Loyola Consumer Law Review

Volume 30
Issue 2 *Antitrust Marathon VI: Compliance Matters*

Article 5

2018

Transcript: Incentives to Comply with Competition Law

Max Huffman

TRANSCRIPT: INCENTIVES TO COMPLY WITH COMPETITION LAW

*Panel Speaker: Max Huffman**

Philip Marsden[1]

Good morning everybody, thank you for coming. My name is Philip Marsden, I'm a Deputy Chair of the Competition Markets Authority in the United Kingdom, a very big welcome to everybody here, thanks so much to the Competition Authority for hosting us and for helping us prepare this event on a topic of compliance, which is of such importance not only to healthy markets and to companies, but also to authorities, because they are great efficiencies in getting the incentives right on this topic. This event couldn't have come together without the hard work of Spencer Waller and his team at Loyola, our speakers today, Tihamér Tóth and the University for bringing us all together in such a nice fashion and to have this kind of interaction amongst officials and lawyers and in-house counsel and academics. This is our sixth antitrust marathon that Spencer and I have been involved with and I see other marathon runners around the room, Max Huffman, Ted Janger and others you'll meet as we go through. I just want to make sure you understand that by joining us today, you are indeed all required to run the Budapest Marathon on Sunday [laughter], so thank you so much [laughter]. If you get tired maybe you could just stand at the side of the road and give Max and Ted and Spencer and I a drink as we go along but it's wonderful to be here in this beautiful city and to be talking about these topics. Previous

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antitrust marathons have been held at the Competition Appeal Tribunal in London, at Loyola in Chicago, at the British High Commission in Boston, at the Italian Competition Authority in Rome, and at the Dublin Writer's Museum in coordination with the Irish Competition Authority. So, what we really try to aim for in these discussions is an understanding of long-enduring competition problems that may take at least a day to discuss, and we'll have some aid stations and some rest-breaks and some re-fueling, but really that's the idea of this marathon series, these are always topics, whether it's abuse of dominance or today, compliance, which are long living, they'll never go away. We're always learning and always trying to get better and more efficient, but they're topics that have a life of their own. Further, the interaction amongst academics, officials, and the lawyers in the room is something that only helps us have a better understanding of how this works. We're so very honored to have so many senior officials with us, and indeed the President of the Authority here today, and we are really grateful to you for being here today and for being able to offer us a few initial remarks. Thank you.

Miklós Juhász[2]

Thank you very much ladies and gentlemen. The speakers from across the Atlantic, from Europe, I would like to welcome you on behalf of the Hungarian Competition Authority. We are delighted to hold the Sixth Antitrust Marathon on compliance at the GVH. As you know, people of the same trade seldom meet together even for merriment or diversion. You might have recognized the words of the famous Scotsman, Adam Smith, would have been grateful to hear that today's lively discussions will not result in conspiracies against the public, but in favor of promoting competitive mechanisms.

Our agency is very much devoted to promoting compliance with competition rules. Promoting competition culture is a key element in prevention, the GVH actively participated at the fifth ICC roundtable on Competition Policy in Warsaw and we are also big supporters of the ICC Antitrust Compliance Toolkit.

[2] President, Hungarian Competition Authority (GVH).

As of an agency perspective, since 2012 the GVH launched a unique online and offline competition law compliance campaign. Our authority set up a homepage, we established cooperative relationships with professional organizations such as lawyers, accountants, and business interest groups whose daily works closely link to the work of SMEs[3]. Our media campaigns targeted mainly these companies, as according to our statistics, more than 70% of our cartel investigations were conducted against small and medium enterprises. These companies are the backbone of our economy, but compared to large firms, they have a lower level of competition awareness and fewer resources. Ex post surveys strengthened hopes that our campaign in fact reached company directors and improved their knowledge on competition rules and on the GVH. I'm convinced that this event will further contribute to the better understanding of competition compliance. I look forward to a fruitful discussion, especially on the very demanding second topic on the trade associations and information exchange. Enjoy your stay in Hungary, thank you very much.

Spencer Waller[4]

Good morning everybody, my name is Spencer Waller and I'm a professor at Loyola University Chicago School of Law and the Director of our Institute for Consumer Antitrust Studies. I am thrilled to have everyone here today. I want to echo Philip's thanks to all of our hosts and all of our speakers and everyone who took time out of their busy day to join us for the antitrust portion of the marathon. I assure you, no running is involved, unless you want to. My job is to discuss the rules of the road, I guess that makes me the course director. Our marathon, as it has evolved over the six times that Philip has talked about, has settled into a comfortable pace.

What we do is have a conversation. This is truly a round table. It is truly a discussion. It is not papers and an audience, either we are all audience, or we are all speakers, however you want

[3] Small and Medium Sized Enterprises (SMEs).

[4] Professor, and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law.

to think about it. For this to work, we all come together in our individual capacities. I understand, obviously, that everyone works somewhere and represents some interests, public and/or private, and that's fine. But today we come as individuals and do our best to shed that affiliation to offer our expertise in conversation about these important issues.

It's my pleasure also to introduce, and you'll hear from them a little later, Ben Mayers and Abra Slivinski, they are the editors of the Loyola Consumer Law Review and after lunch they will tell you a little bit about the publication process. We will be publishing, as we have, alternating between the European Competition Review and the Loyola Consumer Law Review and in that part of the race we will be tied three to three after the publication. The short papers that you have to get the discussion rolling will be published and then an edited version of the transcript will be published so that no one will be published without their explicit consent and approval of the words that they choose.

We are assuming that you have read or at least glanced at the issues papers and as a result we just ask the speakers to give ten minutes of a summary to remind us of the thoughts that kick off each of the four sessions. The first session has two speakers for ten minutes each because we are delighted to have the Chairman of the Hungarian Competition Commission, Dr. Andras Tóth, with us as well as Max Huffman from the University of Indiana. All of the other sessions have one speaker and one commentator who will speak for about five minutes, so the idea is to save as much time as possible for the general discussion. I am thrilled to be a part of this continuing conversation and I think we should really begin the first panel with Philip Marsden as Chair and he can introduce the topic and the speakers. Let the marathon begin.

Philip Marsden

Thank you, Spencer, alright so the race is on. We're going to pace ourselves quite calmly at the start, you don't want to burn out, you don't want to have your brain fill up with lactic acid, but nevertheless there are certain ground rules we have to really get out and understand when you're talking about the incentives behind getting companies to comply. We'll be hearing throughout the

day that they have their own incentives, of course, to obey the law and to be law-abiding companies and that's very natural, but there's things that competition authorities can do to help induce that kind of compliance culture, which we will be discussing throughout the day. And it is very important that competition authorities understand each other's different approaches because it has been quite surprising as the competition laws have grown and expanded around the world that you do see quite different approaches on how competition authorities induce compliance, reward compliance, perhaps sometimes punish certain forms of compliance if it doesn't work. So, we're very honored to have András and Max here to begin our discussion and you've got the papers in front of you but I know that they are going to have some real-life topics to discuss and please, as Spencer has indicated, remember that this is a dialogue, it's not really a lecture so after the initial speeches we'll be taking opportunities for you all to have the opportunity to speak, thank you so much.

Dr. András Tóth[5]

Thank you, thank you Philip. Talking about the relationship between the competition agencies and the competition compliance is so challenging, like running 100 meters within 10 seconds, but I will try to stick to my ten minutes. I would like to show you from an authority's perspective why and how a competition authority can reward a company's competition compliance efforts. By compliance I am referring to the company's compliance program. Two weeks ago, we closed our public consultation on our new draft of antitrust defining guidelines, which for the first time in Hungary are taking into account compliance efforts. The first question that needs to be answered is, "why should a competition authority encourage and recognize companies' competition compliance efforts?" The following reasons can be given: firstly, the companies are best positioned to prevent or detect infringements

[5] András Tóth PhD, Chairman of the Hungarian Competition Council; Vice-President of the Hungarian Competition Authority; Associate Professor, Károli University, Budapest, Hungary.

and technological developments have further enhanced companies' internal detection capabilities. For example, company's big data analyzes software and can enable a real-time compliance effort to be undertaken. Secondly, it may help to reveal and put an end to conduct at an early stage. Thirdly, the provision of the rewards may accolade the competition between potential leniency applicants. Finally, it may anchorage more leniency applications. The second question concerns the manner in which competition authorities should recognize the compliance efforts of companies, I would like to raise six issues here. The first, we have to differentiate between ex ante and ex post compliance. Ex ante recognition of competition compliance refers to a situation in which a competition compliance program has already been implemented prior to the finding of the competition infringement. Ex post recognition of competition compliance means when a compliance program is either adopted or operated during the competition proceeding. Second, based on the international best practices, the mere adoption of compliance programs cannot in itself lead to immunity or total reduction of fines, otherwise competition compliance would become a cheap insurance policy against the competition liability. Based on international experiences, only genuine compliance efforts can be recognized, which means that the company must be able to demonstrate how its competition compliance regime is altered in detection and determination of the infringement and the discovery of new or evidence in the case in question. In such a case, authorities may further reduce a fine by an extra five to ten percent. So, an automatic ex post recognition of compliance may undermine the adoption of ex ante compliance programs which could prevent or detect illegal activities before an actual infringement is committed. However, ex post recognition of compliance can be used to improve the attractiveness of cooperative and administrative burden-saving procedures such as settlement or non-full immunity leniency. The fine can be reduced in this case by a few, up to a maximum of five percent, in case of a company that adopts or upgrades an existing compliance program to ensure effective competition compliance for the future in settlement or leniency application for a fine reduction or if the company has compensated the damages caused by the infringement during the procedure. Fourth, the recognition of compliance may raise the question as to whether

this recognition can only be positive. I am confident that if a company deliberately breaches the compliance program that it adopted in the previous competition procedure then this can be regarded as an aggravating circumstance. The question is, what can be regarded as a deliberate breach or what should the competition authority do when it learns that an ex ante compliance program has been used to hide an infringement? For example, if a competition authority obtains evidence that a compliance program has been effective and the responsible officers of the company have been informed of the wrongdoing but they have chosen to neither stop the infringement nor report it to the competition authority, should we require the company to report the wrongdoing identified as a result of the effective operation of the compliance program? Or, is it enough that the company puts an end to the infringement based upon the compliance effort? Fifth, the informant reward also raises important questions, if the competition agency has such kind of system. Based on our experiences, we have informant reversed systems in Hungary, informants usually do not provide high-quality first-hand evidence and therefore, a very limited number of informant applications, in our case ten percent of the total applications, are capable of initiation of competition procedure and so it's very limited. So therefore, it can be very desirable if the potential informant is subject to a company's compliance program to first report his or her finding to the company's compliance officers. Of course, this is heavily dependent on whether the informant believes that he or she will not suffer adverse consequences of reporting the behavior. It is usually the case that the company has sufficient resources to collect and submit evidence according to the competition authority's needs. However, the company may attempt to hide the infringement as reported by the informant. The question is, shall we take into account this factor and shall we maintain the competition between the informants and the companies? Finally, compliance as a mitigating factor would discriminate against those small and medium sized enterprises who don't have sufficient resources to develop compliance programs. When taking into account ex post and ex ante compliance programs, my question is how can we ensure that small and medium sized enterprises are not discriminated against?

Philip Marsden

Thank you very much. An excellent start to lay out some of these important issues for the companies and obviously for the staff of the companies and also of the authorities and how to best juggle these various incentives. I know already that we've got some differences of opinion in the room, which will be really nice to bring out after Professor Huffman has had a chance to lay out his views on the same topic relating to the incentives related to compliance, and also this idea of what is genuine compliance. I remember one time talking to a group of company officials, sales directors at a company, and them saying, "yes don't worry we've all been through the sheep dipping," meaning you take the sheep and put them into some sort of soap and now they've had their compliance program. And you could just tell by the way they described it that this was not a genuine feeling that they understood the law, but the company had a compliance program, but it wasn't the kind of active program that the authorities like and I know that some of the companies in the room right now have really quite active and involved compliance programs and that's what we're trying to understand: what works? Something that's not just cosmetic, that's not just some sort of, how you say, cheap insurance, you don't want that, so Max over to you please.

Max Huffman

I'll try to add some comments that are actually valuable additions to the comments from Dr. Tóth. It seems to me that there are three things that come up when I think about the issue of compliance. The first one: It always confounds me that this is such a problem. We have this phenomenon where there are laws passed and we expect people to comply with the law and yet there is a huge literature, both academic and professional, on what it means to comply and how you accomplish compliance. I'm intrigued by that necessity. I also want, second, to speak to the question of the allocation of responsibility among the various players in the process. Dr. Tóth, I think, spoke very accurately and ably about the role of the regulated entities, but to me there were other players as

well that should be considered when we think about who is responsible for compliance. And finally, I think maybe from all that, I can offer some suggestion for what I think bringing these together might reflect achievement of compliance, something where we can actually say that's an outcome that would accomplish the goals.

Starting with the first: The idea of why compliance is a problem, in particular in the area of competition policy. There's one reality that is generic across all entity decision making, and it's the problem that the costs of decisions may not be borne by the decision maker and may not be borne by the beneficiaries of a particular decision. And where that's the case, you would tend to see somebody making a decision but shifting a cost elsewhere. I include in the discussion paper a couple of anecdotal examples of this that have sort of come up in trade press or otherwise. I'm actually curious, when the conversation continues after I relinquish the microphone, I'm curious what people's experiences are, if that's actually accurate, if it's true that you see entity decision making in which the individual that is making and benefiting from a decision is not then bearing the cost of any violation that has been caused. But to the extent that's so, compliance to me really is a corporate governance question more than it is a law enforcement question. It's really a question of how do we shift the responsibility to the right place? It's not a meaningful disincentive to have law enforcement if the person who is actually responsible for the decision and the person who actually benefits from the decision, whether it be the high-level decision maker or whether it be the marketing executive who was otherwise insulated, if that person doesn't get caught, then all this discussion is, I think, all for naught.

It seems to me, and I'm now going to revert a little bit to U.S. experience, we've dealt with this fairly well, or at least we've dealt with this very visibly, in the securities-law context. There, we've shifted responsibility to high-level decision-makers to actually reflect their approval of particular publications, disseminations of information in a way that helps to ensure at least in securities law, that the CEO is on the hook and then you can hope for a trickle-down effect from that. I don't think we do it as well in competition law and I think the reason for that is that competition issues arise sort of on a recurring basis, it's a business tort like any

other, which is to say, the cartel is not formed with the yearly statement that gets filed with the Securities and Exchange Commission, the cartel is formed—as Spencer Waller ably points out in his discussion paper that we'll talk about this afternoon—somewhere in the bathroom or on the golf course or otherwise, and it's a lot harder to sort of put someone on the hook for that if that person is not signing off and saying, "yes I approve of this cartel." So, you have the difficulty of actually tying the harm to the person actually engaged in the process.

If the first question is why is compliance something that we see as being a problem, I move on to the next question of what is it about the nature of competition law that makes the field likely to present compliance issues? And there's some discussion, I think Dr. Tóth points this out, but we have other discussion papers that also raise this, it's the commonly asserted issue with antitrust specifically, which is the ambiguous nature of the prohibitions. There are very few bright line rules in this field. The places where you do see bright line rules that are fairly easy to counsel on and advise clients on, I actually think that this is one place where the U.S. does a fairly good job because we've got the criminal law scheme and other jurisdictions that have a criminal law scheme, it's fairly easy to say, "that's criminal conduct," and avoid that at all costs. Before I'm too adulatory of the criminal law scheme, even that is a matter of degree: there's still an eye of the beholder phenomenon in deciding whether something will be treated criminally or otherwise, but at least there you have a fairly binary principal—don't do the thing that is criminal. If you don't have a criminal law scheme, you're left with gradations of enforcement emphasis that I think are, at their worst, very fuzzy but even at their best, I think are defined well by sophisticated practitioners and not well-understood by business-people, and I think it's a necessary result of the phenomenon like rules of reason and otherwise. So, when you have malleable rules for conduct it becomes tremendously important to say to somebody, "here's what you must do, here's what you must not do," and for that reason, added to the fact that we have individuals making decisions who are not necessarily bearing the cost, you are likely to have compliance problems.

And the last one that I'll flag, which I think is sort of a problem we have in the competition scheme, is that the remedies end

up being not necessarily correlated with the harms that we're seeking to prevent. It's one thing if you have a criminal/civil breakdown and so you can identify, okay, criminal remedies over here for certain really bad conduct and civil remedies over here, but we haven't considered the possibility of, for example, add in to that private damages remedies and in the U.S. there is a fair amount of discussion in literature about the problems of private damages remedies and how private damages can increase the difficulty of deciding what is something a firm should avoid. If the agency is saying this thing over here but the private plaintiff has the opportunity to bring a lawsuit that challenges that conduct, you've undermined some of these, sort of, binary distinctions between good and bad conduct.

All of these are sort of wrapped into the problem of why competition law ends up with compliance issues at a level that maybe we don't see in some other areas of the law or that we've dealt with more effectively in other areas of the law. The last thing to cover here that I think is important as a discussion topic is that of who is responsible for trying to manage these compliance issues? From my perspective, there are probably three different parties you could pin this on. The first would be, I think, the public enforcers, and say that for compliance, because public enforcers are in charge of ensuring that the markets operate freely and operate without restraint, they should have the role of trying to facilitate and encourage the compliance process. The second choice to me would be the entity, of course the regulated entity, and that makes a lot of sense and most of the compliance literature seems to put the onus on the regulated firm. But the third would be the individual who's actually making the decision, this might be a person you could put this on.

To start with the public enforcer, to the extent that we think that is the important place to put compliance obligations, I think we have a fairly effective dissemination of information that should facilitate compliance. We have, at least in the most sophisticated of the antitrust regimes that we have on the globe, you tend to see education programs that I think are very difficult to improve on. So much so that you could teach an antitrust course just on the basis of the materials that are housed on the websites of the antitrust enforcement agencies, and so too for a lawyer's informing his

or her client as to the kind of conduct that will be challenged. So, I think that's pretty impressive. And you add to that things like enforcement guidelines, which inform the ways in which agencies interpret the ambiguous rules and you also add to that questions like business review procedures, which do a good job in sort of narrowing the ways in which we think about these ambiguous rules, and it mitigates a lot of these problems about ambiguity that we've been talking about. From that perspective, I think the enforcers get a lot of credit for what they've done in order to advance the goal of compliance. But it doesn't fully answer the question of if the responsibility is mostly on the enforcers and you see a problem, should we see that as being a law enforcement, should we see it as being a criminal violation problem, or should we see that as a failing in the process of informing the public about what it is we find problematic; and where that responsibility ultimately lies I think speaks to some of how you end up treating the notion of compliance.

The second question is that of the private firm's taking the role, and most of the literature referenced in Dr. Tóth's thoughtful remarks point to the role of the private firm in compliance programs. When I think about that, I'm not sure what a private compliance program fully accomplishes. You are left with these problems of cosmetic compliance issues, the concern that someone uses compliance in order to communicate to the world—whether it is internally or externally—that the firm's agents are good people doing a good job abiding by legal rules. But whether these programs actually do a good job of stopping problems, I think is less than 100% clear. If we have a relatively sophisticated understanding of what compliance is and what programs are, and we are still not preventing enforcement issues arising that suggests to me that maybe the private firm is not the place to put the obligation for compliance. To say nothing of what we've started with, which is the idea that individual decision makers are ultimately the ones who are driving the law violations.

Where that's so, then maybe we're back to the question of whether the onus for compliance should be put most squarely on the individual, somehow ensuring we have found the correct individual. I'll finish up there with the idea that when I think about

what makes sense for compliance I come back to, what I've attributed to Spencer Waller but also others, that the idea that ultimately, it's a question of finding a way to shift responsibility to the person making and benefiting from the decision within the entity and so any kind of a compliance regime that accomplishes that, to me, overrides any other possible understanding of what would be appropriate compliance. I think all of the problems of cosmetic compliance and otherwise are mitigated if the compliance program that the entity adopts is one that finds a way to see that the person who actually engages in the conduct suffers the harm, whether it be jail or a fine or otherwise, at the end of the day.

In sum, we circled through why it is that compliance in competition law is a problem, some of it being ambiguity, some of it being individuals, some of it being agency-cost issues that are discussed in the academic literature, and then we've talked about in some depth about how it is we might allocate responsibility for trying to achieve these things on the basis of who seems to be the most affective locus of the responsibility.

Philip Marsden

Thank you very much Max. So, both speakers have taken us through the five-kilometer mark, and we are warmed up a little bit and we don't reach out second wind until after caffeine. But, to get us to that point, I'd like you to start indicating that you'd like to participate in the dialogue and when you do to use your microphone and please, for purposes of our publication, to identify yourself and your affiliation before your remarks. So, while you are preparing to raise your nametag, I just want to do a brief reflection. It is so important in this compliance area, which seems so broad, to try to think about this question that Max has asked which is, "why is this so difficult?" Anti-money laundering compliance, securities compliance isn't; so is it because there's something, some issue, which I know we will speak about later about the ambiguous nature of competition law or is it to do with the culture? I've had a case recently in the U.K., where, it's a cartel case, and they knew full well that what they were doing was wrong, they knew full well that it was a criminal act. They didn't particularly know anything about competition law, but they felt the moral wrongness. Their

conclusion was, "we therefore have to hide what we're doing," obviously rather than, "we shouldn't do it." You know, whether you do a cost-benefit analysis, which they didn't do, about the profits they would gain by cartelizing. They just felt we need to order this market, we need to stop killing ourselves, stop hurting ourselves through vicious competition, we need to be more sensible. Yes, it's illegal and it feels wrong, but we have to hide it, not, we shouldn't do it. So, this may be an obvious statement, but it has puzzled me as well about why we have to, as authorities, devote so many resources to compliance and getting the message out when it seems a pretty easy message, but that's just with respect to price fixing, which is relatively binary and in some countries criminal. But when you get into the area of hub and spoke cartels or vertical restraints areas or what is a dominant position, and what is the specialty responsibility of a dominant company, it becomes very, very difficult. So, let's begin the dialogue. Some of the people in this room have advised these companies, they've seen a range of conduct where they think, "gosh, I'm going to have to now take this company through several years of litigation and investigation because of what they did wrong. Why didn't we catch this early?" Thank you, Mark.

Mark Clough[6]

It's only because I'm bold and nobody else seems to want to take up the challenge. I was going to raise two questions. One is, I think Max just referred to the Securities and Exchange Commission and the obligation to file there. We also have in the U.K. the U.K. Financial Conduct Authority and in answer to the president's question about who should be responsible for competition compliance, I wonder whether, in fact, it shouldn't be the legislator that puts the burden on the competition authority? And I wonder how it works in the U.S. so well, or so it appears from constant newspaper reports and cartels being filed in the Securities Exchange and whether it is working in the U.K. I just raise that as the first question.

[6] Dentons Europe LLP

The second question is how this all fits in with leniency because the two papers constantly refer to that. I think that's very important and I think that we live in a harsh world if I can put it like that. In my experience with dealing with certain commercial operators, and I will not mince my words by using the word "banks," I've been amazed by the reaction sometimes to the competition law advice given to banks and being told to basically go and lose myself. And I think one has to bear in mind that there are certain members of corporate society that consider themselves to be above the law, and I wonder what we do about that in terms of making an incentive out of leniency for that sort of business mentality.

Philip Marsden

Thank you, Mark. Never, never provocative Mark Clough. Fantastic. Gábor…

Gábor Fejes[7]

Thank you very much. My name is Gábor Fejes, I'm a private practitioner and partner at Oppenheim, a law firm in Hungary. I was going to make just one comment on Professor Huffman's point. I think one of the reasons why it's relatively difficult to say who benefits of a wrongdoing is that board members, when they are caught for cartels, can say, and I have heard them saying to shareholders, "whilst we have been doing the cartel, you have been benefiting from it, too." So, the extra-profits are in the dividends actually. And I think that leads to the point of non-cosmetic compliance programs. I think it's right that responsibility should be shifted to the decision makers and that's what a compliance program should finally be about. Finally, a compliance program is an internal law. It's just actually implementing the law within a community; an institution, a company is a community of people governed by a set of external, but also self-made, internal rules. And this company will have assets. However, assets cannot have responsibilities, it is people that have responsibilities within that

[7] Oppenheim, Hungary

company. And a non-cosmetic or a genuine compliance program will, I think, have this main feature, and that also comes up in this bible which is exhibited here, namely the ICC Compliance Program Guide. The decision makers should know what the law is and bear the consequences. So, in this internal root, a compliance program is nothing else but an implementation (in the European Union we all have an idea of what implementation means) of a higher-ranking norm in this "community" and if it's implemented right then those decision makers bear certain responsibilities. So, if I were a competition authority, I would look at a compliance program and see, whether, in addition to the sheep washing, there is a rule that says that the affected board members or the affected managers will have their own responsibility, in whatever form, but obviously a financial responsibility will be the bottom line. Thank you.

Spencer Waller

Well, along those lines I just want to share two very short stories about the difference between that internal company or community ethic where people get it and perhaps, where they don't, which is a common experience that many of us have had as advisors or enforcers. One is, a family friend, this is years ago. He was a mid-level businessman at Mobil before it merged with Exxon, so this is a number of years ago and this gentleman has passed away. When he learned that I was teaching antitrust law he began to talk to me and he said, "we all are gun shy because do you remember the *Socony-Vacuum*[8] case?" I said, "well of course." And he says, "when I joined the company they simply told me, they sat me down and said 'if you run into someone in the waiting room that works for a competitor, here are the things you can talk about: you can talk about the weather, you can talk about sports, you can talk about your families, and the rest you shouldn't talk about.'" And it relates to the famous *Socony-Vacuum* case, which in part, helped establish the per se rule against price-fixing in the United States. And so, even in the late-80s early 90s, even though this was now

[8] United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940).

almost fifty years after the case itself, somehow, at least in his part of the company, this was an established ethic.

In contrast, I don't remember the gentleman's name, but there is a published interview in the Antitrust Bulletin, a number of years ago, with the gentleman who went to jail in the Marine Hose cartel. And if you read this interview, and I can send anyone a link to this article, it's fascinating. He says, well, he's serving time in prison, "I understand it's illegal," I'm paraphrasing, he says, "I'm still not sure why it was wrong." He said, "of course I had to admit what I did in court, I did those things. But I'm still not 100% sure why me." So, I thought it was a nice contrast.

Philip Marsden

That's really nice. And the example I was giving before about where people knew it was wrong, they knew it was illegal in some way, they didn't know anything about competition law. But they realized, we shouldn't be doing this. And then there's that contrasting position where people think there's some regulation out there, we've crossed some sort of boundary, but I don't understand why that's wrong but I have to put my hand up to it. It's amazing. Ted…

Edward Janger[9]

Ted Janger, Brooklyn Law School. I am, by in large, not of the world of antitrust. However, I've been listening closely, and see that there's a common thread between this discussion and ongoing discussions in other areas that I also know relatively little about . . . I'm a bankruptcy guy, so I've had to get used to the idea of bank resolution. And I'm a bankruptcy guy so I've had to learn about securities regulation and in both of those areas, right now, compliance is at the forefront. But, in each field, the underlying norm is different. In bank resolution the concern is, systemically important financial institutions (SIFIs) should not fail, and if they do fail, the failure should not lead to the collapse of the global financial system. In securities regulation, by contrast, one is, by and

[9] Professor, Brooklyn Law School.

large, concerned with fraud, and in antitrust we have the norm of don't conspire with your competitors. However, what you see, in all of those discussions, is a somewhat generic set of moves.

In other words, compliance is corporate governance writ large (and small). While, on the other hand, we've moved away from concern about the underlying norm to sort ask, how do you govern a firm? We are also stuck in our own little silos talking about how do we govern within the firm to enforce a specific legal norm?

I think Max's paper really brought it out quite nicely. First, "what's the underlying norm?" This question may be fuzzy, when asked in the abstract, but as Max pointed out, it can be made concrete once contextualized by asking, "what's the underlying behavior that people should just know is wrong?" Second, within the firm, how do we make sure that each of the actors has skin in the game of norm enforcement? It is possible to construct compensation and enforcement structures that work on different levels with different people. For banks, for example, capital rule influences the top-level decision makers. By contrast, structural subordination and hierarchies of compensation may influence investors. While, at the individual level, the task may be making sure that managerial compensation structure ensures that you pay for something you did a long time ago? Finally, there's the role of the regulatory supervisor, which is to ask, "Can we look at what a firm is doing and say, 'They are getting it right?'" So, in bank resolution, you have the living will process, where the FDIC says, "we're going to look at how your plan and we're either going to sign off on it or not? We're not telling you how to do it, but we are asking you to show us that you are you doing it."

These are the levels of analysis that I think we are going to be dealing with throughout the day. But Mark put his finger on something: Within an industry, we need to shift the norm from, "this is not our job - our job is to make money for our shareholders" to "it's our job to be a company that is a good corporate citizen." Which by the way, is what Brandeis said 100 years ago, "business is a profession cloaked with a public interest." That seems to me to be a role that the regulators can inculcate but there's a lot of walking to do before that.

Philip Marsden

But also, let's do it the right way. Vincent…

Dr. Vincent Power[10]

Philip, I'll have to say, with all of your great analogies about the marathon, I have hit the wall at this stage [laughter].

Thank you for such thought-provoking and different perspectives. I would like to make just a few observations on those perspectives.

First, to Max's point about securities law, I believe that "time" is a very important factor in this context. If you look at the securities arena, many of the issues come to light because of announcements which are often made quarterly (e.g., results being published each quarter) or filings which are made in the aftermath of a share transfer but, by contrast, competition or antitrust issues are usually not so quick or transparent. If you contrast the securities sector with, say, the recent Intel case where the Court of Justice of the European Union referred the matter back to another court, the EU's General Court, this is a matter where the complaint was started in 2001. Put the EU's Intel case in human terms, if that was a baby born in 2001 when the complaint was lodged then it is about to leave high school now and the case is not concluded. Equally, if you look at cases where there may have been cartels which may have been hidden for, say 14 years as in one recent case, you are looking again at the "time" factor. So, it would be very useful to be able to take some of what has been done in the securities' side and bring it across into the antitrust/competition arena but it's not always that easy. I believe that the speed at which securities issues are dealt with is a very good case study and I think it should serve as a magnetic north for the competition arena that we should aim for, but it will be more difficult in the antitrust arena.

András' point was, I thought again, very interesting about should companies and other undertakings be obliged to report? And if you think about how the aviation sector deals with near-misses then there is a useful analogy. In the context of aviation

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near-misses, reporting is not seen as a criticism or condemnation but rather as a necessary step in preventing future issues. And I was doing a case recently in the context of driverless cars and it was very interesting because one of the people involved mentioned, "if I drive home tonight and narrowly miss a cyclist, I've learned something for the rest of my life, but no other motorist has done so. With driverless cars, there's a software download five minutes later to every car in the Universe." So, there is some value in reporting. There is also another angle worth exploring in this context, namely, the element of compliance assistance undertaken by advisors. Specifically, this is what law firms or economists do when they send their clients information about new investigations, cases and trends, this is a form of indirect reporting.

I believe just on the responsibility point, that "sheep dipping" certainly works but only to a point. It's when "sheep shearing" happens that it really works (i.e., there is an investigation, prosecution, conviction, punishment etc.). You do need individual responsibility to make competition law work otherwise it is just a tax on the company. The problem there is, again, the gap of time. If people are paid bonuses on an immediate basis, but a breach is uncovered much later then the impact may be lost so there is great value in having "delayed rewards" until something has really been cleared through the system and proof that there is no breach or issue.

Max just raised a point and I thought it was very, very interesting again, about the criminal sanctions. The great thing about criminal sanctions is that they really concentrate the mind of executives. But it also means that, in all probability, many judges (and, possibly, jurors) find it more difficult to decide that there has been a breach of the law because sometimes people may have done something wrong but they were unaware of the illegality and courts can be reluctant to criminalize someone in such circumstances – the courts would have had less difficulty in finding that there was a civil breach but a criminal breach might be going too far. General non-specialist competition law judges who have not had the benefit of doing six competition law marathons may not actually grasp the fact that breaches of competition law can be criminal etc. And therefore, you are sometimes better off with a civil standard so as to get some notches on the "competition law

belt" and then you move it to criminality when there is widespread understanding that this is criminal in some situations. While Canada had competition law in 1889, the U.S. in 1890, and so on, many competition laws around the world are mere teenagers. And it is not always clear to business people that they are doing something illegal – indeed, if lawyers and economists can find this area difficult to grasp at times, one must have sympathy and empathy for lay business people.

The last point to mention is enlisting advisors in the enforcement process. Now, it's a difficult space because of privilege and confidentiality and so on, but at what point does an advisor have a responsibility to say this is actually something which is wrong, step back or indeed report it to the authorities? It is an issue worth reflecting on carefully.

Philip Marsden

A company went to a law firm for some advice with regards to whether its prospective conduct was legal or not and the law firm advised it was legal, so the company is raising this as a defense right now. In the investigation, they admitted that they asked the law firm the wrong question, they didn't give all the information to the law firm and now the law firm is quite interested in and is being named in some of these proceedings. So, advisors are definitely important, but they have to be given the honest picture. But of course, Vincent may have hit the wall with respect to running puns, but you have to run through the wall in a marathon or else you won't get to the finish line. And if he brings up the subject of time, time is relatively important in running a marathon, at least that you have a good time while doing it. But in respect to his near-misses point, this is why in a marathon we close the roads because we don't want to be hit by cars when we are running across the river in Budapest. And I can go all day, and all night with running puns [laughter]. Now, moving back to Tihamér.

Tihamér Tóth[11]

[11] Habil. Assistant Professor at Pázmány Péter Catholic University, Competition Law Research Center; Attorney, Réczicza Dentons Europe

Thank you, Philip. Just a short note, you posed that very important question, "what makes competition law special? Why do we need special incentives here versus labor law or securities law?" I think it may have to do with human nature. I do not pretend to be a human anthropologist but that has been my impression and experience that many people would prefer to cooperate than to fight with each other. We prefer to socialize, to chat together, to meet together. Just like this event which is the result of a co-operation between three great institutions. We did not create our own, competing events. So that might be, I think, an underlying problem with which we have to deal with and an efficient compliance program would have to deal with.

Philip Marsden

And it's an interesting point too because in many of these industries we are dealing with people and people swap jobs. While they know each other as a negotiating counterpart, or they may know each other as former colleagues. And they might say to each other, "what are you doing? Why can't we have this market and you have that market?" They may not even cross a line just because they are trying to be amenable, friends. And they butt up against legal standards which favor independence and ignorance about what the competitor is doing, and these can be inconsistent.

Zoltán Hegymegi-Barakonyi[12]

My name is Zoltán Hegymegi-Barakonyi, I'm a partner at Baker McKenzie and also represent the Hungarian Competition Association here. I'd like to refer to the title of this panel, this session, "Incentives to Complying." Of course, there are lots of incentives for companies to comply, which we are always teaching at the trainings and educational programs for companies. But, I'd like to take the opportunity that we have a group of law enforcers and there was this excellent introduction by András. I don't think that

LLP.

[12] Baker McKenzie; Hungarian Competition Law Association.

compliance should come from the authority or the regulator. There is the law and there is self-regulation. But an authority cannot be totally neutral to compliance programs. I think it's a great responsibility of an enforcer and an authority what it does with or about compliance. It can do something which will encourage compliance but if it doesn't do it the right way, it will discourage compliance. And that's where we come to the bullet points of András: what a good policy a regulator would be towards compliance programs? It should be a genuine compliance program with regards to how it operates, etc. But, I think that you have to be reasonable, if a law enforcer expects too much from a compliance program, it might backfire because the business would realize, "I might not be able to meet that standard." Whether it is expected that the compliance program will reveal all the wrongdoings in a company of 10,000 employees, whether compliance should end the violation or report it to the authorities by submitting a leniency application where it is possible that for those infringements there won't be leniency available. First, I think the regulator should ask the question "what do I want from a business's specific compliance culture or program?" I would like to hear from law enforcers present here, what is in their mind in this regard? What do they expect from our clients and businesses? There is a compliance culture already present in Europe, but I know there is a lot more that companies and regulators can do for improving as the United States has done it. Here in the European antitrust arena, there are national movements, but I think we should come to some sort of common EU policy on this point as well. Thank you.

Philip Marsden

Thank you and while others are reflecting on your question that you put to the enforcers, I'll move away from our running analogy, to a cycling analogy [laughter]. If I was a competition law enforcer and you think of that as perhaps being someone responsible for anti-doping laws, I would be saying to the cyclists, "you want to have a fair competition, don't you?" "You don't want any cheats in your industry because it stains the whole industry." If a sector becomes known for violations, and then it becomes hinted that the sector is corrupt, it stains the whole industry. Further, it

can stain people's views of possible business in general. And so, I would say that yes competition authorities have a responsibility, and the main responsibility I would put on us is to have targeted compliance efforts and targeted punishment efforts so they are very much focused on the individuals so we can say, "we're going to go after the bad apples, we might have to fine you as well but we will be very targeted." Then we will have to describe to the companies, "don't you understand, this is hurting the whole industry." Let's hear from Poland and what is going on there.

Maciej Bernatt[13]

Hello, my name is Maciej Bernatt from the University of Warsaw. When preparing for this great event, I was thinking about Poland and what is the incentive for compliance programs working in Poland. I talked to a couple of private lawyers and I think there is a link between detection and how compliance programs are popular. They told me that you can see effective compliance programs in the industries that were under scrutiny of competition authorities. Once the fear of detection increases, you can then expect some compliance programs to be present. There is also a link with leniency programs. They are effective only once competition authorities are capable of detecting cartels. In Poland, for example, detection has improved slightly but I would say the detection of cartels is still a weak side of competition law enforcement in Poland. Similarly, compliance programs might not be working effectively because there is no fear of detection.

Amedeo Arena[14]

[13] Centre for Antitrust and Regulatory Studies; University of Warsaw.

[14] Associate Professor of European Union Law, University of Naples "Federico II" School of Law.

Good morning. My name is Amedeo Arena and I teach competition law at University of Naples "Federico II." I really enjoyed the section entitled "Achieving Negative Expected Value," in Max's paper. I think it provides a reliable model to predict the conduct of corporate decision-makers. According to a my own very simplified model, the expected value of an antitrust infringement ($\mathbb{E}[I]$) is equal to the revenue of the infringement (R) multiplied by the probability of not getting caught (P_1) minus the sanctions and other negative consequences of getting caught (S), multiplied by the probability of getting caught (P_2). So: "$\mathbb{E}[I] = R \cdot P_1 - S \cdot P_2$." Now, this P_2, the second probability variable, is essentially a matter of perception. I wonder how compliance programs may affect this variable. From my experience, the P_2 curve has an "inverted-U" shape. At the beginning of the session, you hear remarks such as, "Oh, is that really prohibited?" "Can they really fine us up to 10% of our turnover?" By and large, the value of P_2 is grossly underestimated in business circles, therefore antitrust compliance programs are really encouraging at the beginning as they quickly lead to the upper part of the "inverted-U," where firms become aware of the risks and they try to minimize their exposure by promoting antitrust compliance. The problem is that towards the end of these antitrust compliance sessions commercial executives get cocky and say, "True, but maybe we can hide this from the antitrust authorities." So, I am afraid that the incentives provided for antitrust compliance programs cannot be targeted in a way that maximizes the value of P_2. Rather, I'm afraid that providing incentives may only reduce the value of the "sanctions and other negative consequences" factor, thus ultimately decreasing the deterrence of antitrust sanctions. Thank you.

Max Huffman

A couple of comments that I thought were pointing to something that I had been thinking about but didn't include in the discussion draft. I am thinking particularly about a comment you two

made, Gábor and Vincent, about the idea of implementation of higher norms and the internal law aspect of a compliance program. But also, the concept of the near-miss and it speaks to me to this distinction between viewing competition enforcement as a law enforcement project, which sort of is, historically, the way we have done it in the U.S. for the most part. In viewing competition enforcement as a regulatory endeavor, which is really sort of a collaboration between the entities, the enforcement agencies which are charged with ensuring the markets operate and the private enterprises that are operating. If you see it as being law enforcement, then you are really left with compliance, you are left with this question of the goal of compliance is to avoid the negative expected value problem. If you see it as a collaborative endeavor working between the government and the private enterprise in order to, together, achieve efficiency in this particular industry, then you are more likely to have much more sophisticated interaction on the question of the compliance program instead of saying, "you better get it right or else we will hit you with big sanctions." I'm left with this question, I don't know of any agency that says, "we will review and comment on or give a business review letter on your compliance program." I think that would be the extreme of this, would be the idea that if we think someone should implement the law at the corporate level, then why not ask for review of that and get the agency to say, "yes, if you implement this compliance program you will have these benefits from that." I suppose the easy answer to that is this is the classic problem of cosmetic compliance, we just implement what we have in the tool-kit and then presumably stand to never be sanctioned. So, you'd have to find some way around that problem.

Spencer Waller

So, I want to just bring up a topic that is, in some ways, a bridge between what we are talking about and what the next session will focus on. This conversation got me thinking about that

there are industries in the United States and I'm sure in some extent in other jurisdictions that are on their third and fourth generation of antitrust litigation. I mean generations in the sense of 15 or 20 years of any executive's likely lifespan as a senior decision-maker—at least in the United States. there are firms in the road-building industry where the children of the original owners are also being indicted in the footsteps of their fathers. It's not a good situation for anybody. But, industries such as concrete, construction, road building, there are others, and then I was thinking about, as my example to see if we could have more discussion, the cardboard box corrugated paper industries that are on their third or fourth generation of antitrust problems. By and large, they have gone in the United States from being criminally indicted for overt price-fixing conspiracies, to civil litigation without governmental action for information exchange and price signaling that generally hasn't attracted governmental challenge but has attracted class actions. I was thinking about this because a very well-regarded class action lawyer in the United States told me that he is essentially suing the same companies for the third time on different theories. If it is really 50 or 60 years later and they are not going to jail but are still litigating these things, often with the same lawyers on both sides, is that a sign of progress or a sign of despair?

Vincent Power

I have to say that I agree with Spencer. However, I am going to be deliberately provocative to promote discussion. There are certain sectors where the product isn't labeled, isn't branded, rather it's commoditized and many of the people involved move from one employer to another but remain in the same trade association etc. These sectors are rich pickings for the agencies but let me be provocative.

First, say, the local police force has realized that the road to the airport is a good road to catch people for speeding and an officer can meet his or her monthly target by spending two days a month on that road - is that what is happening in the antitrust space? Put another way, because my predecessor in the competition agency found something in a particular sector then perhaps I too will find something there and I don't have to go looking too

far. I meet my target, but I haven't actually investigated non-typical breaches.

Secondly, again being provocative, there are certain sectors and certain concepts which seem to be fashionable among agencies and advisors internationally. So, let's say it's cartels in the construction sector with the Dutch and the U.K. and then the other agencies internationally start to look at the construction sector. Or it might be a concept like price-signaling and so on. It's almost like people go to the ICN with an empty suitcase and they come back with concepts and sectors and industries and say, "that's a place we haven't thought of, we've both gone to the airport road, but there's another road where people go to their holiday homes and they're relaxed, and they drive a little faster." [Laughter] Now, I'm being deliberately provocative, but agencies need to explore all sectors and concepts and not just which are currently fashionable.

Gábor Fejes

Thank you. I just wanted to make a comment on the cycling example. Actually, some of the athletes have said, "well I had to do [doping], because everyone else had been doing it." And, that might also be an answer or a comment on Tihamér's point. I think it's great that people want to, and it is in our better nature to cooperate than to brutally compete. But also, a lot of markets are oligopolistic, and people watch each other. And it's very difficult whenever a compliance program or an advisor spots a behavior which might be problematic, but it's spread across the industry, people at the companies will say, "look, I couldn't stop because everybody has been doing it. If I stop first, we will make losses, while everybody else will be better off." So, there is actually a competition in that sense about who is braver to endure with the practice. Typically, it won't be hardcore cartels, but it will be verticals. Typically, exclusivity clauses, say in the beer industry or other industries. It will be vertical information exchanges, hub and spoke issues.

As a final comment from this perspective, I think authorities will have to be cautious and mindful about this issue when dealing with compliance programs. I think it is right to expect from a compliance program to be effective in the sense that it should

detect a problem and then the companies should do something about it. I don't think, generally, we can require companies to self-incriminate themselves immediately when they find out about a problem. That's a possibility, but it should not be an obligation, whereas in leniency there are rewards for it. And I think it's right in general to require companies to stop once they've found out the infringement, but there might be circumstances where it simply isn't possible to stop in a meaningful manner without losing a lot. For instance, I refer to the food industry and their main business partners, the big retail chains. What if I'm a major sausage producer and I find out there is something wrong in my vertical relationships with those retail chains in one country. I'm not sure I want to report that because I do business with them in a number of other countries around Europe and I don't want to have trouble with all these retail companies in all those countries. Can I then at least stop from one day to the other? Surely not. So, it will be difficult to advise, and it will be difficult for the companies. I think what matters is that they should start doing something about it in a structured manner which leads to a good outcome, but it's not easy to stop from one day to the other. Stopping the practice will require some time in such cases.

Philip Marsden

I quite agree and the point that Tihamér makes, related to the work by Axelrod years ago about the evolution of cooperation and tit-for-tat cooperation is a very good point. We're social animals, you get into an industry with, as I mentioned earlier, people working for different companies, they change jobs and you come into a situation where this is just the way it is. And even if you say to them "it's no defense to a competition investigation that everybody does it, in fact, thank you very much for telling us that everybody does it, here's a microphone, go back to the meeting and ask some more questions." But, one thing I've noticed, and this again goes to the point about why it is so difficult to induce compliance sometimes. Unless, as we'll hear later, the good works on the international level of trying to get the message out everywhere can help a lot. The two times I've seen, not cartels that have fallen apart, but that are fresh cartels and they suddenly change. One, is

the acquisition by one company, usually an American buyer. And through the due diligence process you suddenly see people being told, "whoa, what you've been doing is wrong." And the other thing I've noticed, which, sadly doesn't have the same direct effect, is if we as competition authorities win a case and publicize it and put posts on our Twitter account about what we've found—we've seen this at least in the real estate sector in the U.K.—we see an estate agent suddenly say, "hang on, we better review because we've sent very similar messages to our competitors as well." So, the competition authority publicizing what they think safe isn't, "this is not normal, it may be business as usual for you, but it's not normal." Then we've seen actual evidence of leniency applicants coming in and saying, "we're coming in because we saw your Twitter and we think something is going on and can I please wear a microphone at the next meeting?" And I wish they were always that generous but those are just some reflections. Mark…

Mark Clough

Thank you, Philip. Just a quick question about an issue we've raised but haven't really discussed, and that's the advisor's responsibility. With the benefit of so many different countries here, I just wondered what the money laundering rules are, maybe starting with the U.S. and the obligations imposed on lawyers who are told by a client that their client is involved in a cartel? In the U.K. it is quite complicated because of course the criminal nature of the cartel offense is addressed at the individual rather than the company level. I thought I'd bring us back to that because it may be quite important in the future.

Vincent Power

Philip, I just wanted to say that Mark's question is a very good one. But just to go back to the issue of "importance," you've actually hit the nail on the head by giving the examples. It is extremely important that competition agencies give examples. The reason why it is important is because clients, colleagues, such as lawyers are going out and giving examples to companies. You

know, people can talk about Intel with a fine of €1 billion, they can talk about trucks at €2 billion, they can talk about lifts and €995 million. Many people sit there at compliance sessions and look up and say, "in my wildest dreams, I could never do anything that could cause a problem like that for my employer." On the other hand, if a national competition agency gives them practical, simple examples like the infamous email in the Hasbro case, where as you know, an executive emailed colleagues saying something along the lines of "you've done a great job in fixing prices but a word to the wise, delete this" followed by several exclamation marks. People can see that and identify with those examples. So, competition agencies will enhance compliance where they give as many examples as possible that most employees could identify with – simple cases can be just as persuasive as the mega cases. Equally, to enhance compliance, it is a good idea to utilize during compliance training, photographs of real people who have actually been convicted because participants can find that very persuasive – it brings the message home loud and clear – these are people like the employees of this company etc. And if you make it really local and relevant, then people are more likely to comply. Examples are really important.

Philip Marsden

Yes, keep it real and make it real, and make it hit home. We're coming to the end of the first session, the aid station is in sight. András, some concluding remarks, reflections on some of the points we've discussed?

András Tóth

I'm convinced, based on today's discussion, that the competition authorities have to be willing to recognize companies' compliance efforts. Especially because competition law is still a teenager in our region, where for more than 40 years during communism business leaders were told that they should cooperate with each other in order to meet centrally devised plans. These leaders

then, without any transitional period, had to radically change their mindsets in 1990 and stop cooperating. In this regard, I am sure that competition authorities have a responsibility to incentivize companies' compliance effort.

Philip Marsden

Thank you very much, great point. Let's have a break now.