

"The development of compliance programs in Chilean competition law - Taking stock, looking ahead"

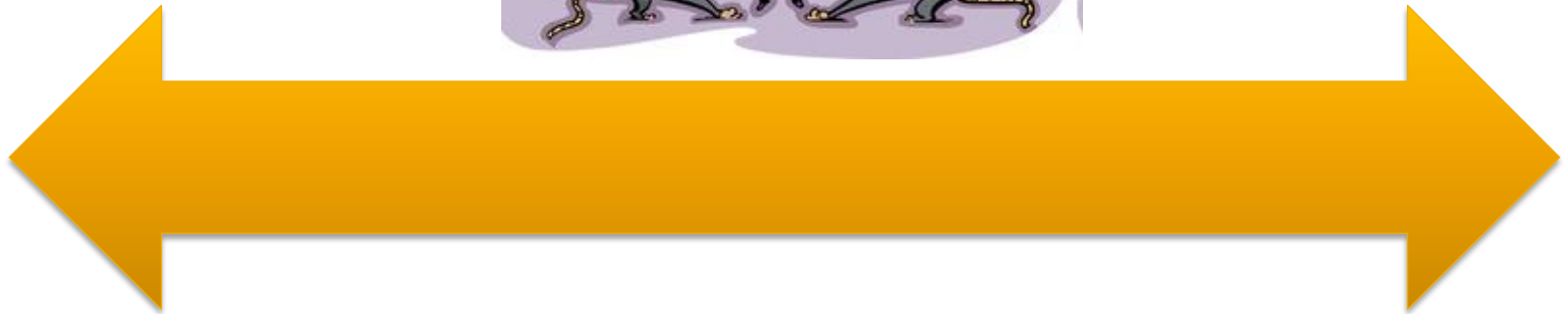
Javier Tapia
Chilean Competition Tribunal
(*opinions are strictly personal)

Regional Compliance & Ethics Conference
Santiago, Chile
21.08.2019

The diagnosis

Two undeniable facts

Contending regulatory approaches



Dissuasion

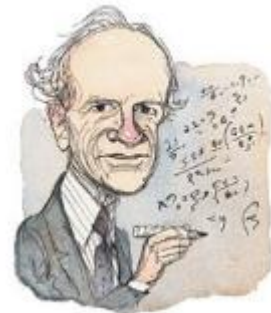
Compliance
(& ethics)



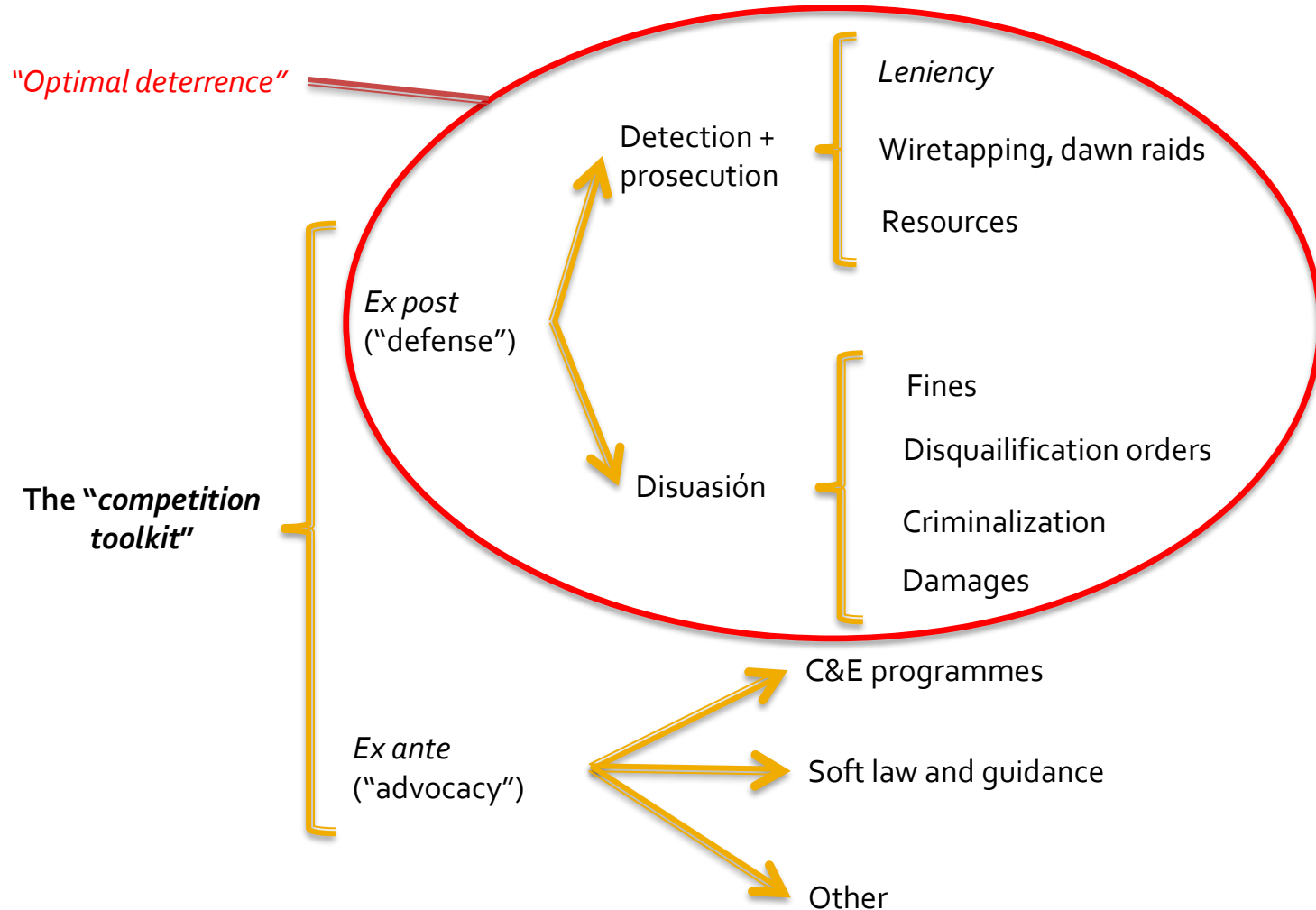
Predominant in Latam...

What does dissuasion mean?

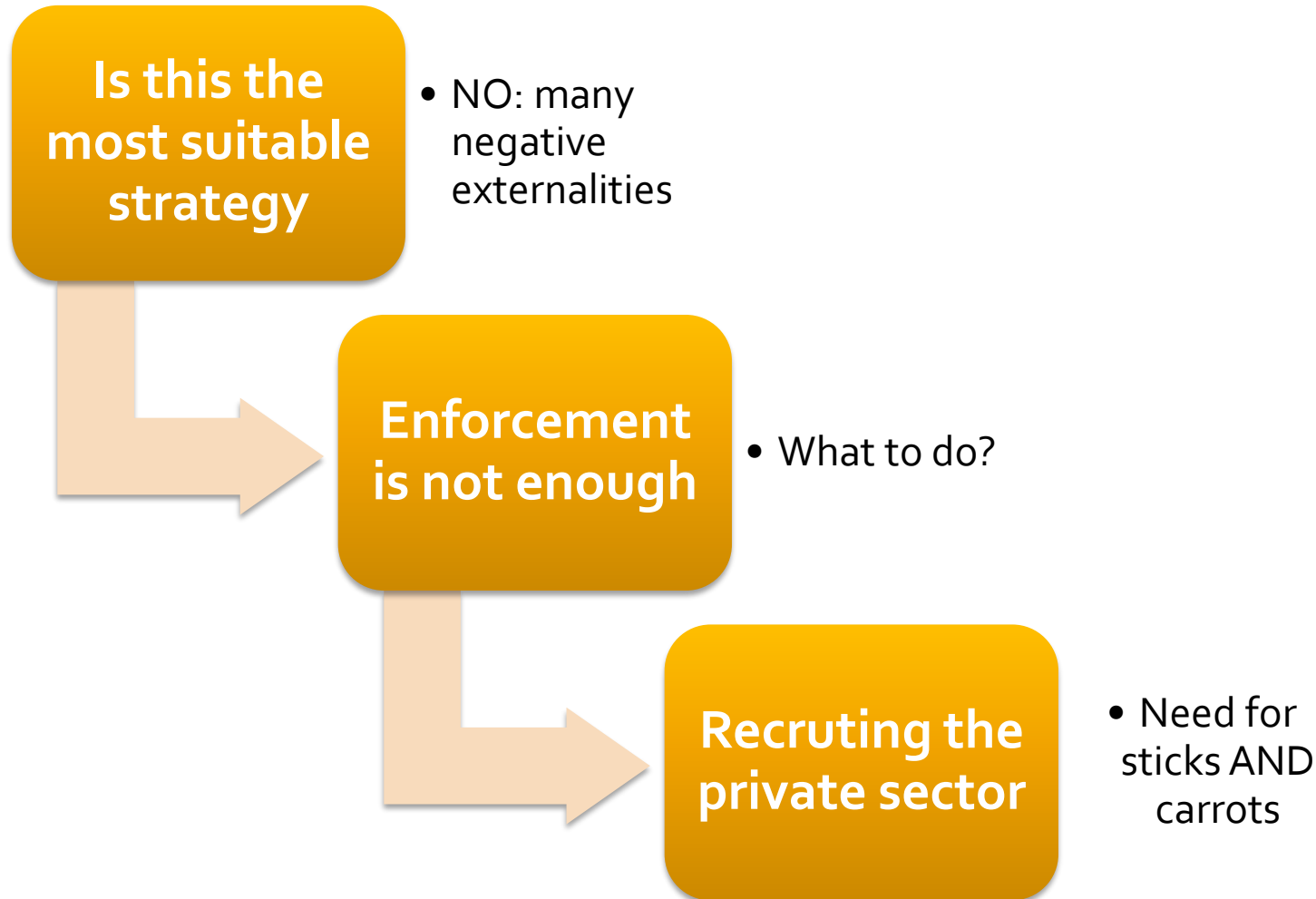
- For governments
 - C&C regulation
 - Rules, not standards
- For companies
 - Reactive approach
 - Fines can be “calculated”
- Optimal deterrence (Becker, 1968)
 - The “optimal” level of offenses is >0
 - So, $S \geq \beta * g - d$



Competition law comes from this world



Fact #1: Dissuasion is not enough



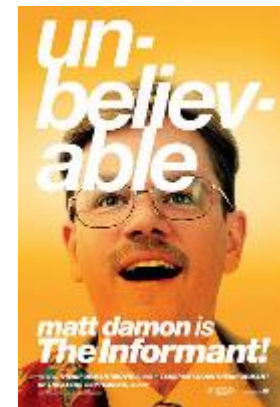
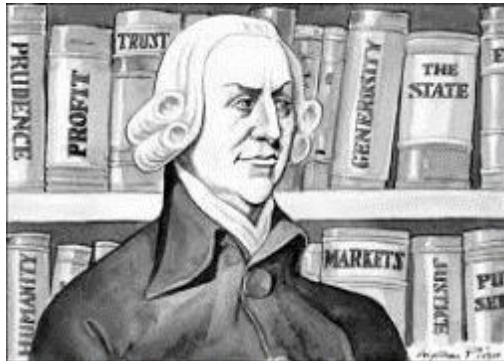
Competition Law: antitrust

Different risks



Cartels are bad!

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."



"Our competitors are our friend. Our customers are the enemy!"

Latam prone to cartels?



- Dependence on extractive industries
- Isolation from many world markets"
- Product markets and capital ownership unusually concentrated
- Local market relatively small
- Distant from many major markets and production centres
- Insiders historically a closely confined group
- Well-developed market economy, but...
- ...much of the population operates in a less developed economic environment
- Strongly bipolar distribution of wealth and income

Cartels are more complex for compliance

- Libor “scandal”:
 - *Hayes claimed he was “confused about everything”, including what rules may have been broken. He added: “So as far as I was concerned any rules I’d broke were like retrospectively being applied. And I wasn’t sure ... Libor wasn’t a regulated product. We had no compliance training. No rules were outlined to us.”*
 - *“I knew that was not right. I blatantly knew I should not have done that. But I was participating in an industry-wide practice that pre-dated my arrival at UBS and post-dated my departure.”*

(The Guardian, 01.06.15)

Why if you don't comply?

- Modify or terminate acts, contracts, covenants, systems or agreements
- Modification or dissolution of partnerships, corporations and other legal persons of private law
- Impose fines:
 - Double of economic benefits
 - 30% of sales
 - Up to 60,000 UTA (US\$50m aprox)
- Prohibition of contracting with the State (for cartels)
- Incarceration (for cartels)

The highest sanctions in Chilean Law

You can go to jail

You can pay damages for third parties actions

It *does* happen

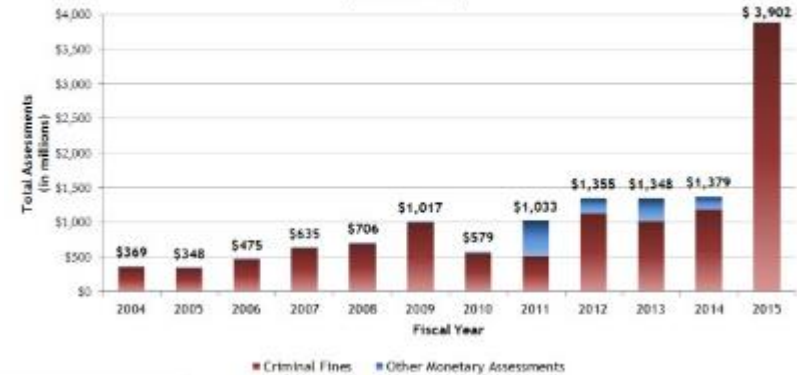
Global fine levels



Statistics not available for certain countries and regions due to data unavailability or the time it takes to collect data. 2014 U.S. statistics are for the U.S. from year October 1, 2014 to September 30, 2015. All other countries' statistics relate to 2015 calendar year data unless specified in footnotes in English or in Spanish.

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Total Criminal Fines & Other Monetary Assessments from Antitrust Division Investigations (FY 2004-2015)



Source: DOJ/DOJ LLP 2016

FJ EXPRESIONES

TDLC ha aplicado 53 multas por cerca de US\$175 millones en toda su historia

De ese monto, un 85% ha sido confirmado por la Corte Suprema, por lo que se presume sobre la ley y demás que es un respaldo a la ley y a la TDLC.

KAROL ARRIAGA

Desde su creación, la Unidad de Defensa de la Competencia (UDC) de la Fiscalía General de la Nación (Fiscalía) ha aplicado 53 multas por cerca de US\$175 millones en toda su historia. De ese monto, un 85% ha sido confirmado por la Corte Suprema, por lo que se presume sobre la ley y demás que es un respaldo a la ley y a la TDLC.

Según se puede ver en la siguiente tabla, la UDC ha aplicado 53 multas por cerca de US\$175 millones en toda su historia. De ese monto, un 85% ha sido confirmado por la Corte Suprema, por lo que se presume sobre la ley y demás que es un respaldo a la ley y a la TDLC.

¿Qué pasó?

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Enrique Vergara, presidente del Tribunal de Defensa de la Competencia.

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Competition law: merger control



Multinational firms:
"Think globally, act locally"

Figure 2: Global coverage of merger control¹

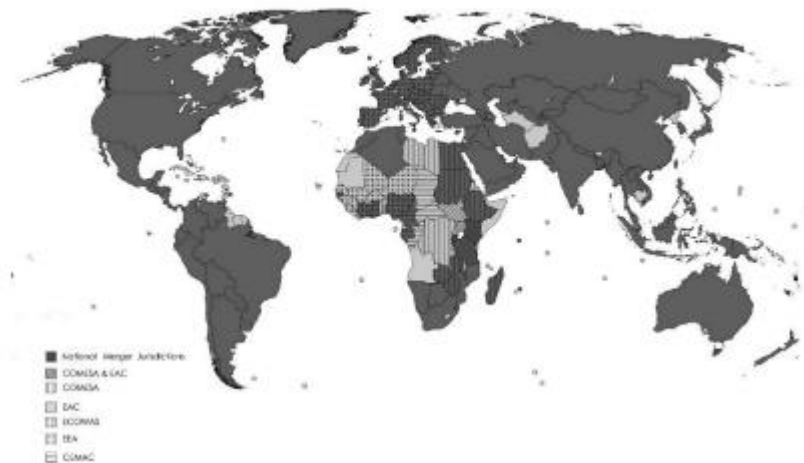
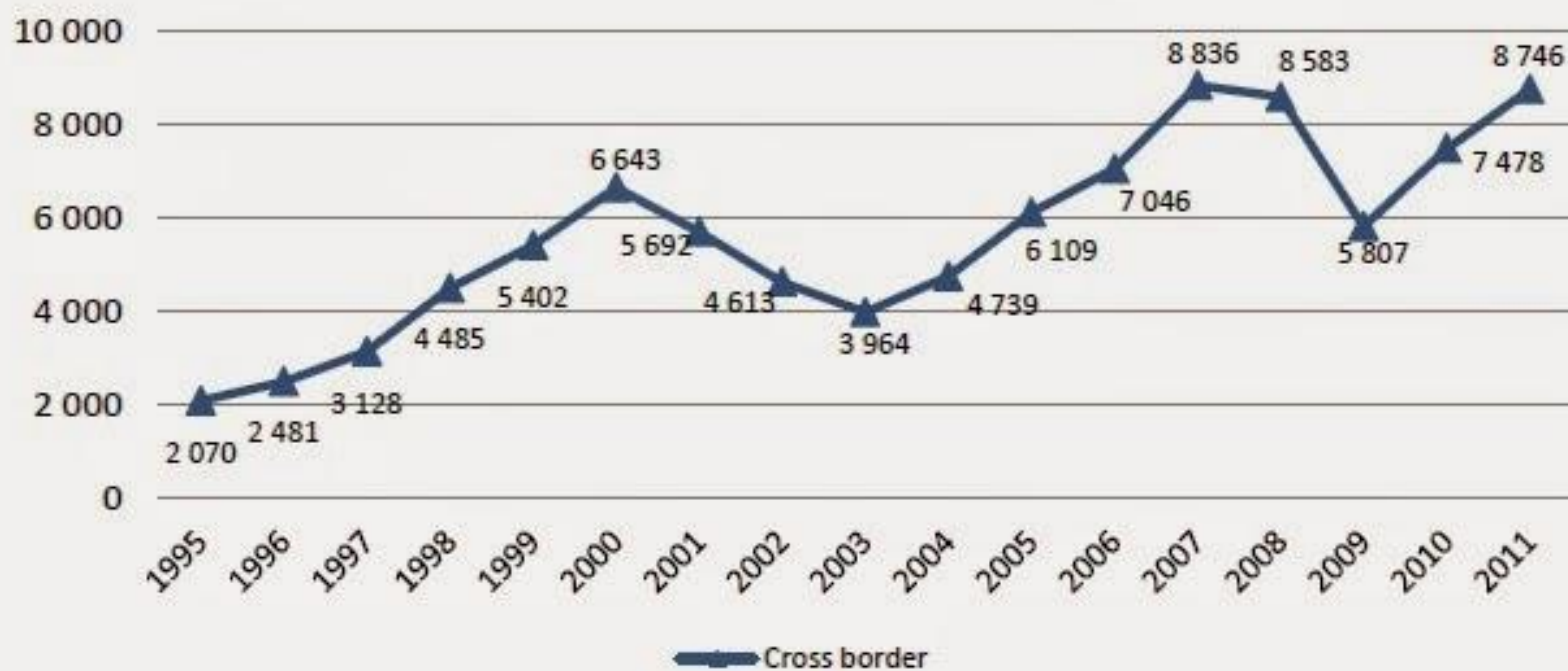


Figure 5. Number of cross-border M&A deals: 1995 - 2011



Fact #2: *huge* competition risks

- Competition law

- Corruption

- Frauds

- Discrimination / harassment

- Environmental

- Lobby

- Conflicts of interest / gifts

- Consumer protection

- Privacy

- Employment



**"Can we, just for a moment, Your Honor,
ignore the facts?"**

**There are good reasons for
preventing!**

What can we do?

Compliance 2.0 - preventing wrongdoing before it starts

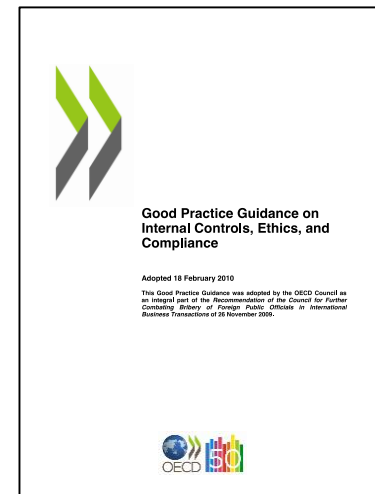
Compliance

By risk area

Compliance 2.0

50's: caso GE

OECD guidance (2010)



What does compliance *really* mean?



Management *commitment* to
do the right thing

Management step to make it
happen

It is business management!

(Perhaps "Compliance Management Systems" instead of "Compliance Programmes"? As in ISO 19,600)

Thoughtful management

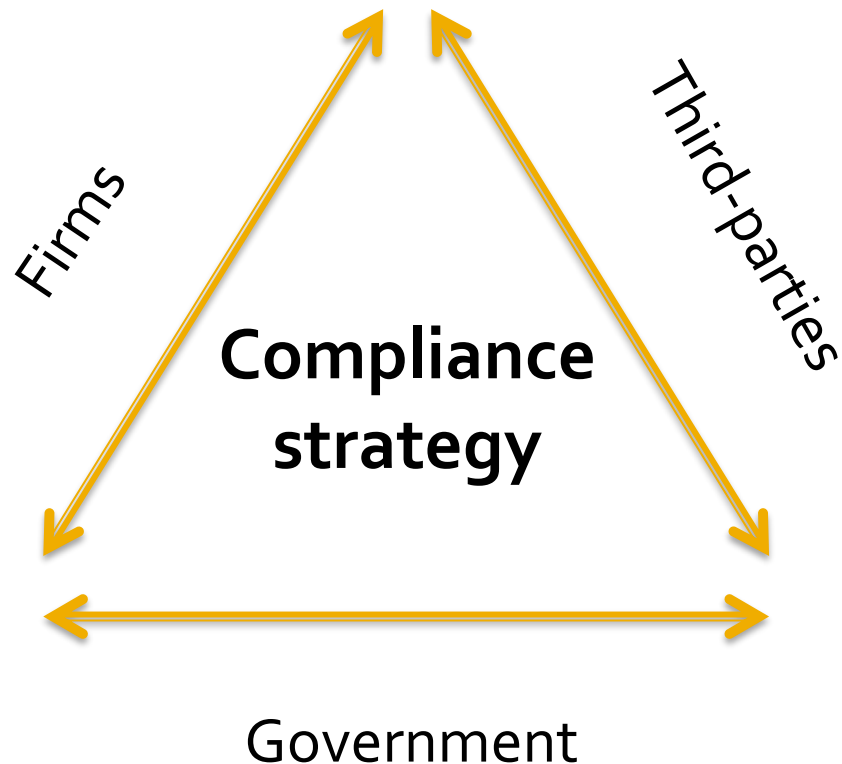
(1) Corporate self-policing



(2) Fostering a compliance & ethics culture

(3) Detecting and evaluating risks

A three-part effort



But mainly an internal effort of firms!

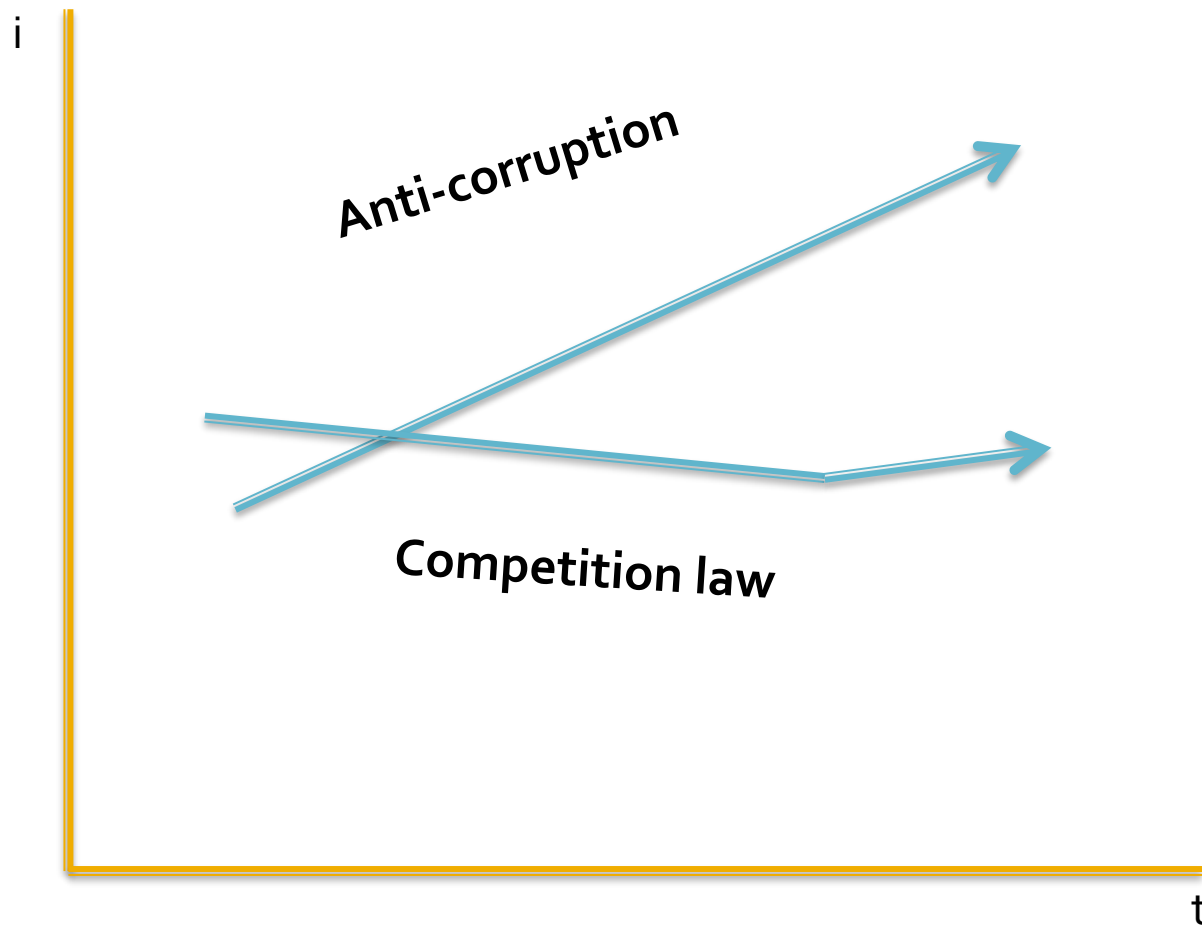
Why?

- In an email dated May 19, 2000, Mike Brighty, sales director of Hasbro, wrote to Ian Thomson, Hasbro's account manager for Littlewoods:
 - *"Ian... This is a great initiative that you and Neil [Wilson, Hasbro's account manager for Argos] have instigated!!!!!!! However, a word to the wise, **never put anything in writing, it's highly illegal and could bite you right in the arse!!!!** Suggest you phone Lesley and tell her to trash? Talk to Dave. Mike."*
 - Hasbro Sales Director in UK Toys case – fined £5 million
 - CAT Judgment (2004):
<https://www.catribunal.org.uk/sites/default/files/Jdg1014Argos141204.pdf>
- Email in the *Sevenoaks Survey* case (2005) (price fixing of tuition fees in private schools):
 - *"**Confidential please, so we are not accused of being in a cartel**"*
 - Case was settled
- Chilean cases are similar (a cartel even in public deeds!)

Where we are

Competition compliance worldwide

Compliance and competition law



What we hear... (too often)

*There is an infraction
because the
programme failed*

*We will recognize programmes
only for the future*

*The programme was
designed to cover up a
cartel*

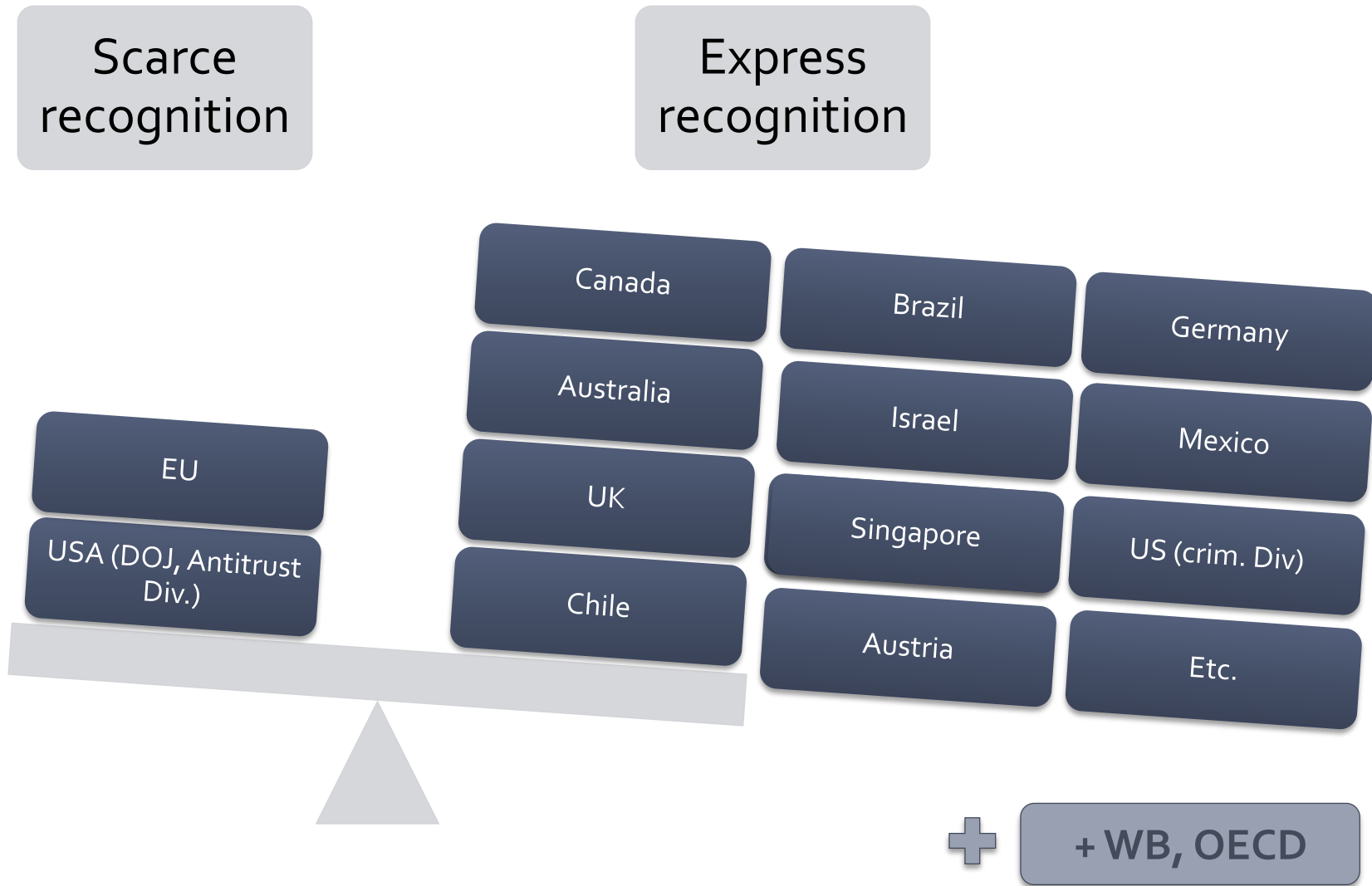
*If the programme
fails, we will increase
the fine*

*Compliance is only
for big firms (too
expensive)*

*Compliance is only for
leniency*



Competition authorities are reacting



Every cloud has a silver lining

- FX Spot Market agreement (*US v Barclays PLC*), guilty pleas, 2015:

UNITED STATES DISTRICT COURT DISTRICT OF COLUMBIA	
UNITED STATES OF AMERICA	Criminal No.
v.	Filed
BARCLAYS PLC,	Violations: 18 U.S.C. § 1
Defendant.	
PLEA AGREEMENT	
The United States of America and Barclays PLC ("McAfee"), a financial services holding company organized and existing under the laws of England and Wales, hereby enter into the following Plea Agreement pursuant to Rule 11(b)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):	

"The parties further agree that Recommended Sentence is sufficient, but not greater than necessary to comply with the purposes set forth in 18 U.S.C. §§ 3553(a), 3572(a), in considering, among other factors, the substantial improvements to the defendant's compliance and remediation program to prevent recurrence of the charged offense."

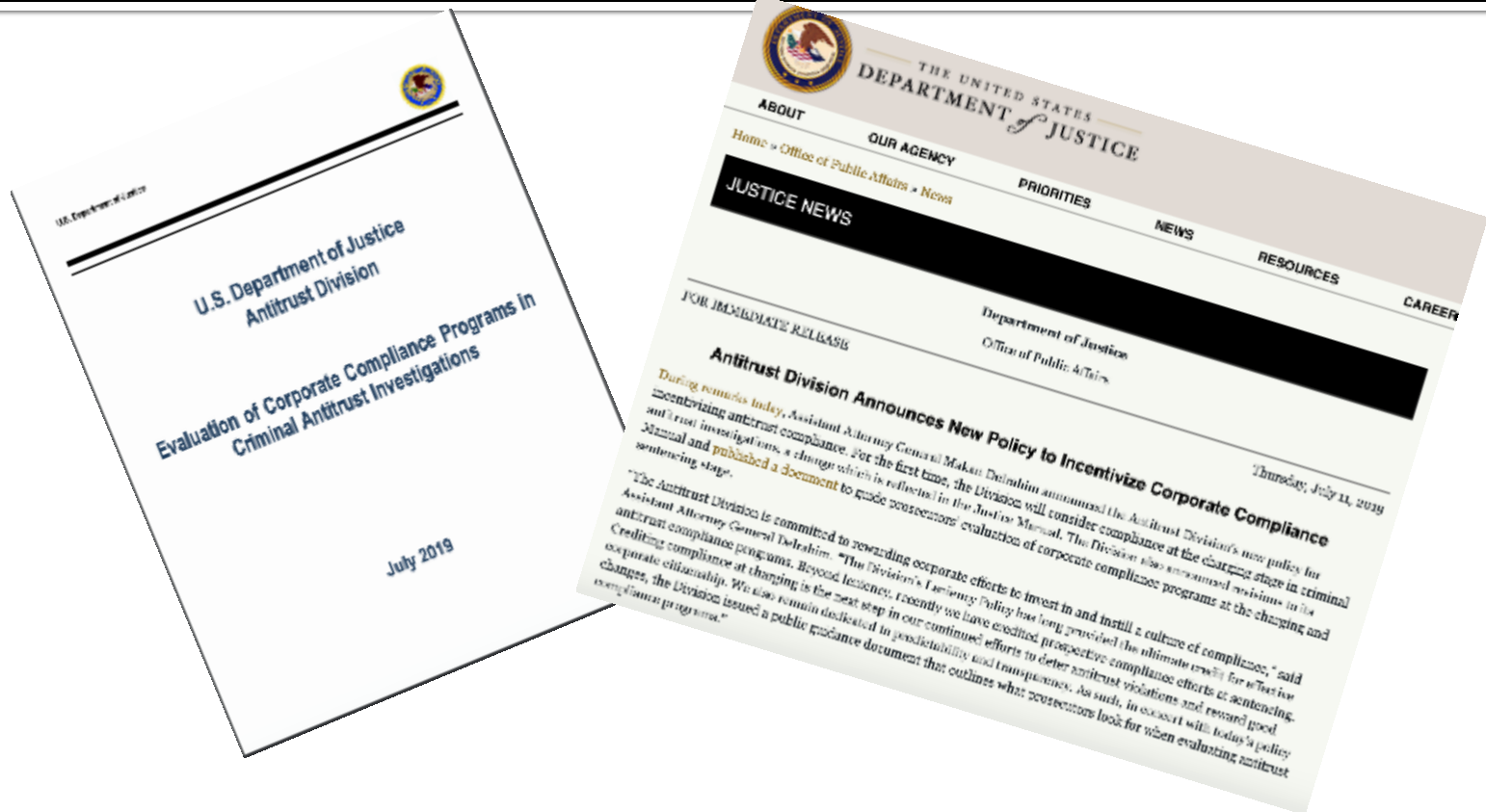
(<http://www.justice.gov/file/440481/download>)

Explaining the DOJ

"We can always count on the Americans to do the right thing, after they have exhausted all the other possibilities"



Finally!



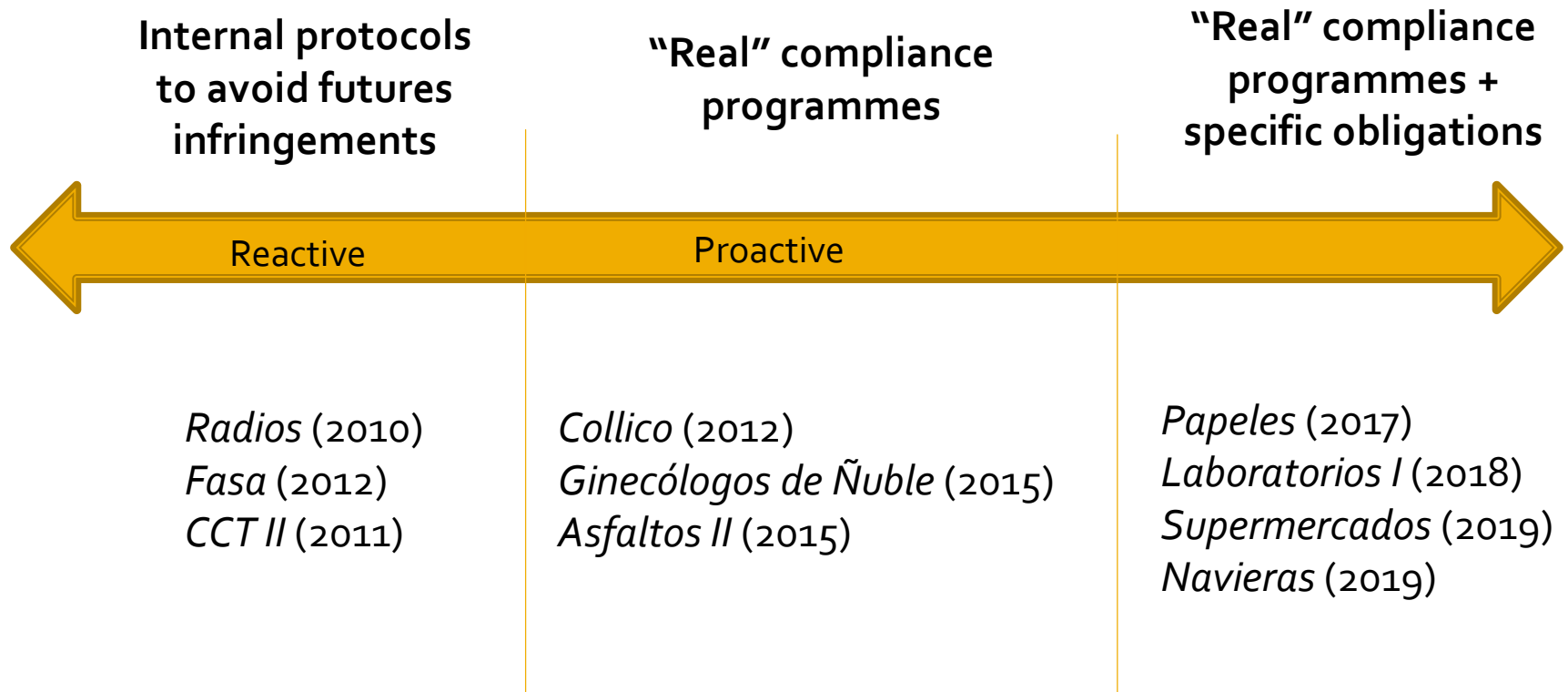
p.10: 'Does the company use any type of screen, communications monitoring tool, or statistical testing designed to identify potential antitrust violations?'...
Wow, giant step forward!

The Chilean FNE

- Tougher enforcement
- Clear standards: guidelines (2012)
 - Way different than our criminal law system
- Requested compliance programmes on settlements and cases
- Main downside: no CECO (!)



TDLC: 3 groups of cases



Imposing compliance programmes is not a
“sanction”

Specific requirements

- Specific requirements and details:
 - Compliance committee within the Board
 - CECO
 - Handle copies of the judgement to key persons
 - Affidavit
 - Training in competition law
 - Audits
 - Hotline
 - Reporting to the comp. agency

Supermercados (2019)

- Main precedent in Chile (so far)
 - Strongest statement supporting compliance programmes
- A firm can be exempted from liability
 - Not only the fine
 - The programme has to be *serious, credible* and *effective*
 - Its objective must be prevention (of any violation)
- Assessment
 - The Tribunal decides
 - Based on reasonableness and completeness of the programme
 - Based on design, implementation and application when needed
 - Burden is on the firm

What to do

Beyond paper and preaching

- Building blocks:
 - Standards & procedures
 - *Compliance* infrastructure (CECO)
 - *Screening* & delegation
 - Training & communication
 - Auditing/monitoring, reports & constant evaluation
 - Discipline & incentives
 - Appropriate responses & prevention



Some concerns about common statements

- Tone from the top
 - Senior management needs full training
 - Performance evaluations need to take compliance into account
 - They need to be subject to discipline
 - Not “talk at the top”
 - It's action! Not only saying the right things

Some concerns about common statements (2)

- No “one-fits-all” solutions
 - Basics do still apply
 - These are management principles
 - The idea is “structured flexibility”
 - There is a real role of guidelines

Some concerns about common statements (3)

- Courses and Manuals
 - Training should be
 - results-oriented (videos, apps...)
 - Updated
 - Use cases!
 - Be aware of the results/objectives of mock dawn raids
 - Nobody reads manuals!
 - It depends on the format (check-lists are much better)
 - Competition law (specially on cartels) requires few and simple explanations

Gracias!



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