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Transcript: The Importance of Compliance: What Businesses and Agencies Can do Better

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

*Panel Speaker: Anne Riley**

Spencer Waller

If everyone could be seated, we'll move onto the next leg of the relay. Now, on to Tihamér Tóth, who is our chair for the second panel, I will turn it over to him.

Tihamér Tóth

Thank you, Spencer. Culture and compliance, that's our next topic. Two rather complex topics. How to define a genuine compliance program? That's a difficult issue. How to define culture? That's an even more challenging issue, especially for lawyers. Culture to me means something like customs, values, traditional ways of behavior, that somehow unite different people working for the same organization, for shared goals. It is true that it's a time-consuming process to build, to create culture. In some cases, it may take hundreds of years. I don't know if corporations have that much time to build their own culture involving a culture open to competition compliance. It's a topic where I believe experts with a corporate background will have added value, for us to share with. So, Anne Riley, if I can start with you? Great, the floor is yours.

Anne Riley

Thanks very much to the organizers for inviting me. I am not a runner, so I just thought, given that we've got an Irishman and somebody who claims to have some Irish heritage here, that I would change the analogy to hurling and to Gaelic football. And I will let Vincent carry on with that one [laughter]. So, but talking about competitive sports, I think we all believe that competition is a really good thing. I think if you ask businesses if competition was

* Shell International Limited

a good thing they would go “yes, it’s a good thing.” It does foster innovation, it does increase consumer wealth and welfare. But I want to start by taking a step back and saying, what is competition policy all about? Is it about imposing massive fines and wielding a big stick? Well, in part, yes. Enforcement has an important place. But fundamentally, if we think about what competition policy should be about, it should be about encouraging compliance and preventing violations, because prevention is better than cure. So surely it is much better for agencies to avoid the ills caused by a violation, then try and mop up afterwards, and sort things out when things sadly have gone wrong. Things will go wrong, inevitably, in any good organization, I’ll come back to that in a moment, but a really fundamental objective of enforcement agencies should be to encourage compliance.

Now, to some agencies that is kind of a novel concept. Not to the Hungarian authorities and I am really glad to hear what András said before, but to some authorities, it is still quite novel that they actually have a role in encouraging compliance. But it is a public policy objective. And in terms of trying to encourage companies, I couldn’t agree more with what was said in the last panel, that it’s about good corporate governance, and if you said to companies, “okay, there is the law, but this is about being a good corporate citizen,” it would resonate far more than you waving a finger in the air and going, “the fines are massive.” Because if people are complying through fear, you will get some compliance, but to get real compliance and to get a *culture* of compliance, you’ve got to get companies believing in it. You’ve got to think this is part of actually being a good corporate citizen.

I like to quote Warren Buffet, who said, “it takes twenty years to build a reputation, but it takes five minutes to ruin it. And if you think about that, you will do things differently.”

And I think that is a way to make an impression on companies, to make them understand that it is their corporate reputation at stake.

I am here today representing the International Chamber of Commerce and I am going to show a few of our rather excellent tools.

The International Chamber of Commerce believes passionately in compliance and compliance advocacy. We think, as the world’s business organization, representing businesses in over 130 countries around the world, both big and very small companies, that fair competition at all levels of the economy, is really good for society and really good for business. And you may say, “well why

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does a business bother so much about this and why does a business organization bother so much about this?” The answer is that it’s because reputation is *the* critical asset that a company has. Yes, every company, every rational company, will be profit maximizing, but at the end of the day, if a company does not have a good reputation, it’s not going to have its customers who are loyal to it, it’s not going to have its staff who are loyal to it, and it’s not going to have its shareholders who are loyal to it. So, reputation is key.

I think if you can get that message over to business, business will *want* to comply. They may not understand it, and I have to say, it is sometimes counterintuitive to business, especially when agencies don’t help us by pursuing very novel theories of harm, (so the hub and spoke cartels can be a bit of an anathema...I think companies understand facilitating cartels more than hub and spoke). So, I think agencies can help us by being a bit simpler in their approach as well.

I want to talk about what companies can do better, and what agencies can do better. But first of all, I want to say what agencies do well. And I think there are a number of agencies that are taking up the compliance challenge. Hungary, Canada, (great job Canada), CADE in Brazil, the JFTC, Singapore, Hong Kong and the U.K. And I do not want to compliment Philip, who obviously is very important, Thank you, Philip [laughter]. But actually, the CMA does do a great job.

I think the most important thing for agencies to realize, is that businesses actually do want to comply. You may get the odd business that goes, “yeah, it’s wrong, so what?” but I think most businesses are not that way inclined. Most businesses, particularly in today’s environment, and perhaps even more so after the banking crisis and the economic crunch, think “I don’t want this to happen to me. I really want to make sure that I am a good business, sustainable for the future.” So, first of all I would say that businesses need *practical* tools, and the ICC has helped by producing very practical, short toolkits. And it really does not have to be very complicated. Maybe just five questions: “Who am I sharing this information with? Why am I sharing it? Is it legal? What am I sharing? Can I prove that we’ve made our decisions unilaterally? And am I sure that this is legal and right? And if you reduce messages to something simple, the simple messages work the best.

I want to just challenge some terminology that’s been used. People are talking about programs, and process, it’s not programs, it’s not process. It’s about *behavior*. It’s about *culture*. It’s about

doing the right thing. That is not hard for businesses to understand.

Businesses need to understand what doing the right thing means. And agencies can make it complicated...academics can make it even more complicated. But if you get it down, to culture and reputation, you're going to encourage companies to do the right thing.

I think, antitrust agencies live in a little bit of an antitrust bubble. You think that antitrust is the only law in the world. It's not [laughter]. I know this is a bit of a shock to you guys. It really isn't. Companies have to comply with all sorts of laws: anti-bribery and corruption, anti-money laundering, trade controls and sanctions, data privacy, health and safety and environment - even through to anti-harassment. So, you cannot live in a vacuum, agencies need to realize that, companies have to have a compliance program that is not *just* a program. We have to have a culture. It's not just about antitrust compliance. It's about complying with all laws. Agencies must not live in a bubble, for example "We're encouraging programs but perhaps we will use them as an aggravating factor."

Now I should say, ICC is not taking a view on whether mitigation is a good thing or not. I think all companies would love it, but we don't take a view - official position. However, I would like to point you to the U.S. Department of Justice. Take a step back. Surely the Department of Justice does not recognize antitrust compliance. I am not talking about the Antitrust Division in the Department of Justice. I am talking about the FCPA people. And it is very interesting that the FCPA Department of Justice has done a huge amount to encourage compliance in the anti-bribery and corruption field. What have they done? They have been creative. They have used Deferred Prosecution Agreements. They have used Non-Prosecution Agreements. They have looked at companies like Morgan Stanley to say, "oh my goodness, you checked, you trained this individual 32 times. We've have seen the stuff you told him. He knew that he was going against company policy. We will go against that guy. And we won't prosecute Morgan Stanley." That is what encouraging compliance is all about.

Moving back to the ICC. The ICC is not just in the business of advocating compliance to agencies and business, we're actually doing quite a lot of advocacy to business schools, because one thing that really distresses me quite a lot is that you get these super clever people coming out of business schools with MBAs being taught that not only cooperation is a good thing, but *collusion* is a

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good thing. So, I think you guys in the agencies need to get into the business schools and start teaching them what it is to be antitrust compliant. Also, I think academics have a real role in terms of making it less complex, please. The ICC hasn't quite gone as far as the Japanese Fair-Trade Commission in engaging schoolchildren in their advocacy, but I believe in "getting them young." As anti-trust agencies, if you can engage in advocating the benefits of competition to society at large, then you will have schoolchildren going home and going, "Daddy, what do you mean you're engaged in a cartel. Surely that's a bad thing." So, advocacy from all elements is a really great thing. And that will help change culture as well.

Suggestions for Agencies. Please don't think that every single company in the world really understands competition law. They don't. The CMA has done an interesting study recently which showed a shocking lack of understanding. Approximately 75% of British business doesn't know what competition law is. That is why 75% don't comply. So, it's not just a matter of enforcement. Enforcement has its place. It's a matter of advocacy and education. It's a matter of changing culture. But also, a more constructive mindset, please. Businesses really want to comply, they just need help complying. There is no such thing as zero risk. If you have compliance efforts and they don't work 100% it's because humans are humans. And companies don't break the law. It's human beings that break the law. And if you have a company of 30,000 people or 100,000 people, not every single one of those people will comply with the law 100% of the time. It's like expecting every single person in Budapest not to speed. I've seen folks in this City speeding by the way...or not expecting people to double park - and I've also seen them double parking.

So, you need to do more than just going big fines or imprisonment. I do think agencies need to make compliance personal. And slightly provocatively, I wanted to add to Max's list of responsibility for managing compliance, public enforcers, yes, but not just enforcement please, education, understanding, constructive mindset. And engaging the businesses, if we don't do it who will. The individual, completely. But external law firms, please, you guys have a responsibility here. Your job is not just to bring bigger fees in for the firm, it's actually to help your client firms comply with the law. And you can do that not by turning up and giving the most boring lecture in the world, having people falling off their seats going "ugh I've done compliance." No - make it entertaining. Really do proper and engaging training. Get people more enthusiastic saying, I actually want more of this. I think that I've done a really

good training session, if people go “don’t stop.” And I seriously get that by the way, so you know, you can make it fun [laughter].

Tihamér Tóth

Okay. Thank you, Anne. Don’t stop [laughter].

Anne Riley

I could carry on [laughter].

Tihamér Tóth

You could continue, I’m sure. Thank you for your presentation which was both entertaining and thought provoking. Let’s move now to Vincent.

Vincent Power

Wow. How do you follow that? First of all, I would like to thank the organizers for this excellent conference. This event is very special. As Philip said, this conference is actually *considering* issues which will be enduring long into the future.

Secondly, it is a pleasure for a commentator to comment on an excellent presentation like the one just given by Anne. Judges often say in cases something like “I’ve had the benefit of reading the judgement delivered by my learned colleague. I concur entirely with it and have nothing further to add.” At which point as counsel you simply say to the court that you’d like to apply for your costs [laughter]. So, I could simply say, I agree entirely with everything Anne has said, but I would have traveled a very long way just to say that. So, let me just make some observations.

I agree entirely that compliance is absolutely critical for businesses. A business without a competition compliance program is like an airline without a safety program. And it is easy to be skeptical; it’s easy to think that these programs are simply window dressing. But a company has no more or no fewer arsonists just because it has got a fire program and a fire drill. But a company would be irresponsible if it didn’t have a fire program and a fire drill.

To take Anne’s last point about the role of lawyers and advisors. I think you know the difference between the Oriental and Occidental doctor. The Occidental doctor treats you when you are

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sick. The Oriental doctor's philosophy is to make sure that you don't get sick - to help you in a proactive way. And that latter element is part of what competition lawyers should do.

What I thought I would do under the four hours I've been allocated [laughter] (because that is how long it would take me to do even half a marathon), is just to focus in on the type of mistakes that companies and executives make in designing and operating competition compliance programs. In this context, mistakes are not simply the opposite of good advice. People actually do make mistakes.

In terms of mistakes in the design of programs, the first mistake is that they often forget about the culture of the particular organization. A good compliance program has to be from the inside-in. Not from the outside-in. Not, as in a cookery program on television "this is one we prepared earlier at gas-mark six and you're the thirteenth multinational to get it from us." It's got to be inside-in. It's got to recognize the culture of the organization.

Secondly, there must be management commitment. And that management commitment has to remain there all the time - not just when the program is being rolled out. As was said earlier, particularly if someone has acquired the business and they spot things, that's a great moment to find if there's a competition problem. Two years, three years on, it's not so easy for the new manager, who is now an incumbent to actually recognize it or to admit it.

Other mistakes that are made in the design of programs is that lawyers, have a great tendency to metaphorically go back to law school and produce something which they think would get top marks from their law professor. A compliance program or manual should not be a law book. Most of our clients don't read law books and they don't want to read them either. And you've got to use examples and ideas that really hammer the message home. Don't overestimate the knowledge of law and, particularly, don't overestimate the knowledge of competition law. Some of the concepts of competition law are absolutely alien to non-lawyers. And if you think about the example you just mentioned at the very end of the last session about being told, about collusion, a very simple example was before the Euro was introduced, the European Commissioner for Internal Markets and Financial Services told banks to cooperate to actually introduce the Euro in a smooth and orderly manner. Sometime later, the European Commissioner for Competition in the next European Commission ordered dawn raids on the

banks for allegedly cooperating illegally. The second Commissioner was Mario Monti, when he was Competition Commissioner. The first Commissioner was also Mario Monti but when he was the Financial Services Commissioner.

Another mistake in competition compliance programs is not customizing them sufficiently.

Many manuals read like textbooks. Do lay clients really need to know section and article numbers?

Many manuals refer to huge fines and long prison sentences. But is it realistic enough to be convincing? Refer to things which are relevant and relatable. Down to earth examples that would be relevant to that particular division of that particular company are more potent. Make the program relevant: are they dominant? Are they participating in many trade associations?

Use user-friendly technology. Some companies are now using video games because the culture and the demographics in the organization will use video games. Other organizations use a lot of apps, and it sounds great, but in a dawn raid, the first thing the agency officials will ask for is the mobile phone or PDA of the employees, so apps may not be useful at all in such circumstances. Paper is very good in that regard. And then finally, keep the messages very simple. The way I tend to design these programs is if it was, say Clough PLC we were talking to – then the first slide is “Clough PLC will never breach competition law. . . unless *you* do first,” because first an individual has to breach the rules before the company breaches it.

Other mistakes are that some people treat compliance programs like puppies - they're for Christmas but they're actually for life. You know - they get a compliance program, but they never roll it out time and time again.

Compliance personnel going native is also a problem.

The product mix and the markets change within companies and the compliance programs need to change.

Keep a very close eye on fashionable topics. My point earlier about price signaling is in, it's fashion - this season's fashion or whatever it might be you've got to keep changing it in that way.

Keep a very close eye in terms of talking with your HR people. If you've got some new recruit who, this is his third company in this same sector, they need special training. They need to be taken aside very carefully.

Just again, in terms of operating, near misses have to be recorded and the learnings learned.

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Junior staff are extremely important because they are either naïve enough or innocent enough to be able to actually identify issues and put their hand up – is this right?

If you've responsibility for compliance programs, then one of your most important tasks is to keep attending "going-away" or "farewell" parties. At going-away parties, people tell you things that they wouldn't otherwise tell you.

I have no qualifications in anthropology and no scientific basis for what I'm about to say Chairman, but I think it's important. I think in terms of operating compliance programs you've got to profile and risk profile people. And the people that I think are most likely to cause a problem are male; they've been in the industry for several years; they have worked typically for more than one employer in the sector; they are broadly bored with what they do; they have got to the highest point that they are likely to reach in the organization; they want as quiet a life as possible; they are networkers; they are very heavy users of mobile phones; and they are extraordinarily heavy users of exclamation marks [laughter]. One of our search terms is exclamation marks in all cartel investigations. Be careful when you search terms because you will search terms for the correct spelling. Very often they're not great spellers, either. They are hugely interested in analogies such as, "it's a game of two halves," "the ball is in your court," "we're all on one team," "I've seen this before," "I know Spencer, I'll talk to Spencer, and he's great friends with Philip and together we'll get this over the line." But I'll leave you with two other thoughts. They've had fundamental problems with their mothers [laughter], and again I have no scientific basis for this, but I believe that most of them are Manchester United fans [laughter]. So, look at the mistakes, the way that programs are designed, look at the way they are operated, eventually you'll learn a lot from that. But a company without compliance programs is like an airline without a safety record or safety program. And apologies to Manchester United.

Tihamér Tóth

So before opening the floor, could I first ask Anne to comment?

Anne Riley

I agree with everything, almost. But let's use program to mean "really good compliance efforts." Shorthand. I completely agree that compliance efforts have to be risk-based. There is no point, whether as an external advisor or internal advisor, going in to a company and talking esoterically about stuff that doesn't matter. The subject has to really matter to the audience: if it matters to them, it will be translated into culture. So, the starting point is that it's risk-based, completely agree, loved your profile. I have been saying through ICC – ICC has been doing quite a lot of work in terms of behavioral drivers of compliance and non-compliance, because a lot of people who don't comply are either sociopaths or psychopaths or some sort of criminal. Generalization, but true. And all male – I've only tracked down a few female cartelists: I think in the Fine Art Auction cartel of the early 1990's. There may be more female cartelists. . .but not very many.

I think that a lot of people in academia and in the authorities talk about this calculation of cost-benefit. In fact, most people engaged in cartels operate from ego. Usually they've not got very advanced in career terms in the company when they hit middle age, and they think they should have gotten a lot further. Reality check guys – you're not going to go further. So, they say, "I'm going to do what I want to do," you know what Vincent said is absolutely spot on. But I believe I've never seen it in my own company.

Tihamér Tóth

Thanks Anne. Zoltán, I see you are the first commentator.

Zoltán Hegymegi-Barakonyi

Yes, thank you very much. I apologize that I have to leave early to hold a compliance training at a client today. But before going, I would like to tell you how much I agree with everything that was said about what compliance is about: it's not a program or a process, but a behavior. I think it starts with the program and process, but it will be a genuine compliance, that we were talking about in the first session if it is an organizational behavior. I also agree with what you said about the commitment of management and I would like to comment on that. Behavior, culture, commitment-these are nice words, but what do they really mean at a company? Everybody knows how important the voice, the tone from

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the top is. Every compliance training starts with an introduction from the CEO, but sometimes that's where encouragement from management ends. And I would like to tell you a provoking and maybe shocking example. In one of my cases, where the infringers were lower level sales people, we had a discussion about the defense strategy with the client internally where at one point the company's executives said: "well, maybe it's our fault, because we were pushing them into that by setting too ambitious sales targets." So, it says a lot about management commitment. Competition compliance is not a separate thing, it is part of the company's business, including setting reasonable sales plans for employees. The employees walk into an entertaining compliance training in the morning but when it's over they go to the next business planning meeting in the afternoon where there is a totally different communication from management to them. So, companies should always think in a broader sense: where are they putting their people at risk? And basically, the company should not just explain to them what is expected from them, but management should also help them in their everyday work to comply. I'm not saying they should forget about profit and a company should become a non-profit organization. But at the same time, management should realize when they put their employees in a situation where they are forced to cartel with others, because maybe they just cannot meet the annual business plan otherwise. And it takes us to a point of company incentives, e.g. the bonus programs. The bonus program usually is about financial results. Employees don't get a bonus for being compliant with competition laws and their supervisors are not saying to them how good that last year was because they didn't do anything wrong. But maybe, at a big retailer somebody should look at a buyer-employee's emails and say, "that guy applied the pushback language in reply to suppliers' unlawful requests ten times during last year." Maybe he should get a handshake or bonus for that because when the pushback language is not used properly, then the company could be in big trouble in a potential investigation. So, it's just a question, and I don't want to say that I know the answer, but I think businesses should think about compliance in a broader context. Thank you.

Tihamér Tóth

Thanks, Zoltán for further encouraging the discussion. And now that you're leaving [laughter], you leave us here with your

great questions. You should read the minutes later to see how our experts responded. Okay thanks. Now, Max is next.

Max Huffman

So, Anne, tremendous comments, both content-filled and engaging. There is a point you make in the draft and you make it also in your comments, which is the concern for your brand, concern for your reputation. It is important that a company feels that concern and can then be encouraged to preserve that through compliance.

It seems to me, maybe I am an unfair skeptic, I wonder how real that is. Take for one outside of the cartel context, right so we will separate those two out. If the firm is not in the context of being prosecuted criminally, under aggressive per se rules, it seems to me that there is a real ambiguity about whether conduct is or raises the kind of social shaming that we might think it would. The example that keeps coming to mind - every time teach *Microsoft* in front of my Antitrust class and the students always side with Microsoft. And I say this is a serial violator of antitrust laws and they've been held on appeal to be so, and to say nothing of what's happened to them in Europe, and yet the students just say, "well, they are just very successful." And so, you have this question, if you're engaged in criminal activity, can you really rely on the desire for preserving your brand, even in the cartel context, I still wonder, and this is pure conjecture on my part, although we have antitrust systems in every developed country, around the globe we continue to have dramatic differences in how we view the economy or who the economy is supposed benefit. If you think of the economy as benefitting labor interests, you're much less inclined to be offended by a cartel, than if you think of the economy as benefitting consumer interests, for example. And so, I am actually curious about some of the commentary from our last discussion on our last panel. The transition in Hungary from "you're supposed to work together" to "you're supposed to compete." And that transition reflects exactly the problem of, if someone still thinks that you're supposed to be working together, how can it be a social shaming phenomenon? And that would undermine a compliance goal.

Tihamér Tóth

Thanks Max. Our next speaker is Ted.

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Edward Janger

I really, really enjoyed both presentations because I think they capture something that is really fundamentally hard about compliance - forcing individuals to get outside themselves to think, (1) about the interest of the firm, instead of the individual, and (2) to more broadly conceive of the firm as an actor within society. This is not a natural thing that is taught in business school, nor is it taught in law school. I've been on a bit of a tear about this lately. At least at Brooklyn, since Spencer left, there's been a hole in the curriculum. He's been gone so long that we don't even realize there's a hole in the way we think about teaching business law. We teach disclosure and accountability. We do not, however, talk about the reasons for legal intervention in the market. The same is true in the academy generally. Since 1980, antitrust has been on the decline, and it has utterly vanished from our political discourse. As a result, we end up with a real estate magnate revealing to the world what the business culture of the real estate industry looks like.

And this brings me to the second point, which is, culture matters. A marathon analogy . . . [laughter]. Sports differ, okay, the dynamic in the lead pack of a running race is different from the dynamic of a breakaway in a bicycle race. These, in turn, are different from the dynamics in a non-draft legal triathlon. The enforcement mechanisms are different too. Now, what's the difference between running and bicycling? Wind. And how much advantage you get from being out of the wind. In a running pack, it's relatively minimal, but on a bicycle, it is huge.

This explains why in the Dublin Marathon, as I was hitting the wall, when Philip came up from behind me, we stayed together for a while, enjoying the camaraderie, and the not insubstantial but relatively weak, benefits of cooperation. And then I became tired and Philip said, "come along" and I weighed the benefit of cooperation and pain I let him go and he weighed the benefit of cooperation and being slower and he carried on up the hill [laughter]. That was fine, that was within the norms of cooperation within the event, and all was good.

Whereas in a bicycle race - well never mind - so you get the point there. Everyone knew, in the American securities industry, that some firms had crappy compliance cultures. Right? These things are known. I could name law firms that have good corporate cultures and law firms that have bad corporate cultures and I could probably tell you, on a micro-level, why. But how did these

firms get from the “I” to the “we”? That actually requires you to flip from individual blaming to collective norms. What does it mean to sort of create a “woke” culture within your corporation? It doesn’t mean that you call someone a racist or a harasser or a tort-feasor. What you say is “you are a good person, and this is what it means to be a good person.” And that’s a fundamental shift from the enforcement mindset to the compliance mindset.

Anne Riley

Do you mind if I respond? Because – yay! I completely agree. It is, I’ll answer you in a minute Max, if I may, sorry Vincent, I beg your pardon. It is a “values, behavior, conduct” mindset. We are moving away from talking about compliance *programs*, to talking about ethics and values, and I think that’s what companies should be encouraged to embrace is the question: “what is your corporate value?” Every company, whether they like to admit it or not, have corporate values. Ours are really simple – honesty, integrity, respect for people. And those are our corporate values. And when you go to speak with anybody within my company, within ICC, and you say honesty, integrity, and respect for people – they go, “I believe in that.” Because, how can you not believe in honesty, integrity, and respect for people? What we do is we use those values to help each other – and it’s like our safety culture – if somebody is doing something unsafe we intervene because we care about that person. And so, if you’re doing something non-compliant we intervene because we care about you and we care about our company. And if you can get companies thinking in that way, embracing ethics rather than “a compliance program,” then you’re really moving towards what we need to do. So yep – totally agree.

Tihamér Tóth

Now, Spencer, you were named in Ted’s comments, maybe that’s why you want to react.

Spencer Waller

So, there’s a vigorous conversation on Twitter about what hipster antitrust, #hipsterantitrust. But now I realize that what we’re doing is #wokeantitrust, which is just awesome, and I’ll eventually work that into the conversation. I have really just three short points. One is, sorry somebody mentioned the Tour De

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France, and this is one of my triggers in life. The Tour De France is a walking cartel antitrust violation and I use it every year as an example for my students. Teams should cooperate with each other. That's the reason they're a team – they could be a firm, but in this case, they're BMC or Sky or whomever. It's great and you take your leader out and you race hard in front of them so they can draft behind you. Then you run out of steam the next person pulls the leader forward until he or she, depending on the race, poops out and then so on. And that's great – that's exactly what you're supposed to do. The domestique goes back and picks up the feedbag to give to the leader and puts him in the best position to win the stage or more importantly to win the overall classification. Now, that is only part of what happens. There is a tradition where competing teams will draft for each other – so be it. I would call that a rule of reason issue. But then there are these things that I think, again the culture of the Tour promotes things that if it were in a commercial context we'd all be horrified. And be having conversations about whether we would support a leniency application. One of them is, from the past tour there was a vigorous debate, when one of the leaders had some kind of mechanical problem, whether the other teams were supposed to wait for him or not? Again, the culture is they're supposed to, and the person who chose to compete was chastised socially. So, I think it's one of the clearest examples of when a culture promotes something that in a purely commercial context would be anticompetitive in the extreme.

Now my other short comment, goes to what Anne was talking about and bravo, here here, we need to focus not just on lawyers, but we need to focus on business schools and business professors, because the language of law is completely different from the language of business. I've written a couple of things about it, and one of the basic tenets of American business schools at the elite and just general level - I can't speak outside of the United States - is that the entire body of strategy and management within business school is premised on the idea that a sustainable long-term competitive advantage can be generated through certain techniques. And some of them involve teaching the value of monopoly and some of them involve the value of disciplining your competitors so they behave well. And they distinguish between good competitors who stay in their lane, and bad competitors that disrupt established sort of premium versus mid-level versus commodities. And on top of that there's a separate conversation where you want to learn about market power, and they'll teach you how to create a brand for which there is no reasonably effective substitute, and

very little of that gets into the law, or law and economics literature that Antitrust people look at. It's a long way of saying bravo., I'm not saying who is right and who is wrong, but I'm just saying the way they talk about this stuff, doesn't surprise me that people come out of business school and sometimes act badly if they're not then disciplined by the culture of the places where they end up.

Last thing, I agree about how to treat people well and how to create a culture of compliance based on positive rather than purely negative messaging. But it also set me thinking about whether the family metaphor will ultimately be pro- or anti- compliance, because if you really view the company as your family, you may be less likely to throw your brother or sister under the bus when the time comes [laughter].

Tihamér Tóth

I see we have two Marks waiting in the line. Can I start with Márk Erdélyi as the first intervener?

Márk Erdélyi¹

Thank you. I am Márk Erdélyi, Legal Head of a mobile network operator company in Hungary. I am presenting my views and not my companies'. Thanks to the speakers for bringing us back to the ground. After the first session I was wondering what the reaction of an average business manager to this conversation would be. What would he or she have understood from our discussion? I fully agree that the rules are very abstract and complex, and there is an aim from business to comply with them, but business people might not know the rules or if they know the major ones, perhaps they do not know the details. Thus, I agree that we need to raise awareness. But besides that, what is our responsibility when we are creating such complex rules, which are very hard for people to understand? And I am not talking about antitrust only, but I see it in many other fields, e.g., GDPR is coming and people are turning to me saying: "please translate this to us, give a specification of what we need to deliver to comply," and you are faced with such abstract rules which you cannot simply transform to business requirements. It is a much harder journey. However, this is the world we live in, since the world became much more complex

¹ Telenor Magyarország Ltd.

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than ever before, hence you are back to the original point: your major job is to promote awareness. Having a compliance program will not solve your challenges, you will be faced with a lot of difficulties. If you release an e-learning and it is not made interesting, then people will not care even though it is mandatory. If you manage to do an interesting e-learning, 80% of the people will fulfil it, but the rest, 20%, you need probably the 80% of the energy spent to finish the course. Let me tell you another example. We organize legal trainings to be interactive, with videos also – it seems pictures and movies are much more interesting than people speaking – and we filmed some scenes from business life showing good and bad examples. After the video we could discuss in the training the learnings. One short movie was about a prospective enterprise customer who meets our business sales and the customer tells us that he is bound by a contract with a competitor and asks us to look into the contract and help him get out of it. This example was very clear, and of course the business sales shall immediately refuse such an attempt. Everyone agreed to this at the training. And what happens? Two weeks later someone from the business calls me, and says “can you give us a lawyer who could meet the customer who would show its contract with a competitor and needs help how to get out of the contract?” I was quite shocked because the one who asked was sitting in the front rows in the training. My point is that even having such awareness campaigns, it might happen that there are a few people who do not get the message. You can only hope that 99% got the message and the 1% who did not is not making any trouble. You can have the best compliance program, you can do the utmost, but there will always be people who will not follow. And will any authorities care if only one did not follow? Of course, it does not release your responsibility. Thus, you have no other choice, but you shall do everything in your sphere of interest that you can do. This could mean to go beyond your own company in raising awareness. For instance, we see huge gap here in Hungary in the level of legal awareness of small-medium companies versus big companies. While the large corporates usually know the law and have the resources to deal with them, small companies have less focus on this. When we would like to contract the SME-s we find that they don’t have a code of conduct, they don’t have anti-bribery rules at all. We realized that the best we can do is to develop template code of conduct, anti-corruption policy, which the SME-s can adopt for themselves. Right now, we are drafting a sample antitrust policy for the same reason, giving them

at least a first step possibility and we try to encourage them to implement it. In my belief it is important to deal with not just internal awareness but external, in your sphere of interest. It might be that some companies just adopt these templates to get a contract with us, but I hope they are not in majority. All in all, when we look into a company in breach we should evaluate their compliance culture and programs, and what the company really did to promote this culture.

Tihamér Tóth

Thank you Márk. Now Mark Clough, and then Phil and Vincent is the order of appearance.

Mark Clough

Thank you, Tihamér. I better say something quickly, while perhaps I'm repeating something that the previous Márk has just said. But I thought Ted brought the debate back to where Anne I think has put the emphasis on competition compliance being good corporate governance. And that's a different approach to one of penalties deterrence and how to avoid that. And I just wonder again with all the benefit of the authorities here around this table, can the authorities see how they would change their culture to work with business to encourage corporate governance and without losing their role as the enforcement and deterrent agency, to actually encourage companies to work with them, that's with the agencies, to demonstrate how this change in culture would operate?

Tihamér Tóth

Thank you. Phil?

Philip Marsden

So, just a couple of words about competition authorities who appear to be employing novel theories of harm. And the expectations, rightly of businesses of how were they supposed to know this new theory of harm until somebody else had been caught or whatever. Well, first I am very concerned about some novel theories of harm that I've seen out there. I hear a lot of offenses based on fairness which probably are more akin to consumer protection

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offenses rather than antitrust offenses. So, there are novel theories of harm out there, which are questionable. And there are theories of harm that look novel and that aren't. And that are what I like to call as a result of business practices evolving - high-tech markets, new ways of doing business, price-signaling has been mentioned, where the authorities theory of harm is actually a very simple, easy exploitative or exclusionary theory of harm, and I say to my case teams, if you book a three day, teach-in with us as decision makers, to explain [to] us your theory of harm, it's probably new, novel and it's probably not an object - what we call in Antitrust an object or per se offense. You better be running an effects case. The theory of harm should be able to be explained in a paragraph if it's going to be an object offense, it's supposed to be obvious, inherently on its face, offense. But you see these sort of evolving theories of harm, or theories of harm that are explaining new business practices in different ways, in both cases, if it's this inappropriately novel theory of harm I mentioned earlier or if it's the, what I call, old wine in new bottles, those business practices coming in in a new way, and we apply it to an original theory of harm, and there's the same obligation on the authorities, as Anne said earlier, which is, simple messages are the best. I agree with her that fun messages are the best, but competition authorities don't have a lot of fun. Except for the first sixty seconds of a dawn raid, a lot of fun. After that, no fun at all. [Laughter]. But scaring receptionists, yeah, a lot of fun. [Laughter]. So, keeping it simple, writing it up. But especially when we do our non-grounds for action decisions, when we close cases down, writing it up really clearly if we can. I always say we are shutting down a case, let's give several examples of where safe is, why this is not an infringement, that way, advisors in business can say, "that's where safe is." It may not necessarily be binding on all companies, it's only binding on the parties, or when we do commitments or settlements, we say, that's where safe is. And that helps pro-competitive business. Equally when we're showing an infringement, under a sort of new theory, we've got to write it up really clearly, so businesses can say, "okay, I can now understand what it is, I will now take you to the courts and fight that all the way," but other businesses can say "okay, now we know, whether or not to invest in that jurisdiction, if it's going to have that theory of harm." So, it's about simplicity, if you're trying to change behavior, the simple messages are the best.

Tihamér Tóth

Thanks, Vincent?

Vincent Power

I agree entirely with Philip and just to say in regard to dawn raids, your first sixty seconds are fun, my first sixty seconds are also fun. It's the moment when I put my underpants on outside my trousers, put an "S" on my chest, a cape on my back, and I fly through the air to the business [laughter]. And while we also advise clients, particularly in multi-day dawn raids, one has to be really careful of the Stockholm syndrome. They really begin to like each other. After the second day they're giving restaurant recommendations, the third-day is, "would you like to come home for a meal? The family will feed you at home." In terms of very quick observations, because the discussion has been absolutely fascinating, quick observations, one about knowledge. It is, it may be obvious to people who live in this world, but to real people, it's not so obvious. Now, we should never feel that the more knowledge we give we will eliminate breaches in competition law. People know murder is wrong, and there is still going to be murder. The point is you identify, and you give people an instinctive feeling. What you do is you don't teach them cardiology, you give them a sense of look – if there is a pain across my checks and something down my arm, I better go and talk to Anne. That's what I do. So, knowledge is important. Secondly, I think in this compliance environment, I think companies should put a mirror to themselves. If Fred is in the post room and is taking out \$10 out of every envelope once a month for the last two years, if it's easier to fire Fred for taking \$10, but not to fire Fred in the boardroom for taking \$10 million, then you do have an issue. Thirdly, I think that it's right to talk about corporate governance and it's absolutely right to talk about corporate reputation. But think about the difference between a politician who thinks about the next election and a statesperson who thinks about the next generation. And at the end of the day a lot of people do think about the bonus they are getting or the quiet life, or whatever it is. Fourthly, I would say that in culture I would say it is very important to design, whatever we call it to match that culture, but cultures change. New CEO, they've had an issue or whatever it might be, but cultures really do change. Fifthly, I think in regard to presentation, a lot of people have been talking about, sort of go-

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ing, talking to the presentation. That's really useful and very important, but the really important thing is actually when the company you are undertaking starts complaining about the compliance program. That's really useful. It's a really interesting sign. It's like a canary in the coal mine. If they are complaining that they have to comply with it and the others in the industry aren't - then that's interesting. If they don't complain, because it's something everyone else does, sheep dipping and that's fine, that's interesting. And then it's taken to the management meetings where people can tell you what their competitors are doing, to two places of decimal, and six months ahead, then you know you have an issue. And the final thing I would say is that perhaps, when you can't raise the Titanic, you have to lower the Atlantic. And in the process of doing these things, we go out and teach people the Ten Commandments of don't do this, don't do that, whatever. What you can get their attention with, is if you go in there and say, look I can give you a new management tool, for competitive advantage. There are trade associations out there that you want to actually break down. There are sort of people overcharging you at input costs, and so on. So, you're using competition law for competitive advantage. Now you're indirectly telling them the same rules, but they're now getting it in a way where they feel that they can actually run downhill rather than run uphill, if you know what I mean. So, there you are.

Tihamér Tóth

Thank you, Vincent. Anne, you had the first words, do you want to have the last words in this session as well?

Anne Riley

Thank you. I will answer Max if I may first, which is I agree. I think unilateral conduct is very difficult. And very difficult to explain. Particularly in innovation markets. Luckily, in my industry, we're in an extremely fragmented and highly competitive market so dominance and unilateral conduct is not a problem we have. I really empathize with you, but don't know the answer I think actually having people say, "okay I may have to go to the training, but what I really want to know is the answer to X, Y, and Z" - that's why I am moving away from calling educating staff "training." I call it an ethical dialogue. If you can have a dialogue, and particularly a dialogue that's led by leaders about ethics with the leaders leading the dialogue and have folks talking to each

other about it, I think that's where you get a real change in culture, and that's what you want to achieve. It's all part of the values and the ethics that we really want to achieve. And that's why I think we should focus really on good behavior.

Tihamér Tóth

Thank you, Anne. Thank you to all. I really enjoyed this fascinating discussion. And I hope that we can continue it over the lunch break. So now let's break for lunch which will be for about an hour or so. And the lunch will be served here. So, see you soon. (Applause).