⁶ The conclusion largely follows from the analysis conducted by the EC based on product characteristics and perceived product differentiation, suggesting that Samsung and Seagate were not close competitors.²⁶⁷ The EC's product characteristics and differentiation findings were based on survey responses.

The analysis of the two mergers showed several differences between the approaches of the FTC, EC and MOFCOM. First, the FTC seems to consistently apply the SSNIP test and assess the substitutability only from the demand-side.²⁶⁸ Just as in MOFCOM's previous decision *Panasonic/Sanyo*, MOFCOM did not provide any clues about how the relevant market was determined in the *Seagate/Samsung* and *Western Digital/Hitachi* cases.²⁶⁹ MOFCOM touched up on the issue of the HDD market being divided according to different user groups, but never carried out a substitution analysis to confirm the hypothesis. While evaluating the anticompetitive effects, the FTC focused on the price effects²⁷⁰ while the EC seemed to center on weighing the extent to which the dominant position was strengthened.²⁷¹ MOFCOM paid attention to the manufacturing and the purchasing system in which they applied some analysis of the bidding system and data from the manufacturers.²⁷² Lastly, on MOCOM's side, there are several inexplicable differences in the hold separate behavioral remedies imposed on these two mergers. In Seagate and Samsung, the order encompassed only pricing. In Western Digital and Hitachi, the order

²⁶³ MA, *supra* note 68, at 218.

²⁶⁴ *Id.*

²⁶⁵ European Commission Decision, *supra* note 255, ¶¶ 316-17.

²⁶⁶ *Id.* ¶ 314.

²⁶⁷ *Id.* ¶ 356.

²⁶⁸ See generally FTC, *supra* note 253. (Devoting most of the analysis on substitutability to what consumers demand from HDDs, and the likelihood that they will switch to a different HDD given an increase in price)

²⁶⁹ MA, *supra* note 69, at 217.

²⁷⁰ FTC, *supra* note 253, at 2

²⁷¹ EC, *supra* note 255, ¶ 313.

²⁷² See MA, *supra* note 68, at 218.

required a complete independence from HDD competitors, creating distortions in the market.²⁷³

2. Life Technologies/Thermo Fisher

The companies are US-based multi-nationals focused on biotechnology and life sciences. The transaction was notified to MOFCOM in 2013 and approved conditionally in January 2014.²⁷⁴ The subsequently issued decision was a breakthrough in MOFCOM's use of economic analysis. MOFCOM found that the parties overlap in three areas and identified fifty-nine relevant product markets based on demand and supply substitutability considerations.²⁷⁵ MOFCOM further identified that two of the product markets were global in scope and, the remaining fifty-seven were local, restricted to China.²⁷⁶ The analysis focused primarily on the market concentration levels and post-merger estimate of the potential price increases. The Commission identified thirteen product markets subjected to an in-depth review based on the HHI.²⁷⁷ The MOFCOM further used margin-HHI regression analysis and indicative price increase analysis to estimate that the prices post-merger would increase by twelve percent in the identified thirteen markets.²⁷⁸ To counteract the anti-competitive effects, MOFCOM ordered asset divestiture, price reduction, and supply guarantees.²⁷⁹ The decision clearly demonstrates an increasing sophistication of MOFCOM's analysis and its will to hire an outside economic counsel to assist its decision-making.

The EC cleared the transaction, with structural remedies, three months ahead of MOFCOM.²⁸⁰ This case was exemplary when it comes to cooperation between antitrust regimes, involving the EU, the US, Australia, Canada, Japan, Korea, and China.²⁸¹ The EC discovered competitive harms in several markets and carried out a market reconstruction that involved requesting transaction data from the Parties to assess the different

²⁷³ Cary, *supra* note 7, at 162-63.

²⁷⁴ Michael Han, Ninette Dodoo & Jenny Connolly, *Mofcom Imposes Conditions on Thermo Fisher's Acquisition of Life Technologies*, LEXOLOGY (Feb. 26, 2014), <https://www.lexology.com/library/detail.aspx?g=1f170eba-3275-4ef4-b887-60271831b0df>.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ European Commission, *Mergers: Commission Clears Acquisition of Life Technologies by Thermo Fisher, Subject to Conditions*, EUROPA (Nov. 26, 2013), http://europa.eu/rapid/press-release_IP-13-1167_en.htm [hereinafter EC Press Release: Thermo Fisher].

²⁸¹ International Competition Network, *ICN Merger Working Group: Practical Guide to International Enforcement Cooperation in Merger*, INTERNATIONAL COMPETITION NETWORK, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf> (last visited Nov. 8, 2017).

markets.²⁸² The EC further examined the differences between the relevant markets in terms of pricing, performance, suitability, purchasing patterns, and equipment required for their production and customer switching patterns, based on questionnaires.²⁸³ The geographic market was determined to be global. In analyzing competitive harms in the cell culture media, the Commission first looked into the potential combination's, and the competitors', reconstructed market shares and their sizes in the relevant sub-products, followed by the review of the competitor questionnaire responses.²⁸⁴ Finally, the Commission concluded there is little possibility of new entry based on the submitted survey responses and a brief industry analysis.²⁸⁵ The approach in the other markets was similar, with minor differences in the determination of the geographic market. In the competitive review, the Commission considered several important factors such as the barriers to switching, closeness of competition, historical data such as sales figures, countervailing arguments, incentives, and possibility to foreclose competitors.²⁸⁶ In this decision, the EC relied exclusively on the questionnaires to determine the closeness of competition, substitutability, or entry,²⁸⁷ which are arguably not very sophisticated or reliable tools. The market reconstruction exercise, on the other hand, distinguished itself by its comprehensiveness—it was carried out in all relevant markets, which required a lengthy and detailed review of the product market.²⁸⁸

D. Brazil

Brazil has made significant progress in quality merger control policy since the adoption of the new antitrust law almost four years ago.²⁸⁹ Ever since then, the straightforward cases have been fast-tracked by the

²⁸² See generally EC Press Release: Thermo Fisher, *supra* note 280 (The EC cooperated with competition authorities from many countries and exchanged evidence and opinions with those authorities). The market reconstruction is a relatively new exercise whereby the European Commission sought to reconstruct the market shares of the main players for some affected product categories or countries. Some recent mergers where the EC applied the technique are for example: *Johnson & Johnson/Synthes, US Airways/American Airlines* or *Cisco/Tandberg*. Gerwin van Gerven & Melissa Gotlief, *Data Gathering and Analysis: the anatomy of a Merger Investigation in Europe*, 39 *FORDHAM INT'L L.J.* 21 (2015).

²⁸³ For example, such analysis was performed in the cell culture relevant market and proceeded similarly in the remaining six relevant markets. European Commission, *Case No. COMP/M.6944 – Thermo Fisher Scientific/Life Technologies*, EUROPA (Nov. 26, 2013), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6944_20131126_20212_3661859_EN.pdf.

²⁸⁴ *Id.* ¶¶ 33-41, at 10-15.

²⁸⁵ *Id.* ¶ 39, at 15.

²⁸⁶ *Id.* ¶ 267 (historical sales figures), ¶¶ 271-77 (countervailing arguments), ¶¶ 243-52 (barriers to entry and incentives), ¶¶ 353-71 (foreclosure possibility and incentives to foreclose).

²⁸⁷ *Id.* ¶¶ 354, 355 (foreclosure), ¶¶ 131-33 (supply-side substitutability), ¶¶ 198-200 (entry).

²⁸⁸ *Id.* ¶¶ 33-41.

²⁸⁹ GCR, *supra* note 141, at 17.

Superintendent's office, and thus the Brazilian Administrative Tribunal for Economic Defense (CADE) has gained more time to devote to the complex cases.²⁹⁰ The success of the reform is apparent. The agency has not only won the award for the Global Competition Review's award for the "[a]gency of the year in the Americas," but some of its recent merger caseload—*Camargo Correa/Cimpor* and *Oxiteno/American Chemical*—were shortlisted for stand-alone merger awards.²⁹¹

The involvement of economists in the decision-making is frequent—the new law requires that the merger notification filings include detailed information and economic analysis, which in turn increases the demands for evaluating economic submissions and contributes to the growth of the CADE's own Economic Research Department.²⁹² A major addition to the economic analysis and tools available to the agency came in the form of the *2016 Guide to Economic Analysis for Horizontal Mergers* and the agency expects to produce a guide on remedies as well.²⁹³ Attesting to its cutting-edge innovation, CADE also launched a draft of the Compliance Guide with guidelines for best corporate practices that is heavily influenced by the economic analysis of the rationality of business strategies with an aim to encourage innovation and produce efficiency gains.²⁹⁴ The review of the agency's policy shows that CADE is up to speed, if not ahead, of the latest state-of-art economic research, and actively applies its knowledge to the case law.²⁹⁵ Some of the recent cases reviewed below clearly demonstrate the alignment of CADE with the Western antitrust standards for economic evidence and a high level of effectiveness in cooperation with other jurisdictions.

Lastly, it is worth noting that CADE also developed own economic expertise on the roles of entry and rivalry in complex oligopolistic industries. The current guidelines in Brazil globally recommend use of the standard tests of timeliness, likelihood and sufficiency to assess future entry. But CADE's own experience suggests that entry conditions, such as the number of players in the market and the ease of entry, are not decisive for merger clearance—instead, pro-competition aspects, such as persistence of strong rivalry in the market, played a decisive role in the merger analysis.²⁹⁶ Instead of prohibiting mergers that would reduce the number of

²⁹⁰ GCR, *supra* note 141, at 20.

²⁹¹ *Id.* at 18.

²⁹² *Id.* at 17.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ See generally the discussion of the *Lafarge SA/Holcim*, *Continental Veyance* mergers *infra* at 55-56.

²⁹⁶ GCR, *supra* note 141, at 17.

players from, for example, four to three, CADE has had a record of imposing remedies that foster competition and effective rivalry.²⁹⁷

1. Lafarge SA/Holcim

In the *Lafarge SA/Holcim* merger of 2014,²⁹⁸ CADE determined the relevant product market to be the product overlap between the firms—cement, aggregates, and concrete—and applied the description of the markets from their previous decisions in cement mergers.²⁹⁹ CADE noted that the cement market is extremely concentrated because the nature of the efficient production requires economies of scale and because the logistics of distribution. Such an environment, the agency noted, is conducive to cartels—a statement that is backed up by CADE's historical experience in the industry.³⁰⁰ CADE extensively analyzed the relevant geographic market and determined distance thresholds in the radii around the production location in a similar fashion to the mechanism used in the EU, which was also consistent with the Brazilian case law in the earlier cement cases.³⁰¹ The final analysis revealed overlaps in each of the product markets.³⁰² CADE deemed additional analysis unnecessary as the parties proposed a divestment package and, in the remaining parts of the decision, it focused on verifying the feasibility of the divestment package.³⁰³ The companies proposed to divest cement and concrete production plants in several cities to third parties approved by the CADE.³⁰⁴ Interestingly, CADE's analysis of the vertical effects also hinged on examining relevant market shares in the affected regions and decided that the combination would not lead to

²⁹⁷ In line with these findings, CADE approved many deals that involved mergers in markets with few players, subject to remedies that would foster competitive environment. Examples of such mergers are *Sadia/Perdigão*, *Anhanguera/Kroton*, or *Maxion/Hayes*. GCR, *supra* note 141, at 19.

²⁹⁸ *Lafarge SA e Holcim Ltd, Document Consulta Externa [Lafarge]* [External Consultation Document], Conselho Administrativo de Defesa Economica, [CADE] [Administrative Council for Economic Defense], Merger File No.08700.007621/2014-42, 1 (Ministério da Justiça November 14, 2014) [Justice Ministry] (Port.) http://sei.cade.gov.br/sei/institucional/pesquisa/documento_consulta_externa.php?PYo2c3jf_MgOFxG2jZnDinApVOIZ9mGiv2Gkbg7FQ5qC0cgLK6vQkbMCEn5f8iOO7jU21wbfZOnPuEmbXpfcBA (last visited Oct. 16, 2017) [hereinafter *Lafarge*].

²⁹⁹ *Procedimento Ordinário, Impugnação ao Tribunal.Recomendação de aprovação condicionada à celebração de Acordo em Controle de Concentrações (ACC)*, [Ordinary procedure Challenging the Court Recommendation for approval subject to the conclusion of an Agreement in Concentration Control (ACC).] Parecer Técnico n.º 3 81/201 4, [Technical Opinion No. 3 81/201 4] Versão Pública Superintendência-Geral' Coordenação-Geral de Análise Antitruste 4, [Superintendence-General Coordination of Antitrust Analysis 4] ¶¶ 18-19 at 10 (Nov. 14, 2014) *reprinted in Lafarge*, 351, 360. [hereinafter ACC Challenge].

³⁰⁰ Gilvandro Vasconcelos Coelho de Araujo, *Voto Acesso Público*, [Public Access Vote] ¶¶ 18-19, at 6 (2014), *reprinted in Lafarge*, 382,387.

³⁰¹ *Id.* ¶¶ 26-30.

³⁰² *Id.* ¶ 27.

³⁰³ *Id.* ¶¶ 31-32.

³⁰⁴ *Id.* ¶ 33.

foreclosure because the concentrations in the given states were insignificant for the relevant products.³⁰⁵

2. Continental/Veyance

In 2014, CADE approved with restrictions the acquisition of Veyance Technologies Inc. by Continental Aktiengesellschaft.³⁰⁶ In its analysis of the case, CADE delineated two relevant markets: the conveyor belts sector and the air springs market, and in both the acquisition of Veyance by Continental represented a merger between the leader company and its third biggest competitor, exceeding fifty percent market share.³⁰⁷ CADE carried out a very advanced analysis of the bidding contracts in the situation of an extreme product heterogeneity, applying the Kolmogorov-Smirnov test.³⁰⁸ The agency also ran a simulation to estimate potential price increases as well as quantile regressions to estimate the combinations' effect on competitors.³⁰⁹ Finally, the Council published an extensive technical note on the analyses conducted and the relevant data used in its calculations.³¹⁰ The resulting remedies required the combination to divest tangible and intangible assets.³¹¹ Other jurisdictions considering the merger—specifically Brazil, Canada and Mexico³¹²—conditioned their approval on the US's requirement to divest parts of the air springs business, which can be deemed a successful example of coordination between international antitrust regimes.³¹³ Additionally attesting to the high level of cooperation is the fact that the CADE's remedy package also included the divestiture of a plant that the Mexican antitrust agency and the DOJ required the company to divest, too.³¹⁴

³⁰⁵ ACC Challenge *supra* note 299, ¶40.

³⁰⁶ *Continental Aktiengesellschaft e Veyance Technologies Inc., Document Consulta Externa*. CADE, Merger File No. 08700.004185/2014-50, 3441 (Ministério da Justiça Nov. 20, 2014), http://sei.cade.gov.br/sei/institucional/pesquisa/documento_consulta_externa.php?cKe81WNaz eL1kKpoZm3fEEELMb7dkUV0Ah40wqoFTuvQkxuqY9urbde0icwbevHNLbGMLJxOMuDOADKSJRav7g (last visited Oct. 16, 2017) (Port.). [Hereinafter *Veyance*].

³⁰⁷ CADE, *Annual Report on Competition Policy Developments in Brazil*, OECD ¶34 (May 12, 2016), available at [https://one.oecd.org/document/DAF/COMP/AR\(2016\)10/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2016)10/en/pdf).

³⁰⁸ *Continental AG e Veyance Technologies Inc., Nota Técnica*, [Technical Note] No. 23/2014/DEE, ¶¶ 32-33 (Ministério da Justiça, 2014), available at <http://en.cade.gov.br/topics/about-us/dee/arquivos/nota-tecnica-n-23-2014-ato-de-concentracao-n-08700-004185-2014-50-3.pdf>.

³⁰⁹ *Id.* ¶¶ 42-43.

³¹⁰ See generally *supra* note 308.

³¹¹ OECD Annual Report, *supra* note 307, ¶ 34.

³¹² Allan Van Fleet, *Interview with Alejandra Palacio, Chair, COFECE, Mexico*, THE ANTITRUST SOURCE (Apr. 5, 2016), available at https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/jun16_palacios_intrvw_6_17f.authcheckdam.pdf.

³¹³ OECD Annual Report, *supra* note 307, ¶ 34.

³¹⁴ *U.S. v. Continental AG*, Case 1:14-cv-02087, 12 (D.C. Dist. Ct. filed Dec. 11, 2014), available at <https://www.justice.gov/atr/case-document/file/492836/download>.

The American DOJ found that the transaction between Continental and Veyance would create a market with only two major providers of springs in North America and limit the number of suppliers for replacement air springs, which would have likely facilitated anticompetitive coordination between the remaining suppliers and risked price increases and quality reductions.³¹⁵ The DOJ applied the HHI and the hypothetical monopolist test to determine the post-merger market power and ability to raise prices³¹⁶ and scrutinized the timeliness of market entry.³¹⁷ In the examination of the companies' contracts, the DOJ determined that Continental has an exclusive supply agreement with Veyance's only significant competitor for barrier hoses in North America.³¹⁸ Similarly to the CADE's analysis, the DOJ also found that "[t]he two suppliers would be able to estimate each other's output, capacity, reserves and costs, making coordinated interactions easier."³¹⁹

E. Russia

Merger control in Russia has undergone significant developments. Amongst the most significant ones is the increase in the concentration thresholds that are subject to the primary notifications, which is reflected in the decreasing number of merger reviews up until 2010.³²⁰ One must note, however, that the number of merger reviews in Russia is still extraordinarily high, creating doubts about their quality and contents.³²¹ The Federal Antimonopoly Service of Russia (FAS) is the largest antitrust agency by the number of staff³²² that handles a correspondingly outstanding number of cases.³²³ The merger regulation in Russia is quite new, yet much of the constituting legislation is criticized as vague and poorly backed by economic concepts.³²⁴ For example, the legal basis to use structural

³¹⁵ *Continental AG*, Case 1:14-cv-02087, at 10.

³¹⁶ *Id.* at 9.

³¹⁷ *Id.* at 11.

³¹⁸ Doyle, Barlow & Mazard PLLC, *DOJ's Approval of Continental AG's Acquisition of Veyance Requires Remedy of a Vertical Concern*, ANTITRUST LAWYER BLOG (Dec. 11, 2014), <https://www.antitrustlawyerblog.com/2014/12/dojs-approval-of-continental-ags-acquisition-of-veyance-requires-remedy-of-a-vertical-concern.html>.

³¹⁹ *Continental AG*, *supra* note 314, at 10.

³²⁰ In the period 2002-2004 Russia reviewed about 20,000 mergers a year. The number fell to 6,097 in 2007, 5,821 in 2008; 4,160 in 2009, and 2,964 in 2010. Anastasiya Redkina, *Using Remedies in Russian Merger Control*, Working Papers 62/EC/2014 at 7, available at <https://www.hse.ru/data/2014/09/17/1314984902/62EC2014.pdf> (last visited Mar. 10, 2017). In 2014, the number of notifications was still over 2,000, which is still an outstanding number compared to for example that of 431 received by Brazil, 262 by China, 1,000 by Germany or 244 by Canada. Cary, *supra* note 7, at 121.

³²¹ See generally Svetlana Avdasheva, et al., *Economic Analysis in Competition Law Enforcement in Russia: Empirical Evidence Based on Data of Judicial Reviews*, COMPETITION LAW ENFORCEMENT IN THE BRICS AND IN DEVELOPING COUNTRIES 263, 270 (1st ed. 2016).

³²² 3,038 total staff members in 2014. See *supra* Section I, Part C. Table I on institutional capacities of the BRICS in economic analysis for more.

³²³ *Id.*

³²⁴ See *supra* Section I, Part C.

remedies was established only at the end of year 2006.³²⁵ Unsurprisingly then, the Russian antimonopoly regime, similar to China's, continues to be criticized for the overuse of behavioral remedies. Just in the period from 2007 to 2010, FAS imposed behavioral conditions that required non-discrimination requirements, business terms control, information remedies, and price caps as well as price fixing, all of which created major economic inefficiencies and lacked a strong economic backing.³²⁶

The FAS introduced its antitrust practice in the use of economics in merger review in the 2011 OECD Roundtable Report where the agency claimed that it routinely applies, *inter alia*, the hypothetical monopolist test to determine borders of the product market and the tools estimating the product market's concentration levels such as the HHI or CRs.³²⁷ The dominant mode of the Russian competition analysis in the past decade had been the structure-conduct-performance approach that originated in the older versions of the guidelines.³²⁸ The most recent guidelines—the *Guidelines for Market Analysis and Assessment 2010*—specify the demands of technical analysis more precisely.³²⁹ For example, while the earlier versions of the guidelines merely referred to substitutability to delineate market boundaries, the current *Guidelines 2010* instruct FAS to use SSNIP or hypothetical monopolist test guided by consumer surveys.³³⁰ The *Guidelines* further aid in the assessment of market participants, concentration, and entry conditions.³³¹ It can be said that some economic theory progress has been codified in the Russian antitrust guidelines and, according to FAS's statements, these guidelines have been put into practice.

However, the application of economic analysis in FAS's decisions is difficult to analyze directly, which makes potential researches rely on quite rare secondary sources. One of the few studies ever conducted on the economic evidence in the antitrust enforcement in Russia was done by Svetlana Avdasheva.³³² This Article concludes that the amount of economic evidence fluctuated until 2012, but eventually reverted to the same levels as in 2008.³³³ Avdasheva recognized an increasing frequency of decisions on natural monopolies and highly concentrated industries with lower requirements for economic evidence.³³⁴ Furthermore, Avdasheva identified an increasing trend in “not proper antitrust cases” where any harm imposed

³²⁵ The structural remedies were first introduced by the Federal Law “On protection of competition,” which listed some of the considerations for mergers and possible remedies. Redkina, *supra* note 320, at 3.

³²⁶ *Id.* at 11.

³²⁷ OECD, *supra* note 137, at 104.

³²⁸ Svetlana Avdasheva, *supra* note 321, at 267.

³²⁹ *Id.* at 266.

³³⁰ *Id.*

³³¹ *Id.*

³³² CRESSE, *Economic Evidence in Competition Enforcement: The Russian Case* (2015), http://www.cresse.info/uploadfiles/2015_pl2_pr1.pdf (last visited March 17, 2017).

³³³ *Id.*

³³⁴ *Id.*

by the dominant seller is considered an abuse, as well as an increasing portion of decisions focused on the analysis of structure rather than conduct.³³⁵ Overall, the study concluded that there is a great ambiguity in the application and quality of the economic evidence presented to or by the regulation authorities in Russia.³³⁶

On the other hand, several practitioners from law offices in Russia claim that the economic evidence, perhaps over time, plays an important role in FAS's interactions with businesses.³³⁷ As an example, the practitioners mentioned that, even though the information regarding the parties' market shares and the overall competition environment in the market affected by the transaction is not on the statutory list of information required to submit in the merger notification filing, the FAS deems such information important.³³⁸ On such occasions when the information about market shares and competitive environment is not delivered, the Agency allegedly often request it from the parties ex post notification filing.³³⁹ Further, these practitioners suggest that in certain cases, the FAS even extends the review period and requires parties to provide certain additional economic data.³⁴⁰ They also claim that that the scope of information that the FAS may request in each particular case would generally depend on the data already available to the FAS, and in particular on whether or not the FAS looked at the relevant market in the past.³⁴¹

1. Holcim/Lafarge

The FAS unconditionally approved the *Holcim/Lafarge* transaction in September 2014.³⁴² Because Lafarge carried a license for the production, storage and use of explosive for industrial use, the transaction was subjected to the special procedure requiring the consent of the Government board and the Prime Minister following the Russian Foreign Investment Law, followed by an extension of the period for consideration.³⁴³ The FAS website does not provide any additional details on what steps the agency took to arrive at the conclusions published in the decision.³⁴⁴

³³⁵ CRESSE, *supra* note 332.

³³⁶ *Id.*

³³⁷ *Russia: An Interview with Alexander Viktorov, Lali Charkviani and Olga Kovtunova*, GETTING THE DEAL THROUGH (Apr. 16, 2016), <https://gettingthedealthrough.com/intelligence/41/article/5067/merger-control-russia>.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² Legislative Acts of the Federal Antimonopoly Service, *Decision on the results of consideration of the application*, SOLUTIONS FAS.GOV (Sept. 26, 2014) (Rus.) <http://solutions.fas.gov.ru/ca/upravlenie-kontrolya-promyshlennosti/ats-38922-14> [hereinafter Legislative Acts, FAS].

³⁴³ Hogan Lovells, *supra* note 61.

³⁴⁴ See Legislative Acts, FAS, *supra* note 342.

2. Rosenft/TNK-BP

Rosenft/TNK-BP was the most significant deal reviewed by FAS in 2012. In this deal the largest Russian petroleum company, Rosneft, took over the joint venture between BP and AAR Consortium.³⁴⁵ The transaction was worth approximately \$60 million, making it one of the most significant global transactions in 2012,³⁴⁶ which led to the creation of the largest publicly traded petroleum company in the world.³⁴⁷ Essentially a four-to-three merger with a history of collective dominance,³⁴⁸ the deal unsurprisingly raised competition concerns in Russia and in the European Union. The takeover strengthened Rosneft's dominant position in Russia and raised vertical concerns because both companies were vertically integrated and held a dominant position in the fuel retail market in some of the Russian regions.³⁴⁹ FAS cleared the merger with imposition of behavioral and—quite rare in Russia but welcomed by the West—structural remedies. FAS required Rosneft to divest itself of a number of gas stations to counteract the effects of vertical integration in the fuel market.³⁵⁰ On the upstream level, FAS imposed only behavioral remedies in which it required that Rosneft cannot discriminate against independent customers and that the new entity has to apply separate accounting standards to oil exploration and refining.³⁵¹ The FAS did not articulate how the merger would exacerbate any pre-existing dominant position,³⁵² which makes assessing underlying employed economic analysis, beyond market shares and structural elements, impossible.

The EC investigated the companies' overlapping activities in exploration, development, production, and sale of crude oil and natural

³⁴⁵ *Global M&A Overview: Industry and Geography Breakdown*, MERGER MARKET (Jan. 14, 2013), http://www.mergermarket.com/pdf/mergermarket_Legal_Advisor_Round_Up_2012.pdf (last visited March 15, 2017).

³⁴⁶ *Id.*

³⁴⁷ Anna Shiryayevskaya, *Rosneft Completes \$55 Billion TNK-BP Russia Oil Acquisition*, BLOOMBERG (March 21, 2013), <https://www.bloomberg.com/news/articles/2013-03-21/rosneft-completes-55-billion-acquisition-of-oil-producer-tnk-bp>.

³⁴⁸ The FAS has previously considered TNK-BP, together with two other Russia's largest petroleum companies—Lukoil and Gazpromneft—collectively dominant. EVGENY KHOKHOLOV, *THE MERGER CONTROL REVIEW* 361 (4th ed. 2013), available at http://www.at-advisory.com/sites/default/files/The%20Merger%20Control%20Review_Russia.pdf.

³⁴⁹ *Id.*

³⁵⁰ Svetlana Avdasheva, Svetlana Golovanova, *Oil explains All: Desirable Organisation of the Russia Fuel Markets (On the Data of Three Waves of Antitrust Cases Against Oil Companies)*, *Post-Communist Economies* Vol. 29, No. 2, 198, 202 (Feb. 13, 2017).

³⁵¹ KHOKHOLOV, *supra* note 348.

³⁵² King & Spalding, *Competition Law/Russia: Russia Gives Go-Ahead to Rosneft's Acquisition of TNK-BP*, JDSUPRA (June 2, 2013), <http://www.jdsupra.com/legalnews/regulatory-competition-lawrussia-rus-53947/>.

gas.³⁵³ The Commission's report concluded that the combination would continue to face constraints from a number of strong competitors globally³⁵⁴ and that their customers would retain the choice of switching to other suppliers as well as other oil transportation providers.³⁵⁵ The decision analyzed the combined market shares, including their aggregation in relevant EU economies, supply contracts, vigor of the competition, and structure of the market in order to arrive at possible incentives for unilateral and coordinated effects, all of which proved competitive.³⁵⁶ Vertical effects were ruled out based on market shares and market structure characteristics³⁵⁷ and the EC thus cleared the merger unconditionally.³⁵⁸

This decision was an interesting one because the Commission looked into whether Rosneft as a state-owned company operated independently of the Russia state, and hence at whether there was a space for coordination of the behavior between the state-owned companies. Herein, the EC utilized a "worst case scenario" approach in which it assessed the harm under the assumption that all Russian stated-own entities³⁵⁹ would act as a single economic unit, but it ultimately found that the competition world-wide is too vigorous even under this extreme assumption.³⁶⁰

IV. Conclusions and Recommendations

The table below summarizes the recent practice in applying economic evidence in the review of global mergers transactions since 2011 by the BRICS as compared to the EU and the US based on the analyses carried out in Section III. Despite occasional divergence, the BRICS have in a demonstrable majority of cases attempted to apply methods and theories used by their Western counterparts, independently of when their decisions were published, which demonstrates a strong pattern of cooperation, utilization, and interest in the use of economic evidence. It is noticeable that some countries, notably China, progressed over several years from applying no economic rationale to using outside economic counsels and, in limited cases, to even publishing the results and relevant analyses in merger review. Others, like Brazil, already had already operated within a developed system and progressed to disseminating their own economic studies regarding

³⁵³ European Commission, *Case No. COMP/M.6801-ROSNEFT/TNK-BP*, EUROPA ¶12 (Mar. 8, 2013), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6801_343_2.pdf.

³⁵⁴ Even in the worst case scenario, all of Russian SOEs gas and oil sector combined with TNK-BP would only exceed 15% of the development production and sale of natural gas. *Id.* ¶11.

³⁵⁵ *Id.* ¶¶ 25, 38.

³⁵⁶ *Id.* ¶¶ 22-28, 33-35.

³⁵⁷ *Id.* ¶¶ 36-42.

³⁵⁸ *Id.* ¶ 43.

³⁵⁹ *Id.*

³⁶⁰ *Id.* ¶ 33-35.

accepted standards.³⁶¹ While it is true that some of the analytical methods as they are currently applied by the BRICS are in need of refinement, precise standards, and perhaps experience in application, the case law clearly shows that the BRICS have, and are able to adopt and routinely use, economic evidence in their merger policy.³⁶² Moreover, this gradual accumulation of expertise can serve as a foundation for cooperation and refinement with a potential for the BRICS to shape themselves as models and leaders in global antitrust. The table below is a concise aggregation of the cases analyzed above, which shows that, even in the selected few transactions, the BRICS inevitably congregate around applying similar standards of economic evidence as their Western counterparts, even if the methods were calibrated with different precision and towards different ends.

Table III: An overview of the economic evidence applied in the analyzed global merger cases

	EU	US	Brazil	Russia	India	China	South Africa
Anheuser-Busch InBev/SABMiller		SSNIP, HHI price increase prediction, downstream effects				Used prices to distinguish high & low end products, concentrations	Supply-side substitution, internal marketing and strategy documents
Continental/Veyance		SSNIP, HHI, future entry—examination of contracts & conditions for coordinated effects	HHI, CR4, Bidding analysis, sales & price data, applied Kolmogorov-Smirnov analysis, merger simulation, regressions				
Holcim/Lafarge	Isochrones, survey-based supply-side substitution, market shares calculation	Supply-side substitutability, HHI	Production radiuses, HHI, vertical effects based on concentrations	SSNIP, HHI	Elzinga-Hogarty, HHI, countervailing buyers' power, supply-side substitutability		Market shares and information sharing structures, collusion incentives based on historical data
Life Technologies/Thermo Fisher	Market reconstructions — surveys & pricing patterns, transaction data to assess substitutability, barriers to switching, closeness of competition, countervailing buyers' power, foreclosure,					HHI, margin-HHI regression analysis, indicative price increases	

³⁶¹ See generally *supra* notes 294, 296, 297.

³⁶² See generally *supra* Section III for the respective case analyses.

	etc.						
Rosenft/TNK -BP	Considerati on of state ownership, market shares, supply contracts, competitors			SSNIP, vertical considerations			
Seagate/ Samsung	Detailed product characteristi cs analysis, supply-side substitution, consumer surveys					Competitor concentrations , coordinated effects, some market characteristics , analysis of the bidding and manufacturers data	
Sun Pharmaceuti cals/ Rabaxy Laboratories		SSNIP, future entry analysis			SSNIP/critical loss analysis, market share combinations		
Unilever/ Sarah Lee	Consumer surveys to establish closeness of competition, nested logit models of demand, future price prediction						SSNIP, used parties submissions to show closeness— diversion rations and price increases calculated
Western Digital/ Hitachi		SSNIP, HHI, coordinated effects				Competitors concentrations , coordinated effects, some market characteristics , analysis of the bidding and manufacturers data	

This Article also demonstrated that potential differences remain in goal setting and remedies imposed by the regimes, and that it would be difficult, if not impossible, to eliminate the prospect of inconsistent outcomes. Yet antitrust convergence and experience sharing can and should continue despite these differences, adopting the approach of “managing divergence” or, in other words, focusing on “soft convergence” in analytical methods used in the merger review. As Professor Daniel Crane put it:

“Differing historical foundations do not mean that shared normative goals cannot be achieved over time. Antitrust’s existential purpose need not become frozen at the time of the regime’s creation. The ostensible goals of US antitrust, for example, have changed and adapted considerably over time. Such convergence on an international scale is possible as well.”³⁶³

³⁶³ Daniel A. Crane, *Substance, Procedure, and Institutions in the International Harmonization of Competition Policy*, 10 CHI. J. INT’L L. 143, 154. (2009).

To that end, this Article discerned several factors that may influence the shape and speed of convergence in substantial analytical methods grounded in economic analysis and data.

The first and most important factor is cooperation. As shown in several of the analyzed mergers, not only the US and the EU, but also the BRICS and other countries, have been actively cooperating in the concurrent merger review process and in the international platforms for exchange of their subsequent experience. The participation of countries is essential, not only to enrich their own practice and development, but also to contribute to the trends and standards recognized in international antitrust.

The second factor is the level of experience and the ability of the critics to take it into consideration when judging a given regime. Several of the BRICS regimes, and even more of the global regimes, have just established merger control regimes in the past few years.³⁶⁴ Yet their active application of the international standards signals their readiness to learn. Thus, it is important to view the BRICS regimes on the learning curve and not be prejudiced against their relative inexperience or diverging policy settings. Their institutional capacity and eager application of the state-of-the-art methods in economic analysis prove that they are, and will be, indispensable contributors to the evolution of antitrust law and economics.

Third, and a very important factor, is the focus on the convergence in substantive methods. As established earlier, there are several types of issues that emerge in antitrust convergence or divergence across the world, such as the antitrust law and merger policy goals, thresholds, resources and expertise, and substantive standards. This Article has concluded that several of the issues may only be open to change in the long term, but others require technical adjustment of laws, resources, or structures. As these factors evolve, often at different speeds, convergence can exist through adapting the substantive standards of merger review that use economic evidence and data. It is barely three decades since the US introduced its first merger guidelines in 1982, setting benchmarks for just a few key measurable variables in merger review. Before that, we did not have a clear sense of what is “substantial lessening of competition” or “market power.” First the EU and, in the past few years, the BRICS have adopted, or are on the path to adopting, similar standards. The US has since revised its guidelines four times, even in the absence of the great communication channels and platforms that the global competition networks provide us nowadays. Given the recent addition of the economic powerhouses such as the BRICS, it is reasonable to expect that the process of convergence in global antitrust has only started, and the regimes most benefitting from its additions will be those open to implement, critically evaluate, and shape these standards. The evidence from the global merger cases attests that such efforts are well underway.

³⁶⁴ See *supra* note 45.

Fourth, strong infrastructure and transparency are indispensable to convergence. Possessing a sound economic framework is only the beginning. Regimes need to have in place institutional framework that allows them to apply knowledge and expertise to the framework and make what are very often difficult and controversial judgment calls. To that end, we have seen that all regimes have over the years built up economic expertise in-house, organized and re-organized the relevant units, and experimented with a wide-variety of expertise from their own research units to outsourcing economic consulting to companies. It is of vital importance to this effort that the regimes become more transparent about this infrastructure and their decision-making. There have been certain improvements in transparency such as the Chinese regime's willingness in the past year to release certain decisions and calculations³⁶⁵ or the re-organization of the Brazilian CADE that led to publishing of the in-house research on key antitrust issues online.³⁶⁶

Lastly, the accessibility of information and the role of international platforms play a greater role than previously imagined. Accessibility and a systematic provision of information are an indivisible part of transparency. Yet, information about the capacities, reforms, and decisions of the BRICS and the non-Western countries are still comparatively more difficult to access than resources in other areas of international law. For example, just to gather information about the capacities, staff, and caseload of the regimes, one must have an access to resources such as the Handbook of the Competition Economics³⁶⁷ issues which is the only publication tracking global regimes systematically and quantitatively, priced at several hundreds of dollars per issue. Additional problems in pursuing antitrust study of global dimensions stem from the accessibility and language issues. Russia, Brazil and China still publish their decisions on global mergers in native languages. China started to release its decisions in English recently,³⁶⁸ but there is no systematic way to search the decisions on their website beyond looking for keywords in the endless lists of announcements or relying on secondary sources. The Russian FAS has a functional and automatized database, but its decisions rarely include analyses.³⁶⁹ Brazil's database relies on scanning and uploading all of the hundreds of pages of different procedural motions of which content is apparent only from a number and a

³⁶⁵ DAVISPOLK, *supra* note 237.

³⁶⁶ GCR, *supra* note 141 (on organizational changes). The Brazilian in-house economic research studies and reviews are available at <http://en.cade.gov.br/topics/about-us/dee/economic-studies>.

³⁶⁷ This Article has utilized two of the annual editions of the GLOBAL COMPETITION REVIEW, THE HANDBOOK OF COMPETITION ECONOMICS from 2015, *supra* note 191, and 2016, *supra* note 2016.

³⁶⁸ See generally for an example MOFCOM, *supra* note 241.

³⁶⁹ The searchable database of the Russian FAS is available at <http://solutions.fas.gov.ru/> (last visited Nov. 17, 2017).

general description.³⁷⁰ These arrangements contrast for example with the comprehensive and searchable database of decisions, in numerous languages, of the European Commission³⁷¹ or the fast and transparent system that retrieves the decision of the Indian Competition Commission.³⁷²

The lack of transparency not only does a disservice to predictability and reliability of the regime, but it makes research an expensive domain of law firms, depriving it of academic contribution from the very countries about which the research is written or critical comparisons from academia worldwide. The international networks summarize and polish outputs from several countries, but these are often provided by the officials of the countries themselves and conclusions are sometimes published without vital insights of the countries, many rounds later.³⁷³ The function of these networks would improve if they not only summarized inputs, but provided access and guidance to how to access primary materials, jurisdiction by jurisdiction, or provide a platform for collecting the data, similar to the Global Competition Review publications, about merger reviews worldwide, which could be then scrutinized by independent academics.

³⁷⁰ For example, see Brazil's documents available for the *Continental Aktiengesellschaft/Veyance Technologies* merger decision, available at http://sei.cade.gov.br/sei/institucional/pesquisa/processo_exibir.php?NJILMKAUD29j6X1yj2GO_P27TZb287t6FyKxmleAun1JinvY7ZxFqQSi58-hiWwzPcpA0eHTkJrOybOdgCS_dw,, (last visited Nov. 17, 2017).

³⁷¹ For example, see the European Commission website, tab "all cases," available at <http://ec.europa.eu/competition/elojade/isef/index.cfm>. (last visited Nov. 17, 2017).

³⁷² For example, see the Competition Commission of India website, available at <http://www.cci.gov.in/notice-order> (last visited Nov. 17, 2017).

³⁷³ See generally e.g. OECD, *supra* note 137; see also ICN, *supra* note 32.

**PROTECT OUR FRIENDS:
THE EXTRATERRITORIAL APPLICATION OF THE ANTI-RETALIATION
PROVISION OF THE SEC'S WHISTLEBLOWER PROGRAM**

*Jasmine Gandhi**

I. INTRODUCTION

In 2008, the United States was hit with the most tragic economic disaster since the Great Depression.¹ Trillions of dollars were lost and many Americans were left unemployed and homeless as a result of a broken financial system.² President Barack Obama signed the Dodd-Frank Wall Street and Consumer Protection Act (“Dodd-Frank”) in July 2010 in an attempt to stabilize the United States’ economy and to prevent future disasters.³ The purpose of Dodd-Frank was “to promote the financial stability of the United States by improving accountability and transparency in the financial system...[and] to protect consumers from abusive financial services practices.”⁴ Specifically, Dodd-Frank created the Securities Whistleblower Incentives and Protection (“Whistleblower Program”), which was added as § 21F of the Securities Exchange Act (“Section 21F”), 15 U.S.C. § 78u-6. The Whistleblower Program is intended to encourage whistleblowers to come forward with information and protect those who report violations of securities laws.⁵

Since the enactment of the Whistleblower Program, the Securities and Exchange Commission (“SEC”) has received a large number of complaints each year from individuals both in the United States and abroad.⁶ In 2015 alone, the SEC received reports from whistleblowers in 61 different countries.⁷ While Section 21F contains specific provisions to protect domestic whistleblowers against their employers’ retaliatory conduct, it is unclear whether those protections apply to foreign

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¹ See Kevin McCoy, *2008 Financial Crisis: Could it Happen Again?*, USA TODAY, (Sept. 9, 2013), www.usatoday.com/story/money/business/2013/09/08/legacy-2008-financial-crisis-lehman/2723733.

² *Wall Street Reform: The Dodd-Frank Act*, THE WHITE HOUSE, <https://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform>, (last visited Sept. 21, 2016).

³ See *Id.*

⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §5301 (2010).

⁵ See *Dodd-Frank Act Whistleblower Incentives and Protections*, KATZ, MARSHALL, BANK LLP, <http://www.kmblegal.com/practice-areas/whistleblower-law/dodd-frank-act-whistleblower-incentives>, (last visited Sept. 21, 2016).

⁶ See U.S. SEC. AND EXCH. COMM’N, *2015 Annual Report to Congress on the Whistleblower Program* 21 (2015), <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf> [hereinafter *2015 Annual Report*].

⁷ *Id.*

whistleblowers.⁸ Conducting business overseas has become a common practice in today's society.⁹ Despite the benefits of conducting business overseas, companies also encounter major employment issues.¹⁰ In particular, companies must determine whether the employment laws of the United States, or another country (where their affiliated company resides) should apply.¹¹

This Note addresses whether the anti-retaliation provision of the Whistleblower Program protects foreign whistleblowers. Specifically, this Note discusses applying the anti-retaliation provision to foreign whistleblowers who work for foreign companies that are affiliated with companies based in the United States. In Part I, this Note examines the background that led to the enactment of Dodd-Frank. It explores the issues of the financial crash from an international perspective. Part II of this Note discusses the principle of extraterritorial application, the presumption against extraterritoriality, and the current legal state of the anti-retaliation provision. Lastly, Part III explains the justification behind extraterritorial application of the anti-retaliation provision. Through the analysis of legislative history and agency regulations and actions, this Note establishes that the anti-retaliation provision of the Whistleblower Program has extraterritorial application.

II. BACKGROUND

A. *Dodd-Frank's Whistleblower Provision.*

Although Section 21F was created in 2010, Securities Exchange Act ("SEA") dates back to 1934, and was created in response to the Great Depression.¹² The SEA "regulate[s] transactions of securities in the secondary markets – that is, the sale that takes place after a security is initially offered by a company."¹³ In order to protect investors, the SEA requires companies to disclose certain information, pertinent to investment decision, to the public.¹⁴

The Whistleblower Program was created to help the SEC discover violations of securities laws with the aid of the public.¹⁵ This program provides "reward[s] and protect[s] individuals who report violations of the

⁸ See Dodd-Frank Wall Street Reform and Consumer Protection Act §922.

⁹ Stephen B. Moldof, *The Application of U.S. Labor Law to Activities & Employees Outside the U.S.*, 17 n.3 LAB. LAW. 417, 417 (2002).

¹⁰ See *Id.*

¹¹ See *Id.* at 418.

¹² *Id.*

¹³ Deepa Sarkar & Eugene Temchenko, *Securities Exchange Act of 1934*, (June 2016), https://www.law.cornell.edu/wex/securities_exchange_act_of_1934.

¹⁴ See *Id.*

¹⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act §922, 12 U.S.C. §5301 (2010).

laws that govern...financial markets” and company activities.¹⁶ Section 21F defines a “whistleblower” as “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC].”¹⁷ A general definition is an individual who reports “corrupt, illegal, or harmful activity” of the company he serves.¹⁸ Section 21F protects whistleblowers through the anti-retaliation provision and encourages disclosure through the bounty provision.¹⁹ The bounty provision authorizes the SEC to grant financial awards to whistleblowers who provide information leading to a successful enforcement action.²⁰ Section 21F(h)(1)(A), the anti-retaliation provision, states that “[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistle-blower in the terms and conditions of employment because of any lawful act done by the whistleblower.”²¹

B. *The Global Financial Crisis*

During the late 1990s, the United States and Europe had a large credit bubble and a sustained housing bubble.²² A financial bubble occurs when there is a “run-up in the price of an asset that is not justified by the fundamental supply and demand factors for the asset.”²³ At the time, housing prices were rising, there was an excess of liquidity,²⁴ and there was a lack of effective regulations for the mortgage market.²⁵ These factors led to an increase in deceptive and complicated mortgages, which many borrowers were unable to repay.²⁶ Because some borrowers repaid their loans faster and sooner, banks began creating riskier loans.²⁷ This slowed down the economy and, overall, caused prices of things to fall.²⁸ However, with wages and prices falling, and borrowers’ debts unaffected in value, the

¹⁶ *Dodd-Frank Act Whistleblower Incentives and Protections*, *supra* note 5.

¹⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act §922.

¹⁸ Gregory G. Sarno, Annotation, *Federal Pre-Emption of Whistleblower State-Law Action for Wrongful Retaliation*, 99 A.L.R. Fed. 755 § 2 (1990).

¹⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act §922.

²⁰ *Id.*

²¹ *Id.*

²² See Bill Thomas, Keith Hennessey, & Douglas Holtz-Eaki, *What Caused the Financial Crisis?*, THE WALL STREET JOURNAL (Jan. 27. 2011, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704698004576104500524998280>.

²³ Bill Conerly, *What is a Bubble?*, FORBES, (July 24, 2013, 6:43 PM), <http://www.forbes.com/sites/billconerly/2013/07/24/what-is-a-bubble/#ee3fad978337>.

²⁴ Excess liquidity is the “cash held by a bank above what is required by the regulatory authorities.” *Excess Liquidity*, QFINANCE, <http://www.financepractitioner.com/dictionary/excess-liquidity>, (last visited Oct. 13, 2016).

²⁵ Thomas, *supra* note 22.

²⁶ *See Id.*

²⁷ *Financial Crisis & Recession*, POSITIVE MONEY, <http://positivemoney.org/issues/recessions-crisis/>, (last visited Sept. 24, 2016).

²⁸ *See Id.*

“real” value of the debt became very expensive for borrowers to afford.²⁹ Those not involved with these borrowing schemes also suffered, thus creating a recession in the United States.³⁰ The American financial sector “created an enormous demand for financial products of different kinds that promoted an unsustainable, risky macroeconomic regime in [the] country, based on asset bubbles.”³¹ In 2007, the United States sub-prime mortgage market collapsed creating a “ripple effect around the world.”³²

Many blame the private and government sector of United States for the financial crisis.³³ However, numerous practices in both the private and government sector around the world contributed to the crisis as well.³⁴ First, many financiers were to blame.³⁵ They “claimed to have found a way to [eliminate] risk when in fact they had simply lost track of it.”³⁶ For example, financiers were taking risky assets, such as mortgages, and pooling them together to create a low-risk security.³⁷ However, despite pooling these assets together, the risky assets still existed and were lost because of financial instruments such as credit-default swaps.³⁸ All in all, the financial system lacked principles of accountability and ethics.³⁹ Second, central bankers and regulators were to blame.⁴⁰ Although they could have likely done something about the financiers’ action, they simply tolerated them, thus growing the credit and housing bubble.⁴¹ Failure “to constrain the financial system’s creation of private credit and money” was key to the financial crisis.⁴² Lastly, the overall macroeconomic backdrop was a contributing factor to the financial crisis.⁴³ There was an “emerging global imbalance in trade and concomitant capital flows over two decades, prior to the crisis, that characterized the distorted pattern of globalization.”⁴⁴

²⁹ See *Financial Crisis & Recession*, *supra* note 27. “Real” value is the nominal (face) value adjusted for inflation.

³⁰ See *Id.*

³¹ Jan Prieue, *What Went Wrong? Alternative Interpretations of the Global Financial Crisis*, United Nations, 47 (Dec. 2010), http://unctad.org/en/Docs/gdsmdp20101_en.pdf.

³² Anup Shah, *Global Financial Crisis*, GLOBAL ISSUES (Mar. 24, 2014), <http://www.globalissues.org/article/768/global-financial-crisis>.

³³ Prieue, *supra* note 31, at 46.

³⁴ See *The Origins of the Financial Crisis: Crash Course*, THE ECONOMIST (Sept. 2, 2013), <http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article> [hereinafter *The Origins of the Financial Crisis*].

³⁵ See *Id.*

³⁶ *Id.*

³⁷ See *Id.*

³⁸ See *Id.*

³⁹ Ben Rooney, *Financial Crisis was Avoidable: FCIC*, CNN, (Jan. 27, 2011), money.cnn.com/2011/01/27/news/economy/fcic_crisis_avoidable/.

⁴⁰ See *The Causes of the Global Financial Crisis and Their Implications for Supreme Audit Institutions*, RISKSREVISIONEN, 17, <http://www.intosai.org/uploads/gaohq4709242v1finalsubgroup1paper.pdf>, (last visited Jan. 5, 2017) [hereinafter *The Causes of the Global Financial Crisis*].

⁴¹ See *The Origins of the Financial Crisis*, *supra* note 34.

⁴² *Financial Crisis & Recession*, *supra* note 27.

⁴³ *The Origins of the Financial Crisis*, *supra* note 34.

⁴⁴ Prieue, *supra* note 31, at 46-47.

Many investors were incentivized to chase risky assets with higher yields, rather than safe assets with lower returns because of years of low inflation and stable growth around the world.⁴⁵ Asia had an excess of savings, which contributed to the decrease in the global interest rate.⁴⁶ These excess savings left the world with a blind spot in regards to the European banks.⁴⁷ Research showed that European banks were purchasing low quality American securities with money they borrowed from American money markets.⁴⁸ As a result, there was a growing amount of debt in what people thought was a less risky world.⁴⁹

The actions of the financiers, the inaction of central bankers and regulators, and the general macroeconomic conditions were the major reasons behind the financial crisis, but all of these factors were avoidable.⁵⁰ By 2005, many analysts predicted that the imbalances in the global economy would eventually cause major financial instability.⁵¹ Therefore, given the advance notice, many scholars believe governments had the ability to prevent the financial crisis.⁵² The potential regulations to resolve the financial issues included transparency requirements that would help align expected returns with the actual risk of the investment, which was grossly underestimated.⁵³

C. *The Principles of Extraterritorial Application*

The question of whether Section 21F's anti-retaliation provision applies extraterritorially arises when an employee, American or foreign, working abroad sues its employer, also located overseas, in a United States District Court.⁵⁴ Generally, extraterritoriality principles constrain the United States when seeking to hold parties accountable for conduct occurring overseas.⁵⁵ However, international law permits the application of

⁴⁵ *The Origins of the Financial Crisis*, *supra* note 34.

⁴⁶ Maurice Obstfeld & Kenneth Rogoff, *Global Imbalances and the Financial Crisis: Products of Common Causes*, 23 (November 2009), <https://www.imf.org/external/np/res/seminars/2010/paris/pdf/obstfeld.pdf>

⁴⁷ *The Origins of the Financial Crisis*, *supra* note 34.

⁴⁸ Obstfeld, *supra* note 46, at 27; *The Origins of the Financial Crisis*, *supra* note 34.

⁴⁹ *The Origins of the Financial Crisis*, *supra* note 34.

⁵⁰ Jeffrey A. Frieden, *The Financial Crisis Was Foreseeable and Preventable*, NY TIMES, (Jan. 30, 2011), <http://www.nytimes.com/roomfordebate/2011/01/30/was-the-financial-crisis-avoidable/the-financial-crisis-was-foreseeable-and-preventable>.

⁵¹ *Id.*

⁵² Kimberly Amadeo, *Could the Financial Crisis Have Been Avoided?*, THE BALANCE, (Aug. 16, 2016), <https://www.thebalance.com/were-mortgage-crisis-and-bank-bailout-preventable-3305676>; Frieden, *supra* note 50.

⁵³ Frieden, *supra* note 50; *The Causes of the Global Financial Crisis*, *supra* note 40, at 6.

⁵⁴ *Asadi v. G.E. Energy (U.S.), LLC*, No. 4:12-345, 2012 U.S. Dist. LEXIS 89746, at *14 (S.D. Tex. June 28, 2012); *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 329 (S.D.N.Y. 2013).

⁵⁵ 48 C.J.S. *International Law* § 19 (2017).

extraterritorial jurisdiction in certain situations.⁵⁶ These situations include when the conduct could “produce detrimental effects within the United States” or when the conduct could “impinge on territorial integrity, security, or political independence of the [United States].”⁵⁷

D. *The Presumption Against Extraterritoriality*

Despite the ability to apply statutes extraterritorially in certain situations, the Supreme Court has held that, unless Congress has expressly authorized extraterritorial application, the statute is presumed to have domestic application only.⁵⁸ This method of analysis is called the presumption against extraterritoriality.⁵⁹ The presumption “guard[s] against inadvertent clashes between United States laws and those of other nations and recognizes that the United States Congress generally legislates with domestic concerns in mind.”⁶⁰

The burden to overcome the presumption lies with the party asserting the statute’s application.⁶¹ The party must show that there is “a clear expression of Congress’s intention to extend the reach of federal law beyond those places where the United States has sovereignty or has some measure of legislative control.”⁶² The party can use the statute’s text, structure, and legislative history to demonstrate Congress’s intent.⁶³

Prior to the enactment of the Dodd-Frank Act, the Supreme Court decided *Morrison v. National Australia Bank Ltd.*, a case applying the presumption of extraterritoriality to securities laws.⁶⁴ In *Morrison*, National Australia Bank purchased a company headquartered in the United States.⁶⁵ A group of Australians who had purchased shares from the bank brought suit against the Australian bank for violating sections of the SEA and SEC rules.⁶⁶ The major issue presented to the Court was whether Section 10(b) of the SEA permitted foreign plaintiffs to sue foreign and American

⁵⁶ 48 C.J.S. *International Law* § 19 (2017).

⁵⁷ *Id.* (citing *United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994)).

⁵⁸ *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

⁵⁹ See Bertrand C. Sellier & Stacy Ceslowitz, *Extraterritorial Application of U.S. Laws: Employment and Securities Laws*, PROSKAUER, (2011), http://www.proskauerguide.com/law_topics/25/II.

⁶⁰ *Id.* at § A

⁶¹ *Id.* at § B

⁶² *Id.* at § C

⁶³ *Id.*

⁶⁴ See Saisha Chandrasekaran, *Recent Development: Liu Meng-Lin v. Siemens AG: The Last of the Foreign Whistleblowers*, 23 Tul. J. Int’l & Comp. L. 557, 562-563 (2015).

⁶⁵ *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 251 (2010).

⁶⁶ *Id.* at 252

defendants.⁶⁷ In other words, did that statute allow for extraterritorial application?⁶⁸

The Supreme Court held that Section 10(b) lacks extraterritorial reach.⁶⁹ The Court first addressed what it believed was a “disregard to the presumption against extraterritoriality.”⁷⁰ The Court discussed how, over the years, different circuits have determined that the extraterritorial application of the SEA and Section 10(b) should be left for the courts to determine because of Congress’s silence.⁷¹ The Court examined various decisions by the Second Circuit which “excised the presumption against extraterritoriality from the jurisprudence of Section 10(b) and replaced it with the inquiry whether it would be reasonable (and hence what Congress would have wanted) to apply the statute to a given situation.”⁷² Thus, the Second Circuit formulated the “conducts” test and “effects” test.⁷³ Courts used the test to determine “whether securities fraud claims could be brought based on securities transactions outside the United States.”⁷⁴ However, the Supreme Court rejected this test because of administrability and inconsistency issues.⁷⁵

Additionally, the Court stated that “[u]nless there is the affirmative intention of the Congress clearly expressed’ to give a statute extraterritorial effect, ‘we must presume it is primarily concerned with domestic concerns’. . . . When a statute gives no clear indication of an extraterritorial application, it has none.”⁷⁶ The Court found that on its face, Section 10(b) did not contain any language, which would allow for extraterritorial application.⁷⁷ The Court also found that general references to foreign commerce or any broad language within the statute was insufficient to overcome to presumption against extraterritoriality.⁷⁸

However, the Court was clear that Congress could still pass legislation that has extraterritorial application despite the presumption against extraterritoriality.⁷⁹ The Court stated that if a statute has

⁶⁷ *Morrison*, 561 U.S. at 250.

⁶⁸ *See Id.*

⁶⁹ *Id.* at 264.

⁷⁰ *Morrison*, 561 U.S. at 255.

⁷¹ *Id.*

⁷² *Id.* at 257.

⁷³ *Id.* (quoting *SEC v. Berger*, 322 F.3d 187, 192-193 (2d. Cir. 2003)).

⁷⁴ Update: *U.S. Supreme Court Limits Extraterritorial Application of U.S. Securities Laws-Morrison v. National Australia Bank*, DAVISPOLK, https://www.davispolk.com/sites/default/files/files/Publication/b8410ed8-13e1-40b0-8f12-033b6ea69c83/Preview/PublicationAttachment/450c2bc3-1d4e-4440-9cd5-a3eff5e1dd2e/062510_morrison_v_nab.html, (last visited Oct. 8, 2016).

⁷⁵ *Morrison*, 561 U.S. at 260-61.

⁷⁶ *Morrison*, 561 U.S. at 255 (quoting *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 251 (1991)).

⁷⁷ *Id.* at 262.

⁷⁸ *Id.* at 262-63.

⁷⁹ *Id.* at 264-65.

extraterritorial application, the extraterritoriality presumption limits the statute to the specific application set forth in its text.⁸⁰ The Court stated that it is to apply the presumption against extraterritoriality in all cases to preserve “a stable background against which Congress can legislate with predictable effects.”⁸¹

E. Extraterritorial Application of the Whistleblower Program’s Anti-Retaliation Provision

1. Asadi v. G.E. Energy (USA) L.L.C.

In 2012, the issue of whether the Whistleblower Program’s anti-retaliation provision could be applied extraterritorially arose for the first time.⁸² In *Asadi v. G.E. Energy L.L.C.*, the plaintiff, a dual citizen of Iraq and the United States, was employed in Jordan at G.E. Energy, a company based in the United States.⁸³ After reporting a potential violation under Dodd-Frank to his supervisor, the plaintiff was eventually fired.⁸⁴ The plaintiff sued G.E. Energy in United States District Court alleging that the company violated the anti-retaliation provision of Section 21F.⁸⁵

The District Court held that the anti-retaliation provision did not have extraterritorial application.⁸⁶ The court analyzed the anti-retaliation provision of Section 21F in light of Section 10(b) of the SEA.⁸⁷ It held that the anti-retaliation provision lacked Congress’s affirmative intent for extraterritorial application of the statute.⁸⁸ The court found that the language of the anti-retaliation provision was silent regarding extraterritorial application, and therefore the presumption against extraterritoriality should apply.⁸⁹ The court, relying on *Morrison*, found that the language of Dodd-Frank’s Section 929P(b), 15 U.S.C. 77h-1 or Section 8A of Securities Act of 1933 (“SA”), reinforces the idea that the anti-retaliation provision should not have extraterritorial application.⁹⁰ While the District Court discussed the matter of extraterritoriality, the Fifth Circuit dismissed the case on other grounds.⁹¹

⁸⁰ *Morrison*, 561 U.S. at 265.

⁸¹ *Id.* at 261.

⁸² *Asadi v. G.E. Energy (U.S.), L.L.C.*, No. 4:12-345, 2012 U.S. Dist. LEXIS 89746, at *14 (S.D. Tex. June 28, 2012).

⁸³ *Id.* at *2-3.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at *22.

⁸⁷ See *Asadi*, 2012 U.S. Dist. LEXIS 89746, at *14-16.

⁸⁸ *Id.* at *16.

⁸⁹ *Id.*

⁹⁰ *Id.* at *17-18.

⁹¹ See *Asadi v. G.E. Energy (U.S.), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013).

2. *Liu Meng-Lin v. Siemens AG*

In *Liu Meng-Lin v. Siemens AG*, the Second Circuit also encountered the issue of whether the Whistleblower Program's anti-retaliation provision could apply extraterritorially.⁹² In *Liu Meng-Lin*, the plaintiff, a citizen and resident of Taiwan, was employed by Siemens China, a subsidiary of Siemens AG, a German corporation.⁹³ Siemens AG maintained an American Depository Receipts program (ADR) on the New York Stock Exchange (NYSE).⁹⁴ The plaintiff alleged that Siemens AG violated the anti-retaliation provision of the Whistleblower Program by firing him after reporting misconduct occurring in the corporation.⁹⁵

The Second Circuit held that the anti-retaliation provision does not have extraterritorial application.⁹⁶ The court relied heavily on *Morrison* and found that "absolutely nothing in the text of the provision...or in the legislative history of the Dodd-Frank Act" could overcome the presumption against extraterritoriality.⁹⁷ Further, the court stated that the broad language of the statutes was "precisely the sort of 'generic' language that the Supreme Court has expressly stated is insufficient to overcome the presumption."⁹⁸ The court compared the anti-retaliation provision to other provisions of Dodd-Frank that explicitly granted extraterritorial application.⁹⁹ Through this comparison, the court found that Congress did not intend to apply the anti-retaliation provision extraterritorially because the provision lacked the explicit grant of such application like other provisions of Dodd-Frank.¹⁰⁰

Although the corporation listed ADR on the NYSE, the court held that this was insufficient to warrant extraterritorial application.¹⁰¹ The court quoted *In re Royal Bank of Scotland*, which stated that "[t]he idea that a foreign company is subject to [United States] securities laws everywhere it conducts foreign transactions merely because it has 'listed' some securities in the United States is simply contrary to the spirit of *Morrison*."¹⁰² Therefore, the court declined to give the anti-retaliation provision extraterritorial application because the retaliatory conduct occurred in China and North Korea, and the only relation Siemens AG had to the United States was the ADR on the NYSE.¹⁰³

⁹² *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 177 (2nd Cir. 2014).

⁹³ *Id.* at 177.

⁹⁴ *Id.*

⁹⁵ *Id.* at 177.

⁹⁶ *Id.* at 183.

⁹⁷ *Liu Meng-Lin*, 763 F.3d at 180.

⁹⁸ *Id.*

⁹⁹ *Liu Meng-Lin*, 763 F.3d at 181.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 179-80.

¹⁰² *See Id.* at 180.

¹⁰³ *Id.*

3. *Ulrich v. Moody's Corp.*

Finally, in *Ulrich v. Moody's Corp.*, the Southern District of New York had to determine whether the anti-retaliation provision of the Whistleblower Program had extraterritorial application.¹⁰⁴ In *Ulrich*, the plaintiff, a United States citizen, worked in Hong Kong at Moody's Investor Services ("MIS").¹⁰⁵ MIS is a subsidiary of Moody's Corporation, a corporation based in the United States.¹⁰⁶ The plaintiff sued Moody's after being suspended from his job.¹⁰⁷ The plaintiff alleged that his suspension was retaliatory because he reported Moody's misconduct.¹⁰⁸

The District Court found that the anti-retaliation provision of the Whistleblower Program did not have extraterritorial application.¹⁰⁹ The court relied on *Liu Meng-Lin* to reach its conclusion.¹¹⁰ The court reasoned that the explicit extraterritorial-application language found in other provisions of the Whistleblower Program underscores the anti-retaliation provision's lack of extraterritorial application.¹¹¹ The plaintiff argued for the use of the "conducts" test and "effects" test in order to determine extraterritorial application.¹¹² However, the court rejected the argument on the grounds that the *Morrison* Court explicitly rejected the "conducts" test and "effects" test.¹¹³ The court also stated that, while Section 929P(b) potentially restored the test, it was only to be used when the SEC or the Department of Justice brought suits.¹¹⁴

Additionally, the plaintiff argued that the retaliatory conduct occurred in the United States and therefore he should be protected by the anti-retaliation provision.¹¹⁵ The court found this argument too vague to overcome the presumption against extraterritoriality.¹¹⁶ It held that all the reported misconduct occurred outside the United States.¹¹⁷ The court reasoned that it could find "no caselaw applying the anti-retaliation provision[of]...Dodd-Frank to a foreign resident working at a foreign subsidiary of an American corporation and alleging retaliation for protected

¹⁰⁴ *Ulrich v. Moody's Corp.*, No. 13-CV-00008(VSB), 2014 U.S. Dist. LEXIS 138082, at *13 (S.D.N.Y. 2014).

¹⁰⁵ *Id.* at *3.

¹⁰⁶ *Id.* at *2.

¹⁰⁷ *Id.* at *10.

¹⁰⁸ *Id.* at *12.

¹⁰⁹ *Ulrich*, 2014 U.S. Dist. LEXIS 138082 at *20.

¹¹⁰ *Id.*

¹¹¹ *Ulrich*, 2014 U.S. Dist. LEXIS 138082 at *20.

¹¹² *Ulrich v. Moody's Corp.*, No. 13-CV-0008(VSB) (MHD), 2014 U.S. Dist. LEXIS 145898 *21 (S.D.N.Y. 2014).

¹¹³ *Id.* at *22.

¹¹⁴ *Id.* at *23.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Ulrich*, 2014 U.S. Dist. LEXIS 145898 at *23.

activity occurring abroad, even if the alleged retaliation did originate in the United States.”¹¹⁸

Despite the courts' findings, these cases fail to address the issue of when a foreign whistleblower's information leads to discovery of misconduct in the United States. Any person promoting the Dodd-Frank's purpose of protecting and strengthening of the American economy should be granted protections under the Whistleblower Program. Based on Section 21F's language, congressional records, and the SEC's regulatory actions, the anti-retaliation provision has extraterritorial application for whistleblowers who provide helpful information to the SEC. This extraterritorial application is limited to a foreign whistleblower working for a foreign employer that is affiliated with a United States based corporation. Therefore, this application does not completely disregard the courts' analyses, but expands the narrow and antiquated analyses to modern understandings in the context of globalization.

III. ANALYSIS

A. *The Need for Extraterritorial Application*

In *Asadi*, *Liu Meng-Lin*, and *Ulrich*, the courts held that neither Section 21F's language nor Congress's intent warranted the extraterritorial application of the anti-retaliation provision of the Whistleblower Program.¹¹⁹ According to these cases, if a whistleblower wishes to sue his employer, he must do so in the country the retaliatory conduct occurred. However, these countries often lack adequate procedures to protect the whistleblower. This raises major concerns for the enforcement of Dodd-Frank and its ability to achieve transparency and accountability. One of Dodd-Frank's goals was to prevent another financial crisis, and whistleblower tips are crucial to achieve that goal.¹²⁰ Lack of protection against retaliatory conduct dis-incentivizes overseas whistleblowers to disclose information about potential violations of securities laws. Whistleblowers do not want to compromise their financial security for the well-being of others. Thus, a company's misconduct may never be discovered or may only be discovered when another financial crisis occurs. Additionally, knowing that a whistleblower is unlikely to report misconduct, a company is incentivized to leave the American market or create subsidiaries in other countries. This offshoring practice can be

¹¹⁸ *Ulrich*, 2014 U.S. Dist. Lexis 145898 at *24.

¹¹⁹ See *Asadi v. G.E. Energy (U.S.)*, L.L.C., No. 4:12-345, 2012 U.S. Dist. Lexis 89746, at *14 (S.D. Tex. June 28, 2012); *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 329 (S.D.N.Y. 2013); *Ulrich v. Moody's Corp.*, No. 13-CV-00008(VSB), 2014 U.S. Dist. Lexis 138082, at *13 (S.D.N.Y. Sep. 30, 2014).

¹²⁰ Charles W. Murdock, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises?*, 64 SMU L. REV. 1243, 1249 (2011).

detrimental to the American economy because many companies would be leaving the market and taking all the potential jobs overseas.

According to the Association of Certified Fraud Examiners, a company loses about five percent of its annual revenue due to fraud occurring within the company.¹²¹ While this percentage may look small, companies with annual revenues in the billions are losing a large sum of money each year for their misconduct. If these companies are selling their shares in the public market, and these losses eventually result in a downturn for the company, many investors will lose their money.¹²² If enough companies' shares become devalued and investors lose their investments, investors will lose confidence in the market. If investor confidence is not restored, the likelihood for financial crisis is increased.¹²³ In addition, the Association of Certified Fraud Examiners reported that companies are increasingly involved with fraudulent behavior because of financial pressures in the countries they reside.¹²⁴ Thus, with the increasing number of fraudulent behavior in conjunction with the loss of annual revenue, the economy will likely become unstable again.

Without the proper incentives and reassurances to encourage whistleblowing, the United States cannot adequately protect itself. According to the Global Business Ethics Survey ("GBES"), almost one third of whistleblowers experience retaliation by their employers in GBES countries.¹²⁵ In addition, "a median of 59 percent of those who chose not to report cited fear of retaliation as a reason for their decision."¹²⁶ These potential whistleblowers likely lack the ability to seek redress in their respective countries. This fear will only hurt the American economy, especially in circumstances where companies based in the United States are

¹²¹ *The Staggering Cost of Fraud*, ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, 1 (2016), <http://www.acfe.com/rtn2016/docs/Staggering-Cost-of-Fraud-infographic.pdf>.

¹²² See Cam Merritt, *Net Income's Effects On Stockholders' Equity*, CHRON, <http://smallbusiness.chron.com/net-incomes-effects-stockholders-equity-60092.html>, (last visited on Jan. 3, 2017).

¹²³ See Kimberly Amadeo, *Could A Stock Market Crash Cause A Recession?*, THEBALANCE, (Oct. 28, 2016), <https://www.thebalance.com/could-a-stock-market-crash-cause-a-recession-3306175>.

¹²⁴ ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, *ACFE Report on Occupational Fraud* <http://www.acfe.com/occupational-fraud.aspx> (last visited Aug. 11, 2017).

¹²⁵ GBES companies include India, United States, United Kingdom, Brazil, Mexico, Japan, Italy, France, China, Germany, Spain, South Korea, and Russia. *2016 Global Business Ethics Survey: Measuring Risk and Promoting Workplace Integrity*, ETHICS RESEARCH CENTER, 19 (2016), http://www.boeing.com/2016_Global_Ethics_Survey_Report.pdf. [hereinafter *2016 Global Business Ethics Survey*]

¹²⁶ *Id.* at 19.

violating securities laws.¹²⁷ Therefore, protecting foreign whistleblowers is important to protect the financial security of the United States.

B. Language of Section 21F

It is important to interpret the language of a statute's provision to determine whether the provision applies extraterritorially. The anti-retaliation provision of the Whistleblower Program is ambiguous in terms of its extraterritorial application. Under Section 21F, the anti-retaliation provision does not explicitly mention foreign whistleblowers.¹²⁸ Section 21F's definition of a "whistleblower" also does not explicitly mention foreign whistleblowers.¹²⁹ However, section 21F defines a whistleblower very broadly and lacks limiting language other than stating it is an individual who reports a violation of securities laws.¹³⁰ Congress defined whistleblowers as "any individual."¹³¹ Congress's use of broad language was likely to ensure inclusion of all potential whistleblowers or to allow the legal system to determine the boundaries of the term. Given the broad language, it would follow that a whistleblower includes individuals based in United States or overseas.

There are two places in Section 21(F) where the statute mentions matters outside the United States.¹³² Section 21(F)(h)(2)(D)(i) states:

Without the loss of its status as confidential in the hands of the [SEC], all information referred to in subparagraph (A) may, in the discretion of the [SEC], when determined by the [SEC] to be necessary to accomplish the purposes of this Act and to protect investors, be made available to: (VII) a foreign securities authority; and (VIII) a foreign law enforcement authority.¹³³

This provision protects the confidentiality of a whistleblower, specifically regarding identity disclosures to other foreign authorities.¹³⁴ Interpreting the anti-retaliation provision to provide extraterritorial application would not contradict this provision. The anti-retaliation

¹²⁷ See Kevin LaCroix, *Dodd-Frank Anti-Retaliation Provisions Don't Protect Overseas Whistleblower*, THE D&O DIARY (Oct. 24, 2013), <http://www.dandodiary.com/2013/10/articles/securities-litigation/dodd-frank-anti-retaliation-provisions-dont-protect-overseas-whistleblower/>.

¹²⁸ See Dodd-Frank Wall Street Reform and Consumer Protection Act §922, 12 U.S.C. §5301 (2010).

¹²⁹ "The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the [SEC]." *Id.*

¹³⁰ *See Id.*

¹³¹ *Id.*

¹³² *See Id.*

¹³³ Dodd-Frank Wall Street Reform and Consumer Protection Act §922, 12 U.S.C. §5301 (2010).

¹³⁴ *Id.*

provision and this confidentiality provision both fall under the protections afforded to a whistleblower. Section 21(F)(h)(2)(D)(i) states that a foreign whistleblower's confidentiality is protected except when the SEC needs to inform the authority in the country which the information originated. Therefore, if confidentiality is a protection for foreign whistleblowers, it should follow that the anti-retaliation provision should protect them as well.

Additionally, under Section 21(F)(h)(2)(D)(ii)(II), "Foreign Authorities - [e]ach of the entities described in subclauses (VII) and (VIII) of clause (i) shall maintain such information in accordance with such assurances of confidentiality as the [SEC] determines appropriate."¹³⁵ This provision also protects a whistleblower's confidentiality. Here, the SEC is authorized to create regulations when providing information to foreign authorities. If the SEC has such power, it is difficult to imagine why courts limit a foreign whistleblower's ability to bring a cause of action in the United States. Section 21(F)(h)(2)(D)(ii)(II) permits the SEC to control what the foreign authorities can and cannot do with the information the SEC provides them. Within the confines of the anti-retaliation provision, the United States would not be controlling or impeding any other country's ability to control its citizens. The whistleblower would only be getting the opportunity to seek redress for the conduct of his or her employer. Although the courts were wary about the United States government interfering with other foreign government procedures, Section 21(F)(h)(2)(D)(ii)(II) explicitly allows it.¹³⁶ A goal of the Whistleblower Program was to enable whistleblowers to talk freely, and the only evidence in the actual text of Section 21F points toward Congress's acceptance of international interactions.

C. Congressional Records

The anti-retaliation provision of Whistleblower Program has very little legislative history.¹³⁷ However, the following sources support the argument for the extraterritorial application of the anti-retaliation provision.

First, according to the Congressional Research Service, the Whistleblower Program was modeled off of the Internal Revenue Service's ("IRS") whistleblower program.¹³⁸ Under Section 25.2.2.1.3 of the Internal Revenue Manual ("IRM"), the definition section of the whistleblower

¹³⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act §922, 12 U.S.C. §5301 (2010).

¹³⁶ *Asadi v. G.E. Energy (U.S.), L.L.C.*, No. 4:12-345, 2012 U.S. Dist. Lexis 89746, at *14 (S.D. Tex. June 28, 2012); *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 329 (S.D.N.Y. 2013).

¹³⁷ *Meng-Lin Liu*, 978 F. Supp. 2d at 329.

¹³⁸ Mark Jickling, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title IX, Investor Protection*, CONGRESSIONAL RESEARCH SERVICE, 7 (Nov. 24, 2010), <http://www.llsdc.org/assets/DoddFrankdocs/ers-r41503.pdf>.

program, the IRS illustrates an example of a foreign whistleblower.¹³⁹ Example One demonstrates that the IRS accepts reports from foreign whistleblowers.¹⁴⁰ In Example One, the IRS considers a person from a foreign country a whistleblower for the purposes of the whistleblower program because the foreign individual has provided information that “substantially contributed” to the IRS’s enforcement action. Section 25.2.2.1.3 shows that the rest of statute also applies to foreign whistleblowers because the IRS considers certain foreign individuals as whistleblowers for the purpose of the whistleblower program.¹⁴¹ Because Section 21F replicates the whistleblower program in the IRM, the Section 21F should also apply to foreign whistleblowers, since nothing in the statute prohibits such application. If Congress did not want to follow the IRM, it would have explicitly legislated for the exclusion of foreign whistleblowers. Thus, it is likely that this ambiguity was intentional to allow the legal system to determine the extent of the extraterritorial application of Section 21F.

Second, after its enactment, many believe Dodd-Frank overruled the *Morrison* decision and invalidated the presumption against extraterritoriality in connection with the SEA.¹⁴² Specifically, the House Financial Services Committee: “drafted and included Section 929P(b) and Section 929Y in Title IX” in response of the *Morrison* decision.¹⁴³ Section 929P(b) gives the SEC and the Department of Justice jurisdiction by

¹³⁹ IRM 25.2.2 (Aug. 7, 2015), https://www.irs.gov/irm/part25/irm_25-002-002.html.

¹⁴⁰ Example one states:

Information provided to the IRS by a whistleblower, under IRC 7623 and 26 CFR 301.7623-1, identifies a taxpayer, describes and documents specific facts relating to the taxpayer’s foreign sales in Country A, and, based on those facts, alleges that the taxpayer was not entitled to a foreign tax credit relating to its foreign sales in Country A. The IRS receives the information after having already initiated an examination of the taxpayer. The IRS’s audit plan includes foreign tax credit issues but focuses on taxpayer’s foreign sales in Country B and does not specifically address the taxpayer’s foreign sales in Country A. Based on the information provided, the IRS expands the examination of the foreign tax credit issue to include consideration of the amount of foreign tax credit relating to the taxpayer’s foreign sales in Country A. For purposes of IRC 7623 and 26 CFR 301.7623-1 through 301.7623-4, the portion of the IRS’s examination of the taxpayer relating to the foreign tax credit issue with respect to Country A is an administrative action with which the IRS proceeds based on the information provided by the whistleblower because the information provided substantially contributed to the action by causing the expansion of the IRS’s examination. *Id.*

¹⁴¹ *Id.*

¹⁴² See Richard Painter, Douglas Dunham & Ellen Quackenbos, *When Courts and Congress Don’t Say What They Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT’L L. 1, 14-17 (2011).

¹⁴³ David He, *Beyond Securities Fraud: The Territorial Reach of U.S. Laws After Morrison v. N.A.B.*, 2013 COLUM. BUS. L. REV. 148, 167 (2013).

providing explicit language for extraterritorial application to the SEA.¹⁴⁴ Representative Paul Kanjorski stated that “the purpose of the language of Section 929(b) of the bill is to make clear that...the Securities Act [and], the Exchange Act, may have extraterritorial application.”¹⁴⁵ Additionally, Section 929Y authorizes the SEC to determine to what extent a private right of action can be applied extraterritorially.¹⁴⁶ Furthermore, according to the House Report, the “provisions concerning extraterritoriality...are intended to rebut [the] presumption [against extraterritoriality] by clearly indicating that Congress intends extraterritorial application.”¹⁴⁷ While these statutes do not fall under the Whistleblower Program, there is clear acknowledgement of the extraterritorial application of the SEA. Further, as noted, the Whistleblower Program was added to SEA.¹⁴⁸ Because Section 929(b) and Section 929Y gives deference to the Department of Justice and the SEC, their actions on the extraterritorial application of the Whistleblower Program should be acknowledged and enforced.

Lastly, the changes in Dodd-Frank’s language, from its inception to enactment, also illustrate Congress’s intent to have a broad definition of a “whistleblower.” Under the initial bill, a whistleblower was “an individual, or two or more individuals acting jointly, who submit information to the [SEC] as provided in this section.”¹⁴⁹ Congress reworded “an individual” to “any individual.”¹⁵⁰ The use of the word “any” demonstrates Congress’s intent to broaden the definition of a whistleblower. The enacted definition only limits who is considered a whistleblower to the extent of what information must be provided. The definition does not state that the whistleblower must only be from the United States.

Additionally, the original version of the anti-retaliation provision of the Whistleblower Program stated:

No employer may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an *employee, contractor, or agent* in the terms and conditions of employment because of any lawful act done by the *employee, contractor, or agent* in providing information to the [SEC] in accordance with subsection (a), or in assisting in any investigation or judicial or

¹⁴⁴ He, *supra* note 143, at 167.

¹⁴⁵ 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski).

¹⁴⁶ He, *supra* note 143, at 168.

¹⁴⁷ *Id.*

¹⁴⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act §922, 12 U.S.C. §5301 (2010).

¹⁴⁹ Wall Street Reform and Consumer Protection Act of 2009 §922(a)(6), H.R. Res 4173, 111th Cong. § 7203 (enacted) (Westlaw).

¹⁵⁰ *Id.*; Dodd-Frank Wall Street Reform and Consumer Protection Act §922(a)(6).

administrative action of the [SEC] based upon or related to such information.¹⁵¹

This provision refers to an “employee, contractor, or agent,” rather than a whistleblower. Subsequently, the Senate replaced the terms “employee, contractor, or agent” with “whistleblower.”¹⁵² This change demonstrates Congress’s intent to include broad language in terms of the anti-retaliation provision and who it would protect. Congress understood that a whistleblower can be an individual other than an “employee, contractor, or agent” and, therefore, changed the term to the all-encompassing term of “whistleblower.” Further, there is no explicit language that denies extraterritorial application. Rather, inclusion of foreign whistleblowers would be consistent with Congress’s use of broad language and trend towards broader interpretation of the term “whistleblower.”

The Whistleblower Program’s legislative history reveals that the statute was intended to be applied not only to whistleblowers in the United States, but Congress recognized the importance of extraterritorial application of the statute and left it ambiguous in order for the SEC and courts to resolve this issue. Based on this understanding, the extraterritorial application of the anti-retaliation provision is reasonable and within Congress’s intent when enacting Dodd-Frank and the Whistleblower Program.

D. *Securities and Exchange Commission*

Deference to an administrative agency can be very helpful in interpreting a statute. Congress explicitly gave deference to the SEC in Section 21F.¹⁵³ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* provides guidelines when deferring to an administrative agency.¹⁵⁴ The guidelines are as follows: (i) “whether Congress has directly spoken to the precise question at issue;”¹⁵⁵ (ii) if the statute is silent on this issue, then the court must ask “whether the agency’s answer is based on a permissible construction of the statute.”¹⁵⁶

As already noted, Congress is silent on whether the anti-retaliation provision has extraterritorial application. Thus, deference may be given to the SEC. Under 17 C.F.R. § 240.21F-8(c)(2), the SEC defines who is an

¹⁵¹ H.R. Res 4173 § 922(h)(1)(A) (emphasis added).

¹⁵² Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. § 922(h)(1)(A) (May 20, 2010) (Westlaw).

¹⁵³ See Dodd-Frank Wall Street Reform and Consumer Protection Act §922, 12 U.S.C. §5301 (2010).

¹⁵⁴ See *Chevron, U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984).

¹⁵⁵ Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, CRS Report for Congress, CONGRESSIONAL RESEARCH SERVICE, 23 (Aug. 31, 2008), <https://www.fas.org/sgp/crs/misc/97-589.pdf> (quoting *Chevron*, 467 U.S. at 842).

¹⁵⁶ Kim, *supra* note 155, at 23. (quoting *Chevron*, 467 U.S. at 844).

ineligible whistleblower under the Whistleblower Program. The regulation states:

You are not eligible to be considered for an award if you do not satisfy the requirements of paragraphs (a) and (b) of this section. In addition, you are not eligible if: (2) You are, or were at the time you acquired the original information provided to the [SEC], a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in §3(a)(52) of the Exchange Act.¹⁵⁷

Based on this rule, a foreign whistleblower is eligible under the Whistleblower Program because he does not fall under the explicit categories mentioned. This inference is justifiable because the SEC has specifically listed an exclusive list of ineligible whistleblowers. The *Liu Meng-Lin* court had rejected this argument by stating that this rule was only applicable to bounty awards because the rule's language does not explicitly mention the anti-retaliation provision.¹⁵⁸ However, under 17 C.F.R. § 240.21F-2(b)(iii), the SEC states: “[t]he anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.”¹⁵⁹ Even if we assume the finding in *Liu Meng-Lin* is correct, the SEC provides anti-retaliation protections to a foreign whistleblower regardless of whether or not they are eligible for the bounty award. Therefore, those considered eligible under 17 C.F.R. § 240.21F-8 are protected by the anti-retaliation provision.¹⁶⁰

In 2014, the SEC announced the largest bounty award ever under the Whistleblower Program.¹⁶¹ The report came from a foreign whistleblower.¹⁶² The SEC found it appropriate to apply the bounty award provision “because the [whistleblower’s] information led to the successful enforcement of a covered action brought in the United States.”¹⁶³ In attempts to justify its position in contravention of the *Morrison* decision, the SEC considered this enforcement action on the United States territory a domestic application, “since the ‘particular aspect that is the “focus of congressional concern” has a sufficient U.S. territorial nexus.”¹⁶⁴ According to the SEC, a sufficient nexus to the United States occurs when a

¹⁵⁷ 17 C.F.R. § 240.21F-8 (2016).

¹⁵⁸ See *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 182 (2nd Cir. 2014).

¹⁵⁹ 17 C.F.R. § 240.21F-2 (2016).

¹⁶⁰ See 17 C.F.R. § 240.21F-8 (2016).

¹⁶¹ Michael V. Seitzinger, *Extraterritorial Application of Dodd-Frank Whistleblower Statute in \$30-35 Million Reward*, FEDERATION OF AMERICAN SCIENTIST, 1 (Dec. 9, 2014), <https://www.fas.org/sgp/crs/misc/extraterr.pdf>.

¹⁶² Seitzinger, *supra* note 161, at 1.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

whistleblower reports “leads to the successful enforcement of a covered action brought in the United States, concerning violations of the United States securities laws, by the SEC.”¹⁶⁵ Given such a domestic enforcement action, the SEC is indifferent as to whether a whistleblower is a foreign citizen or lives overseas.¹⁶⁶

Because the SEC has demonstrated that foreign whistleblowers are an integral part of the whistleblowing scheme, the anti-retaliation provision should protect these whistleblowers. Specifically, the provision should protect foreign whistleblowers providing information that will lead to the discovery of violations in the United States. If these whistleblowers are given adequate protections, there will likely be an increase in whistleblower reports. Given the data provided earlier, many potential whistleblowers are not reporting misconduct due to fear of retaliation.¹⁶⁷ These whistleblowers often have information that would be crucial to help discover illegal activity within the United States. This lack of reporting seriously compromises the Whistleblower Program’s purpose.

Because Congress has explicitly given the SEC power over the Whistleblower Program, due consideration to the SEC’s regulations and decisions is necessary. The evidence demonstrates the SEC’s interest in international interactions. Thus, applying the anti-retaliation provision extraterritorially is consistent with the SEC’s position regarding foreign whistleblowers. This is especially true when it leads to discovery of violations in the United States. Applying the anti-retaliation provision to foreign whistleblowers whose employers are affiliated with companies based in the United States would allow the SEC to successfully discover violations occurring in the United States. Thus, if a foreign whistleblower were to be retaliated against by his employer, a company affiliated with a company based in the United States, the whistleblower should be allowed sue his or her employer in the United States.

IV. THE LIMITED EXTRATERRITORIAL APPLICATION

Extraterritorial application of anti-retaliation provision should be limited to foreign whistleblowers working for companies affiliated with companies based in the United States. These whistleblowers likely have the information needed to discover violations either occurring in the United States or having a detrimental effect on the United States economy. Where the actual conduct occurs is irrelevant because American companies should be responsible for the conduct of their foreign subsidiaries. Having American companies even marginally involved in securities violations can negatively impact the American economy.

¹⁶⁵ Seitzinger, *supra* note 161, at 1.

¹⁶⁶ *Id.* at 2.

¹⁶⁷ 2016 *Global Business Ethics Survey*, *supra* note 125.

While protecting every single foreign whistleblower would help in preventing securities violations around the world, the anti-retaliation provision's extraterritorial application is limited to foreign whistleblowers who help the SEC bring an enforcement action in the United States. Courts are justified to apply the presumption against extraterritoriality to limit the amount of cases that can be brought into United States courts. However, allowing foreign whistleblower, who fall into this specific category, to sue his or her employer in the United States will not place an undue burden on the courts. There is a nexus between the violations and the United States economy because the American companies control their foreign subsidiaries. The primary consideration when enacting Dodd-Frank was the United States economy. Thus, applying the anti-retaliation provision in this limited circumstance would not only be consistent with the language of the Whistleblower Program, but it would also further the Dodd-Frank's purpose.

In order to make things clear, the SEC can put out an interpretative release or create new rules to ensure that certain whistleblowers receive protections under the whistleblower rules. Although an interpretative release is not binding on courts, it would be persuasive evidence to demonstrate the SEC's intention in protecting foreign whistleblowers who help the SEC enforce violations in the United States. On the other hand, the SEC can amend its regulations to make clear that certain foreign whistleblowers are protected by the anti-retaliation provision of the Whistleblower Program. The SEC can either redefine the term "whistleblower" or amend Section 240.21F-2 to include foreign whistleblowers that aid in providing information for a successful enforcement action in the United States.

Lastly, it will be important for the courts to reassess their understanding of the anti-retaliation provision in order to implement the limited extraterritorial application. Through this reassessment, courts will find that rejecting extraterritorial application is inconsistent with Congress's and the SEC's intent. However, the courts cannot implement this application alone. The SEC will need to use its enforcement power to determine whether a foreign whistleblower should be protected by the anti-retaliation provision. The SEC's investigations will help identify any connection a foreign employer has to a company based in the United States. Based on this information, the courts can determine whether the foreign whistleblower has a cause of action under the anti-retaliation provision. While it may seem like an easy task, the courts will most likely face some difficulty regarding the nexus between foreign employers and the United States. Often times, foreign companies do not have a clear and obvious connection to companies based in the United States. Rather, the foreign companies are within a long line of shell companies or subsidiaries, thus rendering a weaker nexus. However, a court can consider factors such as whether the employer has any offices or employees in the United States, or

whether the company is conducting business in the United States. The key to solving this issue will be to understand the impact the securities violation will have on the United States economy. By assessing each situation on a case-by-case basis, the courts will be able to determine whether the foreign whistleblower should be afforded protections under the anti-retaliation provision.

V. CONCLUSION

Section 21F of the Securities Exchange Act, under the Dodd-Frank Wall Street and Consumer Protection Act, was enacted to help create transparency and accountability. The Whistleblower Program's success is due to reports by whistleblowers from around the world.¹⁶⁸ However, there have been disputes regarding the extraterritorial application of the anti-retaliation provision. While the statute is unclear on its face, after assessing Dodd-Frank's legislative history and the SEC's regulations and actions, extraterritorial application of the anti-retaliation provision is reasonable. Because United States courts are reluctant to overlook the statutory construction of the presumption against extraterritoriality, they are failing to protect foreign whistleblowers against retaliatory conduct by their foreign employer. The courts also fail to see that these foreign whistleblowers may be withholding crucial information, which could lead to successful enforcement within the United States. Without the successful enforcement of Dodd-Frank, the United States may find itself in another financial crisis. Thus, we must protect foreign whistleblowers from retaliatory conduct of their foreign employers, who are affiliated with companies based in the United States, to ensure we protect the United States economy, and fulfill the purpose of the Dodd-Frank.

¹⁶⁸ 2015 Annual Report, *supra* note 6.

YOU SAY “TOMATO,” I SAY “TOMAHTO”: GETTING PAST THE OPT-IN V.
OPT-OUT CONSENT DEBATE BETWEEN THE EUROPEAN UNION AND
UNITED STATES

*Julia Palermo**

I. INTRODUCTION

Imagine an individual is playing *Pokémon GO* on his phone, tuned out from the rest of the world, when a coveted Pikachu pops up on the screen. To catch the Pikachu, he walks away from the public area and finds himself in a deserted alleyway chasing the Pikachu. Suddenly, he gets attacked by people who purposefully lured him there to steal his backpack, wallet and phone. This scenario is based on true events that occurred in July 2016.¹ How did the attackers know he was in the alleyway? The answer: through location tracking services that he automatically consented to when he downloaded the app, making it effortless for a third party to track his exact location.²

The problem begins when players download the *Pokémon GO* app. The app collects data about the users' location, Google searches, Facebook accounts, and the like, based on an opt-out consent regime.³ Opt-out consent promotes the free-flow of information by placing the burden on the individual to prevent certain types of information from being shared.⁴ When an individual downloads the app, he or she automatically consents to the access of his or her personal information without receiving a notification to allow such access.⁵ Opt-out consent is evidenced by the language in the *Pokémon Go* Privacy Policy, which states, “[y]ou understand and agree that by using our App you (or your authorized child) will be transmitting your (or your authorized child’s) device location to us and some of that location information, along with your (or your authorized child’s) user name, may be shared through the App.”⁶ A user may rescind consent by submitting a

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¹ This scenario is based on events from a string of cases in St. Louis, Missouri. See Katie DeLong, *Police: Robbers Lure, Then Target Pokémon GO players in St. Louis Area*, FOX6 NOW (July 10, 2016, 2:38 PM), <http://fox6now.com/2016/07/10/police-robbers-lure-then-target-pokemon-go-players-in-st-louis-area/>.

² *Id.*

³ *Pokémon GO Privacy Policy*, NIANTIC LABS (Dec. 21, 2016), <https://www.nianticlabs.com/privacy/pokemongo/en/> [hereinafter *Pokémon GO Privacy Policy*].

⁴ See LORETTA NOTT, CONG. RESEARCH SERV., RL31758, FINANCIAL PRIVACY: THE ECONOMICS OF OPT-IN VS. OPT-OUT 3 (2004).

⁵ *See id.*

⁶ *Pokémon GO Privacy Policy*, *supra* note 3.

request through e-mail to Niantic Labs, the creator of the game.⁷ However, the Privacy Policy cautions that if certain information cannot be shared, the user may not be able to use all features of the game.⁸

The rapid growth of worldwide interconnectedness makes it more difficult for U.S. and EU companies to protect their customers' personal data as shown in the *Pokémon Go* example. In 2016, 17.7 billion devices were connected to the Internet.⁹ In 2020, that number will grow by 75%, meaning about 31 billion devices will be connected worldwide.¹⁰ This increase in connected devices opens the door for bad actors. For example, in 2014, hackers pulled off the largest data breach in history after obtaining the personal information of about 500 million Yahoo! users.¹¹ This breach is just one of many instances where hackers exposed the personal data of individuals.¹² Because of the continued rise in connectivity and the increased risk of hacking, both the U.S. and EU recognize that consumers need a way to take back control of their personal data online, and to monitor how and from where companies are obtaining personal data.¹³

This sparked a lot of regulation over time, specifically in the EU. In 2012, the EU proposed a reform of its initial data protection directive, 1995 Directive 95/46/EC, because of the lack of uniformity between EU Member States' ¹⁴ interpretation and enforcement of the Directive 95/46/EC.¹⁵ The lack of uniformity stems from it being classified as a "directive," which is merely a legislative act that sets out a goal all EU

⁷ *Pokémon GO Privacy Policy*, *supra* note 3.

⁸ *Pokémon GO Privacy Policy*, *supra* note 7.

⁹ IHS, *Internet of Things (IoT) Connected Devices Installed Base Worldwide from 2015 to 2025 (in Billions)*, STATISTA, <https://www.statista.com/statistics/471264/iot-number-of-connected-devices-worldwide/> (last visited Sept. 11, 2017).

¹⁰ *Id.*

¹¹ Dustin Volz, *Yahoo Says Hackers Stole Data from 500 Million Accounts in 2014*, REUTERS (Sept. 11, 2017, 2:52 PM), <http://www.reuters.com/article/us-yahoo-cyber-idUSKCN11S16P?il=0>.

¹² Herb Weisbaum, *What's With All These \$#@& Data Breaches?*, NBC NEWS, http://www.nbcnews.com/id/43499438/ns/business-consumer_news/t/whats-all-these-data-breaches/#.WXVN0a2ZM6U (last visited Aug. 10, 2017).

¹³ Steve Olenski, *For Consumers, Data Is a Matter of Trust*, FORBES (Apr. 18, 2016, 9:35 AM), <https://www.forbes.com/sites/steveolenski/2016/04/18/for-consumers-data-is-a-matter-of-trust/#3b6bc2df78b3>.

¹⁴ Countries that are "Member States" of the European Union are subject to the obligations and privileges of membership, obligations that are set out by the EU as a whole. The countries include: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. *What is the European Union?*, SCHENGEN VISA INFO, <https://www.schengenvisa.info/eu-countries/> (last visited Aug. 10, 2017).

¹⁵ European Commission Press Release IP/12/46, Commission Proposes a Comprehensive Reform of Data Protection Rules to Increase Users' Control of Their Data and to Cut Costs for Businesses (Jan. 25, 2012).

countries must achieve but leaves the individual countries to devise their own laws and policies to advance the goal.¹⁶

The new regulations, EU General Data Protection Regulation 2016/679 (GDPR), will become effective in the EU in May 2018.¹⁷ Because the GDPR is classified as a “regulation,” it will be binding on all EU countries, which is the first improvement from Directive 95/46/EC.¹⁸ The overall goal of the GDPR is to develop a strong and coherent data protection framework that is backed by a strong enforcement mechanism to facilitate continued development of the digital economy.¹⁹ For now, the regulation has been adopted by EU member states, but it is in a two-year transition period, lasting until 2018, to ensure the regulation is unambiguous and will be implemented uniformly.²⁰ The relevant portion of GDPR that will be discussed in this Comment is the transition from opt-out consent to a strictly opt-in policy, a transition that the U.S. has yet to adopt.²¹

Alongside the newly proposed GDPR, the EU and the U.S. enacted the EU-U.S. Privacy Shield (Privacy Shield) on July 12, 2016 as a joint effort between the United States Department of Commerce and the European Commission.²² The Privacy Shield is a separate agreement from the GDPR that aims to ensure American companies are compliant with new EU privacy laws.²³ U.S. businesses, European businesses, European citizens, and Data Protection Authorities (DPAs) can all participate in the Privacy Shield.²⁴ Participation in the Privacy Shield is not mandatory.²⁵ However, if, for example, a U.S.-based company wants to transfer personal data of its European customers to its headquarters in the U.S., it will need to be a member of the Privacy Shield to do so.²⁶ The concern of U.S. entities

¹⁶ *Regulations, Directives and Other Acts*, EUROPA, https://europa.eu/european-union/eu-law/legal-acts_en (last updated Sept. 11, 2017).

¹⁷ Sheila Millar & Tracy Marshall, *Preparing for the EU General Data Protection Regulation: A Checklist for Businesses*, KELLER AND HECKMAN LLP (June 16, 2016), <https://www.khlaw.com/9297>.

¹⁸ *Regulations, Directives and Other Acts*, *supra* note 16.

¹⁹ Commission Regulation 2016/679, 2016 O.J. (L 119), 1, 2 [hereinafter Regulation 2016/679].

²⁰ *See id.* at 31.

²¹ *See* Allison Schiff, *EU Gives Thumbs-Up on Stricter Data Privacy Laws*, AD EXCHANGER (Dec. 15, 2015, 5:35 PM), <https://adexchanger.com/data-exchanges/eu-gives-thumbs-up-on-stricter-data-privacy-laws/>.

²² *Privacy Shield Program Overview*, PRIVACY SHIELD, <https://www.privacyshield.gov/Program-Overview> (last visited Aug. 10, 2017).

²³ *Welcome to the Privacy Shield*, PRIVACY SHIELD, <https://www.privacyshield.gov/welcome> (last visited Aug. 10, 2017).

²⁴ *Id.*

²⁵ *Privacy Shield Program Overview*, *supra* note 22.

²⁶ *See id.*

is that they must comply, not only with the opt-out consent policy of the Privacy Shield, but also the opt-in consent policy of the GDPR.²⁷

Together, the GDPR and Privacy Shield present conflicting consent regimes that cause confusion for U.S. companies that will also be subject to Federal Trade Commission (FTC) enforcement mechanisms for non-compliance with the Privacy Shield.²⁸ Fines for non-compliance with GDPR consent are expected to be four percent of a company's total revenue.²⁹ Therefore, large companies like Apple, Google, and Microsoft will have to take additional steps to ensure compliance with both the Privacy Shield and the GDPR to avoid being subject to such a hefty fine.³⁰

After an analysis of the different consent models between the EU and U.S., this Comment will find that, although the opt-in and opt-out consent models may be titled differently, they operate similarly in practice, particularly when it comes to the protection of sensitive data. First, this Comment will provide background on the 1995 EU Directive's consent model and how the new General Data Protections Regulations modernized that outdated definition. This Comment will then provide background on the Privacy Shield, which aims to make trade between the EU and U.S. more efficient. Second, this Comment will give background on the American model and show that, although the FTC typically uses opt-out consent, when it is in the public interest, it will use opt-in consent to protect individuals' data. Finally, this Comment will analyze the similarities in the EU and U.S. consent models using the protection of health information, SMS text messaging, and e-mail marketing as examples.

II. BACKGROUND ON THE EUROPEAN UNION OPT-IN MODEL

Although the EU has only officially existed since 1993, privacy rights were well established in the constitutions and national courts of member countries prior to 1993.³¹ For example, the German state of Hesse enacted the first data protection statute in 1970,³² and Sweden³³ enacted the

²⁷ *Privacy Shield Framework: Choice*, PRIVACY SHIELD, <https://www.privacyshield.gov/article?id=2-CHOICE> (last visited Aug. 10, 2017) (stating "an organization must offer individuals the opportunity to choose (opt-out) whether their personal information is (i) to be disclosed to a third party or (ii) to be used to a purpose that is materially different from the purpose(s) for which it was originally collected or subsequently authorized by individuals. Individuals must be provided with clear, conspicuous, and readily available mechanism to exercise choice.").

²⁸ *Privacy Shield Framework: Recourse, Enforcement and Liability*, PRIVACY SHIELD, <https://www.privacyshield.gov/article?id=7-RECOURSE-ENFORCEMENT-AND-LIABILITY> (last visited Aug. 10, 2017).

²⁹ Regulation 2016/679, *supra* note 19, at 83.

³⁰ See Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. 88, 90-91 (2012).

³¹ Marc Rotenberg & David Jacobs, *Updating the Law of Information Privacy: The New Framework of the European Union*, 36 HARV. J. L. & PUB. POL'Y 605, 609 (2013).

³² Fred H. Cate, *PRIVACY IN THE INFORMATION AGE* 32 (1997).

first national data protection statute in 1973.³⁴ Traditionally, each Member State³⁵ enacted its own set of laws that would apply only within that country’s borders.³⁶ Most laws of the individual Member States had four characteristics in common: (1) the data protection laws apply to both the public and private sector; (2) the laws apply to a wide range of activities, including data collection, storage, use, and dissemination; (3) the laws impose affirmative obligations on anyone wishing to engage in any of these activities; and (4) the laws have few, if any, sectoral limitations – meaning such laws apply without regard to the subject of the data.³⁷ The lack of uniformity encouraged the EU to produce a harmonious method of data protection across all EU Member States, as demonstrated by the creation of Directive 95/46/EC and, most recently, the GDPR.³⁸

A. The 1995 Data Protection Directive 95/46/EC

As data became easier to transfer across borders, multinational data protection measures became crucial to ensuring Member States were monitoring and enforcing data protection laws uniformly.³⁹ To promote this needed consistency, in July 1990, the European Commission drafted what would become Directive 95/46/EC, which was approved on October 24, 1995 and took effect in 1998.⁴⁰ The Directive bound twenty-seven Member States of the EU and three members of the European Economic Area (Iceland, Lichtenstein, and Norway) to its rules and regulations.⁴¹

The purpose behind enacting Directive 95/46/EC was to create a closer, more cohesive system among Europeans, and to ensure economic and social progress.⁴² Additionally, the Directive aimed to respect the fundamental rights of European citizens, notably the right to privacy, and to establish an internal market in which personal data could flow freely from one Member State to another.⁴³ Directive 95/46/EC established a series of protections regarding the collection and processing of personal data in Europe.⁴⁴

³³ Sweden enacted the Ware Report in 1973. See Michael D. Birnhack, *The EU Data Protection Directive: An Engine of a Global Regime*, 24 COMP. L. & SEC. REPORT 508, 511 (2008).

³⁴ Cate, *supra* note 32, at 32.

³⁵ A Member State is a country that is part of the European Union.

³⁶ See Cate, *supra* note 32, at 47.

³⁷ See Cate, *supra* note 32, at 46.

³⁸ Birnhack, *supra* note 33, at 509.

³⁹ *Id.* at 512.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Council Directive 95/46/EC, 1995 O.J. (L 281).

⁴³ *Id.* at recitals 2, 3.

⁴⁴ Rotenberg & Jacobs, *supra* note 31, at 615.

However, Directive 95/46/EC was not “the” privacy law in each EU Member State because it was not binding.⁴⁵ The EU Directive 95/46/EC was supposed to guide the creation and implementation of national laws. Francoise Gilbert made this principle clear:

National legislation is required to bring into force the principles set forth in the directive. The principles are a floor. Each country can build additional restrictions (within limits). Consequently, the data protection laws of EU member states are not uniform, even though they are built on a similar foundation. Many European countries had data protection laws long before the adoption of the 1995 Data Protection Directive.⁴⁶

Importantly, the Directive’s territorial scope applied to data controllers in a Member State, and, when the controller was based outside the EU,⁴⁷ the applicable law was that of the Member State where the processing took place.⁴⁸ Directive 95/46/EC defined a controller as “the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data...”⁴⁹ This definition was updated in the new GDPR proposal because it became easier and more common to transfer data across borders.⁵⁰ The new Regulations also added “profiling” as a definition, which essentially prohibits the use of any personal information for advertising or marketing purposes, or to predict consumer behavior.⁵¹ This addition, along with the fact that the GDPR addresses issues created by social media, cloud computing and nearly ubiquitous data collection, makes the GDPR much more relevant to the current climate than Directive 95/46/EC.⁵²

The American view of the 1995 Directive 95/46/EC was unfavorable. Americans thought the Directive was aggressive, too

⁴⁵ Francoise Gilbert, *A Bird's-Eye View of Data Protection in Europe*, GPSOLO (July-Aug 2007), https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/birds_eye.html.

⁴⁶ Gilbert, *supra* note 45.

⁴⁷ Council Directive 95/46/EC, *supra* note 42, at art 4(a).

⁴⁸ Article 29 Data Protection Working Party 0836-02/10/EN, art. 4(1)(a), Opinion 8/2010 on applicable law, adopted Dec. 16, 2010 (WP 179), http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp179_en.pdf.

⁴⁹ Council Directive 95/46/EC, *supra* note 42, at art 2(d).

⁵⁰ *See generally* Regulation 2016/679, *supra* note 19.

⁵¹ *Id.* at art. 4(4) (defining profiling as, “any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyze or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements”).

⁵² Rotenberg & Jacobs, *supra* note 31, at 630.

comprehensive, and did not allow for advancements in technology.⁵³ Even today, the U.S. has yet to adopt federal privacy policy, which is reflective of why the U.S. disfavored Directive 95/46/EC as being too comprehensive and aggressive.⁵⁴

B. General Data Protection Regulations 2016/679

Uniformity and harmonization were key factors the EU considered when drafting the GDPR.⁵⁵ The GDPR impacts EU residents, whom the regulations are meant to protect, but also American companies and how they control data.⁵⁶ According to a 2014 study, cross-border data flow between the U.S. and Europe is at the highest rate in the world—almost double the data flows between the U.S. and Latin America and 50% higher than data flows between the U.S. and Asia.⁵⁷ So, compliance with the GDPR by U.S. companies is crucial.⁵⁸

The EU outlined two main objectives of GDPR implementation that are important to consider. First, the EU wants to strike a balance between increased trust in the use of information services by EU users, while continuing to protect their fundamental rights.⁵⁹ A study done by the European Commission found that more than 90% of Europeans want the same data protection rights across the European Union.⁶⁰ Second, the EU expects that uniformity under GDPR will strengthen the economy by incentivizing non-EU businesses to build offices in the EU.⁶¹ Without the burden of complying with different consent laws for each Member State, companies just have to comply with one set of regulations, GDPR.⁶² This

⁵³ Birnhack, *supra* note 33, at 518; Steven R. Salbu, *The European Union Data Privacy Directive and International Relations*, 44 (William Davidson Inst. Working Paper No. 418, 2001).

⁵⁴ See generally Lisa J. Sotto & Aaron P. Simpson, GETTING THE DEAL THROUGH – DATA PROTECTION & PRIVACY 2015, at 208, 211-12 (Rosemary P. Jay, 3rd ed. 2014).

⁵⁵ W. Gregory Voss, *Preparing for the Proposed EU General Data Protection Regulation: With or Without Amendments*, BUS. L. TODAY 1 (Nov. 2012), https://www.americanbar.org/publications/blt/2012/11/01_voss.html.

⁵⁶ This comment was written before any new regulation regarding Brexit was enacted, as the comment acknowledges the United Kingdom as part of the EU, and was therefore subject to the regulations discussed throughout this comment.

⁵⁷ Joshua P. Meltzer, *The Importance of the Internet and Transatlantic Data Flows for the U.S. and EU Trade and Investment*, (Brookings Working Paper No. 79, 2015), <https://www.brookings.edu/research/the-importance-of-the-internet-and-transatlantic-data-flows-for-u-s-and-eu-trade-and-investment/>.

⁵⁸ *Id.*

⁵⁹ Voss, *supra* note 55.

⁶⁰ European Commission Fact Sheet, *EU Data Protection Reform: What Benefits for Businesses in Europe?*, (Jan. 2016), available at ec.europa.eu/newsroom/document.cfm?doc_id=41524 [hereinafter *EU Data Protection Reform*].

⁶¹ European Commission Fact Sheet, *Questions and Answers: Data Protection Reform*, (Dec. 21, 2015), http://europa.eu/rapid/press-release_MEMO-15-6385_en.htm.

⁶² *EU Data Protection Reform*, *supra* note 60.

spur in business is expected to generate 2.3 billion EUR per year in benefits.⁶³ Third, the GDPR drafters made the regulations vague enough to allow for change.⁶⁴ For example, a broader definition of “personal data,” was necessary in order to “future-proof” the proposed regulation and prevent it from having to be reworked every couple of years.⁶⁵

GDPR replaces Directive 95/46/EC, and, because of the new and improved technology landscape, consent is one article that underwent significant changes. Most importantly, Directive 95/46/EC allowed controllers, in some circumstances, to rely on implicit or opt-out consent models.⁶⁶ However, the GDPR removed any possibility of opt-out consent, specifically by including three new sections.⁶⁷ First, Article 7(3) of the GDPR provides for the withdrawal of consent at any time, indicating that express, opt-in consent must be given in the first place.⁶⁸ Second, Recital 43 states that, if there is “a clear imbalance between the data subject and the controller, in particular where the controller is a public authority,” then consent is not freely given.⁶⁹ Third, Article 7(2) states that if consent is in a written document, it must be “clearly distinguishable from other matters, in an intelligible and easily accessible form, using clear and plain language.”⁷⁰ Each provision creates a higher burden for controllers to meet the GDPR standard when asking for consent to process data.

Article 9 also addresses consent, and deals with special categories of data including health information, political opinions, religious beliefs, and more.⁷¹ Article 9 requires opt-in consent for the disclosure of any type of data that is considered a special category.⁷² Some exceptions to consent under Article 9 include: processing data that was made public by the data subject, processing for a substantial public interest, and processing to protect against a serious cross-border threat to health or security.⁷³ Article 9 demonstrates the similarities between the EU and U.S. policies because,

⁶³ *EU Data Protection Reform*, *supra* note 60.

⁶⁴ Voss, *supra* note 55.

⁶⁵ *Id.*

⁶⁶ Gabe Maldoff, *Top 10 Operational Impacts of the GDPR: Part 3 - Consent*, International Association of Privacy Professionals (Jan. 12, 2016), <https://iapp.org/news/a/top-10-operational-impacts-of-the-gdpr-part-3-consent/>.

⁶⁷ *Id.*

⁶⁸ Regulation 2016/679, *supra* note 19, at art. 7(3) (stating “the data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent”).

⁶⁹ Regulation 2016/679, *supra* note 19; see also Maldoff, *supra* note 66.

⁷⁰ Regulation 2016/679, *supra* note 19, at art. 7(2); see also Maldoff, *supra* note 66.

⁷¹ Regulation 2016/679, *supra* note 19, at art. 9(1).

⁷² *Id.* at art. 9(2)(a).

⁷³ *Id.* at art. 9(2)(e)-(g).

through legislation, the U.S. also specifically addresses consent related to Article 9 categories.⁷⁴

The main difference between Article 9 consent and Article 7 consent is the existence of exceptions. Article 7 allows a consumer to opt out at any time with no exceptions, whereas Article 9 outlines a number of exceptions that outlines scenarios where the consumer’s consent is not required to share his or her personal data.⁷⁵

The GDPR also includes strong enforcement provisions. Non-compliance with any of the consent provisions warrants the most severe monetary fine outlined in the GDPR.⁷⁶ Article 83(5) reads, “infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 20 000 000 EUR⁷⁷, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher.”⁷⁸ Article 83(5)(a) specifies the first condition as, “the basic principles for processing, including conditions for consent, pursuant to Articles 5, 6, 7, and 9.”⁷⁹

In addition to administrative fines, an individual who feels his or her rights were violated by controllers or processors is entitled to bring suit “before the courts of the Member State where the controller or processor has an establishment.”⁸⁰ “Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence...”⁸¹ So, the individual as well as the supervisory authority has the ability to enforce non-compliance of consent requirements with the regulations against the controller or processor.⁸²

The GDPR made notable changes to Directive 95/46/EC that are going to help shape the consent landscape going forward. GDPR’s creation of higher burdens for controllers and strict exceptions signifies the EU’s dedication to protecting its citizens’ data. The EU brought this same mindset to the creation of the Privacy Shield.

⁷⁴See generally Ieuan Jolly, *Data Protection in the United States: Overview*, THOMAS REUTERS, [https://uk.practicallaw.thomsonreuters.com/6-502-0467?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/6-502-0467?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (last updated July 1, 2017).

⁷⁵ Regulation 2016/679, *supra* note 19, at art. 9(2)(b)-(j).

⁷⁶ Regulation 2016/679, *supra* note 19, at art. 83(5).

⁷⁷ This equates to \$22,283,100.00. X-RATES CURRENCY CALCULATOR, <http://www.x-rates.com/calculator/?from=EUR&to=USD&amount=20000000> (last visited Aug. 4, 2017).

⁷⁸ Regulation 2016/679, *supra* note 19, at art. 83.

⁷⁹ *Id.* at art. 83(5)(a).

⁸⁰ See *id.* at art. 83.

⁸¹ *Id.*

⁸² *Id.*

C. *The Privacy Shield*

Before the Privacy Shield, the EU and U.S. had a Safe Harbor program,⁸³ which was invalidated by the Court of Justice of the European Union (CJEU), the highest court in the EU, on October 6, 2015. The Safe Harbor program is analogous to the current Privacy Shield in that it was implemented to promote the legal transfer of EU citizens' data to the U.S. However, the EU has specific data protection regulations, and the CJEU found that the Safe Harbor failed to meet EU data protection standards, mainly because of the U.S. surveillance programs.⁸⁴ The CJEU ruled that the standard was not strong enough by stating,

[T]he reliability of [a safe harbor] system... is founded essentially on the establishment of effective detection and supervision mechanisms enabling any infringements of the rules ensuring the protection of fundamental rights, in particular the right to respect for private life and right to protection of personal data, to be identified and punished in practice.⁸⁵

Stricter EU standards prompted the CJEU to find that its citizens' rights were unprotected by the Safe Harbor Program, therefore leading the Court to repeal it.⁸⁶ Because the Safe Harbor was particularly important in facilitating transatlantic data transfers, the EU and U.S. thought it necessary to enact another, more stringent regulation: the EU-U.S. Privacy Shield.⁸⁷

The Department of Commerce (DoC) is responsible for maintenance of the Privacy Shield by ensuring the list of participating companies is up to date, conducting ongoing compliance checks, targeting the website to specific audiences, and general supervision of the program.⁸⁸ The DoC also collaborates with European DPAs to ensure the EU and the U.S. agree are in agreement of which companies are compliant and which should be looked into.⁸⁹

⁸³ See Commission Regulation 2000/520/EC, 2000 O.J. (L 215) 7, 11, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0520:EN:HTML>.

⁸⁴ See Martin A. Weiss & Kristin Archick, *U.S.-EU Data Privacy: From Safe Harbor to Privacy Shield*, CONG. RES. SERV. (May 19, 2016), available at <https://fas.org/sgp/crs/misc/R44257.pdf>.

⁸⁵ Kurt Hunt & Adam Vernick, *EU-U.S. Safe Harbor Invalidated – What It Means for Your Business*, NATIONAL LAW REVIEW (Oct. 28, 2015), <http://www.natlawreview.com/article/eu-us-safe-harbor-invalidated-what-it-means-your-business>.

⁸⁶ Weiss & Archick, *supra* note 84, at 9.

⁸⁷ *Id.*

⁸⁸ Letter from the International Trade Administration to the United States Department of Commerce, 1 (July 7, 2016) (on file with the Privacy Shield Server), available at <https://www.privacyshield.gov/servlet/servlet.FileDownload?file=015t00000004q0M> [hereinafter Letter to Department of Commerce].

⁸⁹ *Id.*

U.S. and EU officials claim the Privacy Shield has stronger protections and oversight mechanisms, multiple redress possibilities, and new safeguards related to U.S. government access to personal data.⁹⁰ European businesses, individuals in Europe and DPAs can voluntarily join the Privacy Shield by self-certifying that they will follow the Privacy Shield framework, which is largely reflective of GDPR.⁹¹ Once an entity commits to complying with the Privacy Shield, the commitment becomes enforceable under U.S. law.⁹² To participate, the entity must adopt an opt-out consent policy, which is the opposite of the GDPR opt-in policy.⁹³ An opt-out consent policy means that the entity will give the consumer the option to deny consent to the company to use their personal data.⁹⁴ Companies can obtain opt-out consent in writing or, more recently, by unchecking a box online.⁹⁵

For U.S. businesses, participation in the Privacy Shield offers an array of benefits. For example, once a U.S. business is cleared to provide “adequate”⁹⁶ protection of data, there can be a free transfer of data between U.S. and EU business, which is governed by the Privacy Shield.⁹⁷ Additionally, compliance requirements are clear and cost-effective, which makes the Privacy Shield easier to follow than the Safe Harbor, specifically for small and medium-sized enterprises.⁹⁸

Another benefit for U.S. companies registered under the Privacy Shield is that EU entities looking to transfer their data can look at the comprehensive list online to check if the U.S. company has been verified, therefore allowing EU entities to quickly make transaction decisions.⁹⁹ This is particularly helpful when an EU business has a U.S. subsidiary. If a U.S. subsidiary, under the jurisdiction of the FTC or Department of

⁹⁰ *How to Join the Privacy Shield (part 1)*, PRIVACY SHIELD, <https://www.privacyshield.gov/article?id=How-to-Join-Privacy-Shield-part-1> (last visited Aug. 5, 2017).

⁹¹ *Id.*

⁹² *How to Join the Privacy Shield*, *supra* note 91.

⁹³ Privacy Shield Framework: Choice, *supra* note 27 (stating “an organization must offer individuals the opportunity to choose (opt-out) whether their personal information is (i) to be disclosed to a third party or (ii) to be used to a purpose that is materially different from the purpose(s) for which it was originally collected or subsequently authorized by individuals. Individuals must be provided with clear, conspicuous, and readily available mechanism to exercise choice”).

⁹⁴ *Different Types of Consent*, PRIVACY SENSE, <http://www.privacysense.net/different-types-consent/> (last visited Sept. 11, 2017).

⁹⁵ *Id.*

⁹⁶ “Adequate” protection of data, is not defined by the Privacy Shield.

⁹⁷ *Benefits of Participation*, PRIVACY SHIELD, <https://www.privacyshield.gov/article?id=Benefits-of-Participation> (last visited Sept. 17, 2017) (the EU Data Protection Framework they are referring to will not be the GDPR until May 2018).

⁹⁸ *Id.*

⁹⁹ *Active Participants*, PRIVACY SHIELD, <https://www.privacyshield.gov/list> (last visited Sept. 11, 2017) (Participating companies include: Dropbox, Inc., Google, GoPro, Inc., Microsoft, St. Jude’s Medical Center and many others).

Transportation, enrolls in the Privacy Shield, the transfer of data between it and the EU is much more efficient and cost effective largely because the list makes it easy to determine if the subsidiary is cleared¹⁰⁰

The success of the Privacy Shield is particularly important to facilitating and continuing transatlantic trade. The economic relationship that comes from it is the world's largest.¹⁰¹ It accounts for half of the global economic output and nearly one trillion dollars in goods and services, which supports millions of jobs in industries like marketing and human resources in both the EU and U.S.¹⁰² Specifically, cross-border data transfers by business include anything from payroll information to advertising strategies, which is particularly relevant for technology companies.¹⁰³ All types of businesses rely on its success, not just Fortune 500 companies, but also small and medium sized enterprises.¹⁰⁴

Coupled with the GDPR, the Privacy Shield provides an extra layer of protection to ensure that EU citizens' data is protected while still protecting jobs and economic stability created by the cross-border data transfer market.

III. BACKGROUND ON THE AMERICAN OPT-OUT MODEL

Courts and legal scholars credit the inception of the right to privacy in the U.S. to Samuel Warren and Louis Brandeis in their 1890 Harvard Law Review article, *The Right to Privacy*.¹⁰⁵ Associate Justice Denton in *Billings v. Atkinson* described the article's findings: "the authors [of *The Right to Privacy*] concluded that there is a common law right of privacy which had in some instances been protected under the guise of property rights, and that violation of the right itself is actionable."¹⁰⁶ For example, criminal laws were enacted to protect against opening private letters and telegraph messages, as well as protections for confidential conversations with doctors and spouses.¹⁰⁷

The current state of privacy rights in the U.S. has a foundation not just in common law, but also in the United States Constitution, and federal

¹⁰⁰ *U.S. Subsidiaries of European Business*, PRIVACY SHIELD, <https://www.privacyshield.gov/article?id=U-S-Subsidiaries-of-European-Businesses-Participation-in-Privacy-Shield> (last visited Sept. 11, 2017); *see also id.*

¹⁰¹ Letter to Department of Commerce, *supra* note 88, at 1-2.

¹⁰² Letter to Department of Commerce, *supra* note 88, at 1-2; Julia Fioretti, *EU-U.S. Commercial Data Transfer Pact Clears Final Hurdle*, REUTERS (July 8, 2016, 4:47 AM), <http://www.reuters.com/article/us-eu-dataprotection-usa-idUSKCN0ZO0SH>.

¹⁰³ Fioretti, *supra* note 102.

¹⁰⁴ Letter to Department of Commerce, *supra* note 88, at 1-2.

¹⁰⁵ *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973); *Milner v. Red River Valley Pub. Co.*, 249 S.W.2d 227, 229 (Tex. Civ. App. 1952).

¹⁰⁶ *Billings*, 489 S.W.2d at 860.

¹⁰⁷ Vernon Valentine Palmer, *Three Milestones in the History of Privacy in the United States*, 26 TUL. EUR. & CIV. L. F. 67, 72 (2011) (citing *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1895 (1981)).

and state legislation. Privacy rights were first recognized in common law and classified under tort law in suits involving slander, libel, and defamation.¹⁰⁸ Privacy rights have also been interpreted against the background of the Constitution, most notably the First Amendment,¹⁰⁹ Fourth Amendment,¹¹⁰ and Fourteenth Amendment,¹¹¹ though Courts have been careful to narrowly define when privacy rights are actionable.¹¹² Finally, as the right to privacy became a fundamental right, Congress stepped in and enacted legislation to ensure the right was federally protected.¹¹³ However, Congress was mindful not to pass broad legislation.

There is not an all-encompassing federal law to protect against the unauthorized collection and use of personal data, unlike the GDPR in the EU.¹¹⁴ Each piece of legislation that Congress did pass only applies to a specific subject area, such as healthcare or children’s privacy.¹¹⁵ The U.S. allows individual states to develop their own privacy legislation, for example, there is state legislation covering the protection of Social Security Numbers and outlining data breach notification requirements.¹¹⁶

While there is no single authority dedicated to regulating data protection in the U.S., the primary enforcement authority in the regulated industries context is the FTC.¹¹⁷ The FTC relies on an opt-out consent regime that is consistent with the Privacy Shield and typically exercises its authority on a case-by-case basis.¹¹⁸ In contrast, the European Commission,

¹⁰⁸ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 218 (1890).

¹⁰⁹ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”).

¹¹⁰ U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”).

¹¹¹ U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

¹¹² Tim Sharp, *Right to Privacy: Constitutional Rights and Privacy Laws*, LIVE SCIENCE (June 12, 2013, 5:34 PM) <https://www.livescience.com/37398-right-to-privacy.html> (contains a list of relevant Supreme Court cases and how the Court analyzed privacy rights against relevant the Constitutional provision).

¹¹³ See e.g., Fair Credit Reporting Act, 15 U.S.C. § 1601 (1968); The Privacy Act of 1974, 5 U.S.C. § 552a (1974); Children’s Online Privacy Protection Act, 47 U.S.C. § 609 (1998); Gramm-Leach-Bliley Act, 12 U.S.C. § 1811 (1999) [hereinafter the Acts].

¹¹⁴ Jolly, *supra* note 74.

¹¹⁵ See the Acts, *supra* note 113.

¹¹⁶ Sotto & Simpson, *supra* note 54, at 208, 211-12 (for example, as of 2014, 47 states the District of Columbia, Guam, the US Virgin Islands and Puerto Rico had enacted data breach notification laws).

¹¹⁷ See 15 U.S.C. § 6802 (2012); see also Sotto & Simpson, *supra* note 54, at 208.

¹¹⁸ See 15 U.S.C. § 6802 (2012); see also Sotto & Simpson, *supra* note 54, at 210.

the EU's main privacy enforcement authority, has general authority over all data protection violations.¹¹⁹

Congress gave the FTC the power to enforce Section 5 of the FTC Act, which is a general consumer protection law that includes a prohibition against “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”¹²⁰ If the FTC finds an entity violated Section 5, it can issue a consent decree prohibiting the entity from engaging in future misconduct.¹²¹ If an entity fails to abide by the consent decree, then the FTC can fine the violator.¹²²

Section 5 of the FTC Act requires that consumers have the choice to opt-out of tracking services.¹²³ As mentioned above, Section 5 provides the FTC with authority to issue consent decrees on privacy violations that are “unfair and deceptive practices.”¹²⁴ Below are two examples of legislation in which Congress gave enforcement authority to the FTC. The first example will show when Congress gives clear authority for a federal agency to govern privacy by examining the Gramm-Leach-Bliley Act, which protects sensitive financial information through a clear opt-out system. The second example will demonstrate how the FTC uses its Section 5 authority to govern privacy matters using opt-out consent through the lens of the WhatsApp/Facebook merger.

A. *The Gramm-Leach-Bliley-Act Example*

Congress gave the FTC explicit authority to oversee the transfer of data from financial institutions through the Gramm-Leach-Bliley Act (GLBA).¹²⁵ Specifically, GLBA provides that, “each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers’ non-public personal information.”¹²⁶ GLBA is important because it aims to

¹¹⁹ Tobias J. Schulz, *Introductory Note to Schrems v. Data Protection Commissioner (C.J.E.U.)*, 56 I.L.M. 245, 256 (Apr. 2017).

¹²⁰ Timothy E. Deal, *Moving Beyond “Reasonable”: Clarifying the FTC’s Use of Its Unfairness Authority in Data Security Enforcement Actions*, 84 FORDHAM L. REV. 2227, 2232 (2016) (citing 15 U.S.C. § 45(a) (2012)); see also Sotto & Simpson, *supra* note 54, at 208.

¹²¹ Sotto & Simpson, *supra* note 54, at 208.

¹²² *Id.*

¹²³ FEDERAL TRADE COMMISSION PRIVACY & DATA SECURITY UPDATE: 2015 (2015), https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2015/privacy_and_security_data_update_2015-web_0.pdf (Nomi Technologies case).

¹²⁴ Sotto & Simpson, *supra* note 54, at 214.

¹²⁵ See 15 U.S.C. § 6801 (2012).

¹²⁶ *Id.*

protect sensitive information obtained by financial institutions, a category of data not included in the GDPR.¹²⁷

Congress further specified that financial institutions must carry out this obligation through an opt-out consent regime,¹²⁸ meaning that the institution would have the ability to disclose any information unless the customer specifically prevented them from doing so by opting-out.¹²⁹ GLBA defines the requirements for opt-out consent as: (1) the financial institution clearly discloses to a consumer that information may be disclosed to a third party¹³⁰; (2) the consumer is given the opportunity before initial disclosure to a third party to opt-out¹³¹; and (3) the consumer is given an explanation of how to exercise the nondisclosure option.¹³²

The FTC not only uses opt-out consent when enforcing statutes, but also when issuing consent decrees to violators of Section 5 of the FTC Act, as it did in the WhatsApp, Inc./Facebook, Inc. merger.

B. *WhatsApp/Facebook Merger Example*

WhatsApp is a messaging app that allows people to connect around the world for free and serves more than one billion people in 180 countries.¹³³ In an effort to expand its empire, Facebook decided to purchase WhatsApp for \$19 billion in February 2014.¹³⁴ This acquisition helped Facebook expand its international market, specifically in developing countries where Facebook’s presence was not as strong.¹³⁵ However, the merger led to a controversial outcome as users were automatically opted into Facebook’s privacy policy without being notified that the privacy policy was different, and less protective, than WhatsApp’s.¹³⁶

¹²⁷ See generally Regulation 2016/679, *supra* note 19, at art. 9; see also 15 U.S.C. § 6801 (2012).

¹²⁸ See Daniel J. Solove & Woodrow Hartzog, *The FTC and The New Common Law of Privacy*, 114 COLUM. L. REV. 583, 603 (2014).

¹²⁹ See generally 15 U.S.C. § 6802(b) (2012).

¹³⁰ See 15 U.S.C. § 6802(b)(1)(A) (2012).

¹³¹ See 15 U.S.C. § 6802(b)(1)(B) (2012).

¹³² See 15 U.S.C. § 6802(b)(1)(C) (2012).

¹³³ *About WhatsApp*, WHATSAPP, <https://www.whatsapp.com/about/> (last visited Aug. 19, 2017).

¹³⁴ Adrian Covert, *Facebook Buys WhatsApp for \$19 Billion*, CNN MONEY, (Feb. 19, 2014, 6:54pm), <http://money.cnn.com/2014/02/19/technology/social/facebook-whatsapp/> (last visited Aug. 19, 2017).

¹³⁵ Jared Newman, *Facebook’s WhatsApp Acquisition Explained*, TIME.COM (Feb. 20, 2014), <http://time.com/8806/facebooks-whatsapp-acquisition-explained/>.

¹³⁶ Natasha Lomas, *WhatsApp to Share User Data with Facebook for Ad Targeting – Here’s How to Opt-Out*, TECHCRUNCH (Aug. 25, 2016), <https://techcrunch.com/2016/08/25/whatsapp-to-share-user-data-with-facebook-for-ad-targeting-heres-how-to-opt-out/> (last visited Aug. 19, 2017); Kate Cox, *Consumer Privacy Groups File FTC Complaint Over Facebook, Whatsapp Data Sharing*, CONSUMERIST (Aug. 30, 2016, 12:38pm), <https://consumerist.com/2016/08/30/consumer-privacy-groups-file-ftc-complaint-over-facebook-whatsapp-data-sharing/> (last visited Aug. 19, 2017).

WhatsApp never violated Section 5 of the FTC Act and prides itself on being a secure messaging app that would never use personal data of its users for advertising or marketing purposes.¹³⁷ The company viewed this feature as a main selling point to entice consumers to use WhatsApp over its competitors, such as Viber, which also allows users to share text messages and photographs.¹³⁸ WhatsApp says, “[o]ur messages and calls are secured with end-to-end encryption, meaning that no third party including WhatsApp can read or listen to them.”¹³⁹ This was very important to the FTC when analyzing the merger and forced the FTC into a position of choosing which privacy policy to honor, Facebook or WhatsApp’s.

Facebook, on the other hand, has been under strict surveillance since 2011 to ensure compliance with Section 5 of the FTC Act.¹⁴⁰ In 2011, the FTC accused Facebook of deceiving consumers by advertising that users’ information on Facebook was private, and then repeatedly allowing it to be shared and made public for a variety of purposes.¹⁴¹ The claim was settled later in 2011 and Facebook is now barred from making misrepresentations about users’ privacy and security.¹⁴² Facebook also agreed to be audited over the next 20 years to ensure it has a clear privacy policy in place that is truthful and being honored.¹⁴³ The most notable condition of Facebook’s settlement was that Facebook is required to obtain users’ affirmative, opt-in consent before enacting changes that would preempt users’ already set privacy preferences.¹⁴⁴ This is evidenced mainly by the notifications users get whenever Facebook changes or updates its policy.¹⁴⁵

Jessica Rich, Director of the FTC Consumer Protection Bureau sent a letter to the Chief Privacy Officer of Facebook and the General Counsel of WhatsApp, that said WhatsApp must continue to honor its existing privacy policy and not sell any user data to Facebook for advertising purposes.¹⁴⁶ So, the FTC ensured that unless consumers opted-

¹³⁷ Lomas, *supra* note 136.

¹³⁸ *Id.*; see also *About, VIBER*, <https://www.viber.com/about/> (last visited Aug. 19, 2017).

¹³⁹ *About WhatsApp*, *supra* note 133.

¹⁴⁰ Cox, *supra* note 136; Mary Beth Quirk, *Facebook Agrees to Settle with FTC Over Privacy Violation Charges*, CONSUMERIST (Nov. 29, 2011), <https://consumerist.com/2011/11/29/facebook-settles-with-ftc-over-privacy-violation-charges/> (last visited Aug. 19, 2017).

¹⁴¹ FTC, FACEBOOK SETTLES FTC CHANGES THAT IT DECEIVED CONSUMERS BY FAILING TO KEEP PRIVACY PROMISES (2011).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Data Policy*, FACEBOOK, <https://www.facebook.com/policy.php> (last visited Sept. 30, 2017).

¹⁴⁶ FTC Bureau of Consumer Protection, Opinion Letter (Apr. 10, 2014), *available at* https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappttr.pdf.

in, their data will not be disclosed.¹⁴⁷ Rich emphasized that WhatsApp’s stricter privacy policy will remain in effect.¹⁴⁸

So, when two companies have conflicting policies, the FTC safeguards the stricter policy. Even though the FTC typically uses an opt-out consent model, this example shows that, when it is in the consumers’ best interest, the FTC will uphold an opt-in policy.

IV. ANALYSIS

Instead of analyzing consent regimes based on what they are called, it is more effective to analyze them based on how they operate. Sections I and II demonstrate that while the EU and U.S. claim to have opposing views on consent, in practice, both countries aim to protect sensitive information. As noted above, GDPR employs an opt-in regime, meaning an individual must make a clear, affirmative action signifying agreement to a clause or document.¹⁴⁹ In contrast, the U.S. typically employs an opt-out regime, meaning that individuals are automatically subject to data collection unless they remove themselves from the list.¹⁵⁰ While the regimes seem different on their face, the similarities in practice allow the EU and U.S. to continue facilitating transatlantic data transfers while still maintaining compliance with both nations’ regulations.

It is undisputed that there are fundamental differences in the EU and U.S. regarding consent regimes for consumer personal data. For example, the EU has all-encompassing data protection laws that are binding on all its Member States while the U.S. has some federal laws but nothing all encompassing.¹⁵¹ This analysis will explore three categories of sensitive data: (1) health information, (2) SMS text messaging, and (3) e-mail marketing. Each of these examples will demonstrate that despite their differences, the EU and U.S. use similar consent policies in order to provide citizens with the strongest data protection possible.

A. Health Information

Some have argued that the U.S. and EU consent mechanisms for health records are “strikingly dissimilar” and “beyond reconciliation.”¹⁵² This characterization likely comes from the idea that U.S. health privacy

¹⁴⁷ FTC Bureau of Consumer Protection, *supra* note 146.

¹⁴⁸ *Id.*

¹⁴⁹ Regulation 2016/679, *supra* note 19, at art. 4(11).

¹⁵⁰ Regulation 2016/679, *supra* note 19, at sec. II; *see also* 15 U.S.C. § 6802(b) (2010).

¹⁵¹ Phil Lee, *How Do EU and US Privacy Regimes Compare?*, FIELD FISHER, (Mar. 5, 2014, 10:29 PM), <http://privacylawblog.fieldfisher.com/2014/how-do-eu-and-us-privacy-regimes-compare/>.

¹⁵² Janine Hiller, et al, *Privacy and Security in the Implementation of Health Information Technology (Electronic Health Records): US and EU Compared*, 17 B.U. J. SCI. & TECH. L. 1, 32 (2011).

laws are rooted in statute, whereas EU health privacy laws are currently rooted in the GDPR and before that in Directive 95/46/EC.¹⁵³ The argument for “strikingly dissimilar” health privacy laws in the two nations stems from the exceptions to when a patient’s consent is needed to share information that are allegedly present in the U.S. statute, but not in the GDPR.¹⁵⁴ These exceptions include disclosure when it is in the public interest, for research purposes, for healthcare operations, for payment or treatment, and when an individual has the opportunity to agree or object.¹⁵⁵ While this may have been true when Directive 95/46/EC was the governing authority, the new GDPR creates exceptions more analogous to the U.S. statute.

The governing statute in the U.S. is the Health Insurance Portability and Accountability Act of 1996 (HIPAA).¹⁵⁶ The Department of Health and Human Services (HHS) oversees HIPAA and has authority to adopt privacy regulations under the statute.¹⁵⁷ Most notably, HIPAA contains a Privacy Rule that “establishes national standards to protect individuals’ medical records and other personal health information and applies to health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically.”¹⁵⁸ The Privacy Rule sets safeguards to protect individual privacy of health information and sets parameters for when that information can be disclosed.¹⁵⁹ Similarly, the GDPR addresses privacy of individual health information in Article 9, which protects against the processing of special categories of personal data.¹⁶⁰ Article 9(1) specifies that processing “...data concerning health...” is prohibited.¹⁶¹ As mentioned earlier, GDPR also imposes a hefty fine for entities that disclose any Article 9 data against an individual’s consent.¹⁶²

The first similarity between the GDPR and HIPAA lies in the language of Article 9, paragraph 2(b) in the GDPR.¹⁶³ Article 9, paragraph 2(a) provides that personal data, including health data, shall never be disclosed unless the data subject gives explicit consent to the processing of the data for one or more specific purposes.¹⁶⁴ This is indicative of opt-in consent because individuals must give unambiguous consent before any

¹⁵³ Hiller, *supra* note 152, at 32.

¹⁵⁴ *Id.* at 34.

¹⁵⁵ 45 C.F.R. § 164.510 (2013).

¹⁵⁶ Hiller, *supra* note 152, at 11.

¹⁵⁷ *Id.*

¹⁵⁸ *The HIPAA Privacy Rule*, HHS.GOV (Apr. 16, 2015), available at <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html>; see also Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, available at <https://www.gpo.gov/fdsys/pkg/PLAW-104publ191/pdf/PLAW-104publ191.pdf>.

¹⁵⁹ *Id.*

¹⁶⁰ Regulation 2016/679, *supra* note 19, at art. 9.

¹⁶¹ *Id.* at art. 9(1).

¹⁶² *Id.* at art. 83(5).

¹⁶³ *Id.* at art. 9; see also 45 C.F.R. § 164.506(b)(1) (2013).

¹⁶⁴ *Id.* at art. 9 para. 2(b).

third party can access their data. Similarly, the HHS rules outline a standard for consent, stating, “a covered entity may obtain consent of the individual to use or disclose protected health information to carry out treatment, payment, or health care operations.”¹⁶⁵ This language also denotes opt-in consent because a third party must get affirmative consent of the individual before any disclosure occurs.

The second similarity is in the exceptions to consent created by HIPAA and the GDPR. As noted above, HHS, through its regulatory authority, wrote a number of exceptions to when consent is required from the individual, some of which require that the individual at least have an opportunity to agree or object and some of which do not.¹⁶⁶ The purpose behind all of these exceptions, however, is to make healthcare information accessible. For example, one exception allows disclosure of health information for emergency purposes like identifying or locating a family member.¹⁶⁷ Another allows for the transfer of data between healthcare providers if they have a prior relationship with the patient.¹⁶⁸ Further, there are limited instances that do not require the individual to have an opportunity to agree or object at all.¹⁶⁹ These include disclosures required by law; disclosures about victims of abuse, neglect or domestic violence; disclosure for judicial or administrative proceedings; disclosures for law enforcement purposes; disclosure for research purposes, among others.¹⁷⁰ While some may view these exceptions as a way for healthcare providers to give out more information about patients, these exceptions are in place primarily to serve the public interest, similar to the exceptions present in the GDPR.¹⁷¹

Originally, Directive 95/46/EC allowed for a public interest exception to consent only.¹⁷² However, the GDPR broadened the exceptions to be more similar to HIPAA than its preceding Directive. Article 9 incorporate several exceptions including if processing is necessary for the purposes of carrying out the obligations and specific rights of the controller; for the establishment, exercise or defense of legal claims; for public health; for archiving purposes in public interest, scientific or research purposes, among others.¹⁷³ These exceptions are reminiscent of the HIPAA exceptions outlined above. For example, both regulations allow disclosure to further a judicial proceeding, for research purposes and when the law requires

¹⁶⁵ 45 C.F.R. § 164.506(b)(1) (2013).

¹⁶⁶ See generally 45 C.F.R. § 164.510(b) (2013); § 164.512 (2013).

¹⁶⁷ 45 C.F.R. § 164.510(b)(ii) (2013).

¹⁶⁸ *Id.* at § 164.506(c)(4) (2013).

¹⁶⁹ See generally *id.* at § 164.512 (2013).

¹⁷⁰ *Id.* at § 164.512(a-k) (2013).

¹⁷¹ See Ilene N. Moore, et al, *Confidentiality and Privacy in Health Care from the Patient's Perspective: Does HIPAA Help?*, 17 HEALTH MATRIX 215, 260 (2007).

¹⁷² Council Directive 95/46 (EC), *supra* note 42; see generally Hiller, *supra* note 152, at 32.

¹⁷³ Regulation 2016/679, *supra* note 19, at art. 9, para. 2 (b-j) (outlining all exceptions to consent for special categories of personal data including health information).

disclosure. This shows that the EU and U.S., in practice, actually use similar consent regimes and provide for similar exceptions when it is ultimately in the public interest.

B. *Automated SMS Text Messaging*

Not only do the EU and U.S. have similar policies when it comes to the protection of health information, but the nations also use the same consent model for other information, such as automated text messages. The updated GDPR requires freely given, opt-in consent in Article 7(4) for the performance of a contract or service or where there is a significant imbalance between the parties.¹⁷⁴ Although the GDPR does not specify exactly what contracts or services would apply under Article 7(4), it is likely that a large company trying to gain consent for data collection of an individual would fall under the category of “contract or service.”¹⁷⁵ For example, companies that have the capability to send automated text messages to advertise a product or service would fall into this category.

Similarly, the U.S. requires opt-in consent when companies want to advertise their products or services through text messages to individuals.¹⁷⁶ To combat this problem, the U.S. enacted legislation, the Telephone Consumer Protection Act of 1991 (TCPA),¹⁷⁷ which requires opt-in consent before sending automated text messages.¹⁷⁸ The Federal Communications Commission governs the TCPA and is responsible for creating and enforcing the regulations that stop unwanted messages.¹⁷⁹ The TCPA says, “to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party.”¹⁸⁰ This language shows that the U.S. utilizes opt-in consent and, in practice, finds an opt-in regime more useful to deter unwanted advertisers and messages.

¹⁷⁴ Regulation 2016/679, *supra* note 19, at art. 7(4), para. 2 (b-j) (specifically, art. 7(4) says, “[w]hen assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.”); *see also* Stephen Groom et al, *European Data Protection Revolution: Action Points for US Businesses With Operations in, or Targeted at, Europe*, OSBORNE CLARKE (Nov. 2012), *available at* http://www.osborneclarke.com/media/filer_public/04/ae/04aeb80d-32a7-4f84-a748-9303b571c675/european-data-protection-revolution.pdf.

¹⁷⁵ *Id.* at art. 7(4).

¹⁷⁶ *See generally* TextPower, Inc., *A Guide to Text Messaging Regulations*, TEXTPOWER (2013), <http://www.textpower.com/Docs/TextPower-GuideToRegulationsAndOptingIn.pdf>.

¹⁷⁷ 47 U.S.C. § 227 (1991) [hereinafter ‘TCPA’].

¹⁷⁸ Alex Krylov, *SMS Compliance: What You Don't Know CAN Hurt You*, EXPERIAN (Jan. 2, 2013), <http://www.experian.com/blogs/marketing-forward/2013/01/02/sms-compliance-what-you-dont-know-can-hurt-you/>.

¹⁷⁹ TCPA Regulations and Guidelines, EXPERIAN, <http://www.experian.com/regulatory-compliance/consumer-information/tcpa-telephone-consumer-protection-act.html> (last visited Sept. 11, 2017).

¹⁸⁰ 47 U.S.C. § 227(b)(1)(B) (1991).

In addition to the language of the statute, individuals must also input their phone numbers into an online form to prevent their phones from receiving these messages.¹⁸¹ So, to adequately protect individuals from unwanted messages, the TCPA essentially requires double opt-in consent. First by signing up for the program, and second by requiring individuals to enter their phone number in an online form.¹⁸² This double opt-in consent is closely analogous to the GDPR which takes extra measures in Article 7(4) to protect consumers by leaving it ambiguous whether opt-in consent is even enough.

The TCPA and Article 7(4) of the GDPR is another example that demonstrates the similar consent regimes in the EU and U.S. When it comes to protecting consumer data from unwanted advertisements, both nations have parallel policies.

C. *E-Mail Marketing for Businesses*

In 2003, Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM).¹⁸³ CAN-SPAM was enacted to combat the problem of unwanted commercial e-mails.¹⁸⁴ The FTC administers CAN-SPAM, except for when messages are sent to wireless devices, which is governed by the FCC.¹⁸⁵ Under Section 5, the FTC has authority to enforce CAN-SPAM because the unwanted commercial email problem is viewed as an “unfair and deceptive practice.”¹⁸⁶ When an entity violates CAN-SPAM, they are subject to \$16,000 fines per violation or subject to injunctive relief.¹⁸⁷ Because the FTC employs an opt-out regime, it requires the following three things for an entity to be in compliance: “(i) clear and conspicuous identification that the message is an advertisement or solicitation; (ii) clear and conspicuous notice of the opportunity ... to decline to receive further commercial electronic mail messages from the sender; and (iii) a valid physical postal address of the sender.”¹⁸⁸

¹⁸¹ Krylov, *supra* note 178, at 139.

¹⁸² *Id.*

¹⁸³ 15 U.S.C. §§ 7701-13 (2003).

¹⁸⁴ David J. Ervin & Christopher M. Loeffler, *E-Mail Marketing: CAN-SPAM Act Compliance*, PRACTICAL L.J. (Apr. 2011).

¹⁸⁵ *Id.*

¹⁸⁶ 15 U.S.C. § 45(a) (2012).

¹⁸⁷ 15 U.S.C. §§ 7706(a), (d), (e) (2003).

¹⁸⁸ 15 U.S.C. §§ 7704(5)(a)(5)(i)-(iii) (2003).

CAN-SPAM also authorizes the FTC to establish a Do-Not-Email Registry similar to the Do-Not-Call Registry which is already in place.¹⁸⁹ These types of registries are governed by an opt-in regime because the individual must choose to have their information put into the registry to prevent further spam calls or e-mails in the future.¹⁹⁰ This reveals that the FTC has used an opt-in regime multiple times, and does so if it is in the consumers' best interest.

The adequate consent language in CAN-SPAM is also analogous to the language in Article 7 of the GDPR. Article 7(2) of GDPR requires that "the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language."¹⁹¹ Both GDPR and CAN-SPAM require the consent to be clear and unambiguous, so the individual knows exactly what they are opting into or out of. Although the FTC typically has an opposite take on consent from the GDPR, the language of both pieces of legislation suggests otherwise. In addition, the mere fact that the FTC is authorized to use an opt-in regime and has done so when it would be in the public's interest, demonstrates that the two nations will always put the public interest first, including when it comes to consent regimes.

V. CONCLUSION

Although the EU and U.S. seemingly have different consent models – opt-in and opt-out, respectively – when reviewing the real-world application of these models, it is clear that these models promote similar ideas. Many believe the opt-in regime of the GDPR and opt-out regime of FTC are irreconcilable; however, this comment has shown otherwise. Legislation like HIPAA, TCPA, and CAN-SPAM in America coincide with Articles 9 and 7 of the GDPR. The fundamental goal of both regimes is to shield citizens from unwanted data collection and solicitation. Regardless of whether the consent regime is called opt-in or opt-out, the regimes operate in a similar fashion. So, regardless of what consent regime each individual nation requires, when it comes to public interest and safety, every country, no matter what consent policy they individually employ, will honor it and endorse it to protect its citizens.

¹⁸⁹ Grant C. Young, *CAN-SPAM: A First Step to No-Spam*, 4 CHI.-KENT J. INTELL. PROP. 1, 18 (2004) (citing 15 U.S.C. § 7708 9(b) ("AUTHORIZATION TO IMPLEMENT. -- The Commission may establish and implement the plan, but not earlier than 9 months after the date of enactment of this Act.")); see *National Do Not Call Registry*, Federal Trade Commission, <https://www.donotcall.gov/FAQ/FAQDefault.aspx> (last visited Sept. 11, 2017) [hereinafter *National Do Not Call Registry*].

¹⁹⁰ See Yang, *supra* note 189, at 18; *National Do Not Call Registry*, *supra* note 189.

¹⁹¹ Regulation 2016/679, *supra* note 19, at art. 7(2), para. 2(b)-(j).