

2018

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Recommended Citation

Anne Riley *The Importance of Compliance: What Businesses and Agencies Can do Better*, 30 Loy. Consumer L. Rev. 153 (2018).

Available at: <https://lawcommons.luc.edu/lclr/vol30/iss2/6>

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THE IMPORTANCE OF COMPLIANCE: WHAT BUSINESSES AND AGENCIES CAN DO BETTER

*Anne Riley**

I think all of us will agree that competition is “a good thing.” It fosters innovation, it increases consumer wealth and welfare by promoting better choices and lower prices. Competition law provides a stable environment for investment and ensures a level playing field - so not only is competition “a good thing,” so is competition law.

But let us look at compliance and efforts by companies to comply with the law. I think most people – even the most hardened of Government sceptics – would agree that prevention is better than cure. It is surely better to avoid the ills of antitrust violations than to fix them after the event by enforcement. Of course, enforcement is important – it has its place. But, a greater emphasis should be placed on avoiding the violation in the first place by encouraging compliance efforts.

It is not only a matter of achieving public policy objectives by encouraging compliance efforts: it makes really good business sense. A company’s most precious asset is its reputation. As Warren Buffet said, “It takes 20 years to build a reputation but only 5 minutes to ruin it. If you think of that, you will do things differently.”

As a representative of the International Chamber of Commerce (ICC) – it is my opinion that the ICC genuinely believes that fair competition at all levels of business is good for economic and social growth – and very good for business.

There are many pressures facing business today, so you may wonder why business (and the ICC as the World’s primary Business Organization) focuses on competition compliance. The answer is simple, and the need has never been greater.

* Chair of the International Chamber of Commerce Task Force on Antitrust Compliance and Advocacy.

Many companies understand that compliance with competition law and behaving ethically in business helps reputation management and is part of good corporate governance.

First, this Article discusses what agencies have contributed to the debate: what they do well in encouraging compliance efforts. I applaud the agencies that have constructively engaged with business organizations such as the ICC. In particular, I applaud the efforts of agencies such as the Canadian Competition Bureau, CADE in Brazil, the Singapore Competition Commission, the JFTC, the UK's CMA, the Hong Kong Competition agency, and many more. As a representative of business, I'd like to thank you. Your efforts are truly appreciated.

Now what business can do and is doing. The ICC is passionate about spreading the compliance message: businesses want to comply. But, many businesses do not really understand the law and some in business even find antitrust law rather counter-intuitive. Perhaps even more so as agencies pursue ever-more inventive and creative theories of harm.

The ICC has embraced the task of trying to spread the compliance message to business, but we have done this in a practical way. We have produced two "Toolkits" for business: one for larger companies and the second for SMEs. But we have not just produced documents (which we know might not be read if they have not been "socialized" in the business community, – additionally we have held more than 50 business engagements around the world – from Australia and Canada through to China, Malaysia, and Singapore.

The ICC is working to educate businesses, both large and small, about the benefits of compliance. This is not about programs or process, but about corporate culture, competing fairly and sustainably. It is about corporate reputation.

The ICC is also trying to encourage antitrust agencies to work with other compliance enforcers: antitrust compliance cannot exist in a vacuum. The Anti-Bribery and Anti-Corruption agencies in particular have been very creative and forward-thinking about encouraging compliance through the appropriate use of Non-Prosecution Agreements and Deferred Prosecution Agreements.

But the ICC is not just confining its advocacy to agencies and business. We recognize that Business Schools and Academics have a really important role in "spreading the message." We have not yet gone as far as the JFTC and CADE in engaging school children, but we definitely applaud these methods.

I would not be giving fair feedback if I only praised the good things. Are there areas for development and improvement? Of course. On both the side of agencies and business.

First of all, some suggestions for agencies. First, please understand that many businesses do not understand (and maybe do not even know about) competition law. The CMA did a very interesting survey, not long ago, showing a shocking lack of understanding amongst British businesses. If the businesses do not even know what the rules are, it is very hard to expect them to comply. More advocacy is absolutely essential, not just a matter of more enforcement and bigger “headline grabbing” fines, but a matter of real advocacy – training the industry on what the rules are. Again, without unduly praising my home agency, I do feel the CMA has done a good job here: they use each case as an advocacy opportunity, with “open letters” to the industry after enforcement action. This is good practice and should be encouraged.

Also, a different and more constructive mindset from agencies would really be appreciated. Agencies should understand that most businesses WANT to do the right thing. So, if agencies explained competition law compliance in terms of good corporate governance, competing fairly and sustainably “on the merits,” they would have an open and listening audience in business circles.

Also, please understand that there really is no such thing as “zero” risk. No matter how good a company’s intentions are and however hard they genuinely try to comply, problems will occur. All a business can do is learn from the mistakes and really try to do better in the future. Compliance is a lifetime commitment and not a spectator sport.

What can businesses do better? Well, frankly, a lot. Business organizations, such as the ICC, need to continue to “spread the word” (and need to be encouraged to do so). We think we can help the agencies. Most companies do believe that behaving ethically in business helps reputation management and is part of being a good corporate citizen.

The ICC is using its unparalleled business network throughout the world to spread this message – we represent business both small and large in over 80 countries throughout the world, right down to the tiny local chambers of commerce. We want to get simple messages over to our business members in a simple, clear and straight-forward way. We are focusing on simple check lists and “Dos and Don’ts”.

My plea to agencies is “let’s work together on this” – let’s focus on behavior and culture. Let’s remember that it is not companies that break the law. It is people who do – humans will be humans.