

# Loyola Consumer Law Review

---

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

---

Article 9

2018

## Transcript: Competition Law Compliance and Leniency

Mark Clough

Follow this and additional works at: <https://lawcommons.luc.edu/lclr>



Part of the [Consumer Protection Law Commons](#)

---

### Recommended Citation

Mark Clough *Transcript: Competition Law Compliance and Leniency*, 30 Loy. Consumer L. Rev. 186 (2018).

Available at: <https://lawcommons.luc.edu/lclr/vol30/iss2/9>

This Feature Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized editor of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

## TRANSCRIPT: COMPETITION LAW COMPLIANCE AND LENIENCY

*Panel Speaker: Mark Clough\**

### Spencer Waller

Our third panel really digs into an issue that has been hinted at but not yet been a deep dive, which is the relationship between compliance programs and leniency. This issue has been lurking in the shadows for the morning discussion. I'm going to turn it over to our speaker Mark Clough from Dentons. Csongor Nagy will be the commentator and then we open for full discussion. Welcome back everybody.

### Mark Clough

Thank you very much. I seem to have done the opposite of most of the other speakers in that my paper raises the questions and doesn't give you the answers. So, I hope that the people around this table including my learned commentator may have a go at answering the questions.

The main focus that I want to have in my 10-minute presentation is on the proposal for a directive of the European Parliament and the Council to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market. The directive was proposed by the European Commission on the 22nd of March 2017.

Chapter 6 deals with leniency and my main theme is the same as the Commission's announced theme which is that companies will only come clean about secret cartels in which they have participated if they have sufficient legal certainty about whether they will benefit from immunity from fines. Chapter 6 is intended to increase the legal certainty for companies that wish to apply for leniency and to maintain their incentives to cooperate with the

---

\* Dentons Europe LLP.

2018

*Transcript: Third Panel*

187

commission and the 28 national competition authorities in the EU, though not all 28 have leniency programs.

The purpose is to reduce the current differences between the leniency programs applicable in the member states. And to achieve this the proposal transposes the main principles of the European competition network model leniency program into law; makes it legally obligatory. Ensuring in that way that all the national competition authorities can grant immunity and reduction from fines and accept what it calls summary applications under the same conditions.

Summary applications are applications to a national competition authority at the same time or after an application to the European Commission DG competition. Apparently in the public consultation prior to this proposal, 61% of the stake holders which I presume to include some of you, found the lack of implementation of the European competition network model leniency program by member states to be a problem, 61%.

There are some specific aspects of this section, Article 16 to 22, which I just want to highlight before I turn to the questions in a bit more detail. This section of the proposal, chapter 6, is intended to ensure that the applicant for leniency will have the benefit of 5 working days to file these summary applications and it clarifies that it should not be confronted with parallel resource intensive requests from national competition authorities while the commission is investigating the application of the case. Once the European Commission has decided not to act on a case, summary applicants should then have the opportunity to submit full leniency applications to the relevant national competition authority.

The chapter also ensures, and this is a new, and very important, development, that employees and directors of companies that file for immunity are protected from individual sanctions and personal sanctions where they exist, provided they cooperate with the authorities. This is said to be important in order to maintain incentives for companies to apply for leniency because their leniency applications often depend on their employees cooperating fully without fear of incurring sanctions.

And then there is another little add-on, which again is very important - this is the last of the three new aspects of chapter 6 of the proposed new directive. Individuals who have knowledge of the existence or functioning of a cartel or other types of other anti-trust violations should be encouraged to provide that information. For example, through the establishment of reliable and confidential reporting channels. To that end, many national competition

authorities have in place or are considering the introduction of effective means to protect individuals who report or disclose information about violations of EU competition law from retaliation. For example, protection from disciplinary measures by their employers.

The Commission has, for example, introduced its own anonymous whistle blower regime for competition cases on the 16 of March 2017. The Commission underlined the importance of the protection of whistle blowers and is looking into the possibility of further action at EU level. Well, as Philip Marsden will tell you the U.K. has already done it. Maybe he can tell us more about whistleblowing. So that's what this new section of this proposed directive is about.

If you look at the questionnaire that I drafted, you'll see that I raise a number of questions. First of all, the definition of leniency and you may want to discuss what I say about the possible extension to civil liability, to give immunity from civil damages claims. In other words, is it enough just to give immunity from fines when we now have the European Commission recognizing that it's necessary to give immunity from prosecution if criminal liability is at stake. Again, is that necessary in every jurisdiction in the world? So that's the first two questions.

Then my question of legal certainty, which what I wish to say a couple of things about, before I hand over to my commentator.

In question three and question five, you will see the question is who can prove they are first in line? How can greater legal certainty be established with the use of marker systems and the evidence test applied in leniency programs? For example, by the European commission.

Again, in five, how can ECN best practice guidelines be improved which obviously includes Articles 16-22 of the proposed directive. Is that section in the Commission's proposals sufficient to ensure uniform marker systems and common standards of evidence in the member states of the EU? I have deliberately attached as an annex those articles 16-22; just let me deal with that before I come back to the final international aspect.

In the ECN guidelines, which are not totally verbatim set out in these articles I want to illustrate what I mean about lack of legal certainty. It seems to me still that maybe it's impossible to rectify this, but it will be interesting to hear what people think. First of all, in immunity from fines under type 1A the national

2018

*Transcript: Third Panel*

189

competition authority is said to give immunity provided the undertaking is the first to submit evidence. That is first in the competition authorities view, which is subjective, and I don't know how it is applied in practice. It goes onto say that this is decided at the time it evaluates the application, again that sounds to me fairly unpredictable. So, I have two problems, subjectivity and unpredictability.

In the next paragraph, 5B, we have an example of precision in the words the competition authority did not at the time of the application, and we know when the application was made so we know at what time they are looking. At that time, they have to be satisfied that they already have sufficient evidence to adopt an inspection decision or seek a court warrant for an inspection.

We then have similar examples under type 1B immunity, if you remember type 1A is where the competition authority hasn't really done anything at all, got no evidence. Type 1B is where it may have some evidence but not sufficient to actually make a decision finding a cartel exists. And here we have again the same sort of language in paragraph 7A - the undertaking is the first to submit evidence, which in the competition authority's view, subjective, enables the finding of infringement of the competition rules. And B, the competition authority did not have sufficient evidence. Well, we know what is supposed to be included in an application in terms of the outline and there is even a template from the ECN guidelines. But, again with the test that the competition authority did not have sufficient evidence, there's no real hard and fast guidance as to what that means.

For Type 2 leniency, we have similar examples in paragraph 10. In order to qualify for reduction of fines an undertaking must provide the CA with evidence of the alleged cartel which in the competition authority's view represents significant added value relative to the evidence already in the competition authority's possession at the time of the application. Well again, that is unpredictable. It does actually go on to give a definition of some sort, the concept of significant added value refers to the extent to which the evidence provided strengthens by its very nature and or it's level of detail the competition authority's ability to prove the alleged cartel. There are a few more examples of where in my view the competition authority has a very wide discretion. We know the ECN guidelines approve a very wide discretion. The question is how wide that discretion should be and how subjective to judicial control and checking it should be.

So finally, in just one minute I just want to draw your attention to the last three questions on my questionnaire which should be six, seven and eight. They are effectively asking whether the ICN best practice model leniency program can be improved. It's a very good description of different leniency programs; but it probably needs to be updated, especially in light of the new ECN European Commission exercise.

Again, as we have an international panel here, what are the lessons that can be learned from each jurisdiction, the U.S., Canada, Japan, Korea, Australia, Brazil, Russia, China and South Africa? Finally, does the ECN and/or the ICN model leniency program actually encourage competition compliance? Which is where the link to our debate comes in. Here one might like to ask: does the availability of immunity of fines really make any difference? Now I'm being a little bit cynical when I say companies can pass on fines to the consumer through their pricing policy. Well, they can in some circumstances, or indeed by reducing their dividend payments to their shareholders. You may not agree.

And again, if we do not have sufficiently coherent leniency programs with sufficient legal certainty, giving guarantees as to what will happen in certain circumstances, is it not likely that secret cartels will remain undisclosed? I've already asked the question this morning whether a system with a legal requirement for companies to report cartel behavior actually is a better solution that should be focused on everywhere. As it appears to be the case in the U.S. and in the financial services sector, supposedly, in the U.K. Thank-you.

Csongor István Nagy<sup>1</sup>

Thank you very much for the floor. Yeah, my first thought when I'm reading something on leniency, the first thing that comes to my mind is an anecdote. I heard it in a documentary and I would like to start with this. The documentary was about the Cosa Nostra, the mob, or one of the families in New York. And one particular part of the documentary dealt with the son of a "made-man," a mafia member. He was interviewed about his life and how his life was going and what it was like to be the son of a made-man. He said that one day he went home and reported to his father excellent news. He said, "daddy I am very much respected in class," he was

---

<sup>1</sup> Professor of Law, University of Szeged; Research Chair, Hungarian Academy of Sciences.

about seven or eight years old, “and I was appointed president of the class.” “Whoa, that's great! That's an honor. What are you doing in class?” “Well, in the breaks I'm standing up and if something goes wrong, someone commits something then I'm reporting this to the teacher.” His father became furious and said “okay, now you go back and tell the director that you will not be the president of the class.” “Daddy, why?” “Because my son will not be a rat.” So, culture is very important. In leniency there are a lot of regulatory questions, but culture is very, very important and I would like to add that to the list of issues. Especially because I come from a region and I mean not only Hungary, but also Romania, the Czech Republic, Slovakia, Poland, and also the Mediterranean region, where leniency policy doesn't really work. It doesn't work in the same way and it's not as effective as in other parts of the European Union. There are significant cultural hurdles and I think this is the reason that, for instance, in this country the number of the leniency applications per year is between zero and three, zero and two. It's a small country but still these numbers are not truly promising.

There are a lot of reasons why culture matters: you see what others do, you can expect them not to submit a leniency application. You take the long-term effects of your corporation into account. Sometimes it's better to get a hit than to trade your reputation for being a reliable business partner. It's better to, if I may use this Cosa Nostra metaphor, it's better to go to jail for two years than to lose your honor: a successful leniency application may be much more harmful in the long run than the fine in the short run. That's pure business and pure economics.

I'm following up on what Maciej said in the first session, you said that when deciding whether to submit a leniency application, enterprises take into account the chance or the risk of detection. I think that was very telling because what you should take into account is the risk of detection and the chance that your fellows reach out to the competition office and report this first. But, we don't take into account that part of the story. What's taken into account is that maybe you want to submit a leniency application before an investigation is launched. It's not a particularly significant risk in quite a few sectors that your fellows would submit a leniency application. The Hungarian Competition Office has done immense work to find out what could be done. It dealt with legal protection, protection against competition fines, sanctions, criminal liability, debarment from public procurement, damages; I mean, this is one part of the picture. But, actually the core issue is the cultural environment. Can we overcome this? Or should we

yield and accept that we have to live with this and content ourselves with the few leniency applications we get? What comes to my mind is that in competition law we have probably not managed to bridge two things: the company and the individual interests. So, we're always thinking about fines imposed on enterprises; we have criminal liability, but it doesn't truly work in most of the member states: there's no criminalization or if there is, then it applies only to tenders or public procurement cartels. So, it is really only one slice of the whole story. Criminal liability is not truly part of the everyday issues, I would say. Of course, you don't want to live with such risks but it's not a really important field for competition law. Director's disqualification, again it's important but we don't have that in all members states. What we have is not working in practices, employees' liability for the fine the enterprise received. But, in practice, that's very rarely shifted upon employees. First, it's difficult to prove of course, I see that part of the story but on the other hand there might be some other reasons as well why they are not shifted. I think there's some sort of a principal-agent problem. In case of compliance programs and especially in the context of the leniency policy, the relevant question is whether we can overcome the principal-agent problem. Because, the question is whether the employees may internalize the risk and the burden faced by the company. Whether we may overcome the problem emerging from the fact that you become risk-neutral once the story is not about you, it's about the company.

It is said that from the perspective of risk-taking there are three groups: risk averse, risk neutral and risk loving people. Most people, in fact the vast majority of people, are risk averse. You are risk averse when it's about your stakes. Once it's about the company, people have the ability to become risk neutral and it is said that they take it into account there. The benefits, the advantages, the risks, the drawbacks and they make an assessment, and of course they are doing this instead of the company. But if it were your fate, if it were about you, if you risked going to jail or getting disqualified, you would be very risk adverse. I think the fact that we cannot shift the burden of the company to employees explains the lack of impact. Actually, I think, in this part of the world, employees are really risking something if they submit or they take part in submitting a leniency application. Also, in the Mediterranean region where business is more personal, being part of a submission of a leniency application means that you are impairing your personal reputation. Now the question is, "should I impair my own reputation to save some money for the company? Or to create the



2018

*Transcript: Third Panel*

193

chance for the company to save some money because you know that the fine is not on the table, it's just a risk. Should I impair my own reputation?" I think this is the cost-benefit analysis of the individual when you are a director in a company and you have to decide whether to impair your reputation for saving some money for the company. Thanks a lot.

### Spencer Waller

The queue is open. While people gather their thoughts, I just want to throw one more thing on the table. We touched on it this morning, a tiny bit. The success of a leniency program is inherently linked to the credible prospect that agencies will identify and prosecute successfully, criminally or civilly, cartel behavior even if there's not a leniency program in place. Because, no one rationally will take advantage of a leniency program unless they have some fear that they are going to be detected, in the absence of self-reporting of some kind. And that's a very serious issue. I think the agencies have become over reliant on leniency programs in different ways. As we made analogies to other areas of the law, let me suggest tax and securities regulation and organized crime, besides antitrust, I did organized crime prosecution, I've run the leniency program idea by my colleges that used to work in that area of the law and they thought it was kind of funny. They said that's quaint, you sit around and wait for someone to turn themselves in and then you prosecute all the other people. I said how many cases do you think you'd get if you did it that way? And they said none. Whether they are exactly correct or not, again it requires the credible threat of detection some other way in order to create the incentives that are at the core of this thing. So, the floor is open, who would like to chime in on these important things? Maciej? Go ahead.

### Maciej Bernatt

Okay, just following up on the culture question. I think the situation in Poland might be similar to Hungary as we also have very few leniency applications. There were some leniency applications at the time when the competition authority was going after RPM's. This was possible because the Polish leniency problem is quite original, it also covers vertical agreements. There were some leniency applications concerning vertical agreements but later there was a shift in the competition policy and the enforcement against RPM's slowed down. Right now, we have around one or

two leniency applications per year. If you think that Poland is a bigger country than Hungary, the similar number of leniency applications is even worse. I was thinking about culture and maybe we should ask ourselves the question how our students behave. I teach at the University of Warsaw and for my students it's common to cheat. Absolutely a normal thing, to cheat and this is something they are proud of. If they manage to cheat, they are the winners of the game. It's part of Polish culture and I'm not sure about Hungary but my guess would be that this is similar. When I was in the U.S., I could see that cheating is something completely out of students' minds. And probably the other students would report such a fact. So, I feel that this culture affects popularity of leniency. And there is another thing we should understand. For people from former communist countries working with the state was something they didn't like; that was seen as collaboration. As a citizen, you were rather in opposition to what the state was doing. You were working with your friends maybe, but reporting somebody during the communist times—your friend—to police was probably one of the worst things you could have done. So, from this perspective, even if we are twenty-five years after fall of communism, I think it's still in people's mind and this may be the very obvious reason why the leniency policy is not working and why our students are cheating and they are proud of that.

#### Spencer Waller

Mark wanted to respond and then I'll go through the queue.

#### Mark Clough

Longer ago than I'd like to remember, I worked for a member of the first directly elected European parliament and being a good British citizen of course a lot of what happens on the continent is difficult to understand at first. But it was all explained to me and I'm still struggling to be a good Catholic myself. Really, I was advised you have to understand Christianity and Catholicism in order to understand the European Union. This is because as we all know as devout Catholics that Catholicism and indeed Christianity depends on the concepts of repentance and forgiveness. In other words, you don't need to obey the law, you have to repent when you break the law and then you get forgiven. Why the British don't understand this I don't know because having studied English literature at university I ran across a bit of Shakespeare. And all of

2018

*Transcript: Third Panel*

195

Shakespeare's plays are about, sorry all his tragedies are about repentance and forgiveness. And you get the upset of society and when the baddie says sorry, so to speak, and the murderer is dealt with society is restored and you have the forgiveness. So, do not worry, one British person understands you.

### Philip Marsden

My son who's now in his twenties but when he was eight, my son came up to me and said, "um dad I just learned an important lesson" and he said to me, "it's better to beg forgiveness than to ask permission." That worried me a lot.

### Max Huffman

So, I think this is a great topic. And to me there's an intriguing parallel. We spoke this morning about the internal law—about the idea of what's going on inside of an enterprise. And the question of whether a particular compliance approach is something that's generalizable across all industries and we talked about the different cultures between industries and of course we delved into sports in the process. When I think about things like leniency programs, it feels to me like you have the same question but of course at the national level. There seems to be some sense and it really starts with the absorption of competition laws around the globe. But then it's also the absorption of the different ways in which we handle competition laws around the globe. There's some sense that maybe we should all do the same thing the EU has done, or the U.S. has done. Of course, the U.S. invented this leniency project twenty-five years ago. Now the rest of the world has to have a leniency program because it works so well in the U.S. You wonder if that isn't sort of moving too quickly. If, instead, there weren't sort of the cultural, national, regional differences that would suggest that the idea that we can just promulgate some optimal leniency policy and also adopt this thing, is perhaps somewhat naive. I think some of the questions raised by this include, "are there ways we can improve on the policy?" To me the view is, "does it make sense to have one policy that the rest of the world tries to adopt?" Or really are we missing the opportunity to look at the idiosyncrasies of the particular economy or particular jurisdiction? In the same way that we were discussing missing idiosyncrasies in the industry on the firm level, in a different context this morning.

Spencer Waller

Gabor you're next.

Gábor Fejes

Thank you. I was going to make a remark on Mark's point on legal certainty. I think it's immensely important and I think there is still plenty to be done, in terms of compliance of different fields of law in dealing with the intention of the corporation to report wrong doing and hence, as a result, receiving immunity. A lot has been done of course, so as you rightly summarize in the paper and it's also part of the new directive and most of the legal systems at least I'm aware of. There is immunity of fines, there might be immunity for the private person of criminal sanctions, and there are also some rules on making the immunity applicant's life easier in terms of private damages claims. There are a number of fields which we bump into when advising for instance financial regulations. How do we advise a client to come into the competition authority and submit the leniency application, if he has to fear the next day the financial regulator will impose a major fine? Public procurement law may foresee debarment. There is, for instance under Hungarian law, an exemption for the immunity applicant, from under debarment. But in a number of legal systems that does not exist. There is also no immunity under Hungarian law from fines by the public procurement agencies. So, there's a lot of fields where competition authorities and also international organizations could conduct a bit of discussion about this. And also, here in Hungary maybe the GVH could lead an initiative in contacting other (sectoral) regulators and discuss how they would deal with such a case? I mean would people have to fear that after successful immunity application with the GVH, they would have to pay heavy fines with other authorities? In other words, not even on the global but on the domestic level there is I think insufficient coordination and it is still insufficient coordination in terms of different fields of law. And that adds on top of the individual issues of any given case. Hungarian managers are sometimes in the very easy position to convince their mostly American and German shareholders who are very familiar with the concept of leniency and would want to implement it because it's very normal in Germany, in the States or in England. The Hungarian managers tell them: if you look at the particulars of this jurisdiction, we can't do it, we can't afford to

2018

*Transcript: Third Panel*

197

take these risks. So, there is potential for further improvement I think domestically in that sense.

Spencer Waller

Vincent Power, go ahead.

Vincent Power

Thank you. Just if I may make two observations. The first was on Mark's paper which sparked a thought which actually I hadn't thought of before, maybe everybody has thought of this and I'm last to the party. It was interesting in item one of the third indent you said does immunity from fines actually benefit companies when they can pass on the cost of fines to consumers in the form of higher prices or to shareholders in lower dividends. The thought is this. If I look for leniency immunity I don't get fined. Everybody else gets fined. Rationally you'd imagine that the companies which are fined would raise their prices to recover the cost of the fines. The interesting thing is that I got immunity, I don't have that cost, but I could raise my prices to match those of my competitors and thereby increase my profits even more than I ever thought possible. So, my prize for being the immunity applicant is not only the saving of the fine but also the potential to earn more profit later.

And the second observation I had was just borrowing a little from Ted this morning and the idea of using different disciplines and looking at the tax area. The thing that works well with tax amnesties and tax immunities (and it's a bit like what's happening with the GDPR) having an execution date. And query whether or not there would be something, I'm not suggesting it but I'm just putting it out for discussion, whether there might be a value in some sort of super leniency sale, so as to speak. That actually by such and such a date you have an opportunity to clean up your house, maybe the second and third person might even get some special, an amnesty of some sort. Or something of some sort, it is a little clumsy, but that's how tax leniency works. Because if the shop is always open you never rush to get there until you need to get there. But if there's a door which is closing and won't be open again by say for a number of years, is there some value, a little bit like raising consciousness of this as an issue. Just as the GDPR has raised consciousness of the whole issue of data protection because of a looming deadline, the same could be done about competition law leniency.

Gábor Fejes

I was just going to add one comment, but then I realized that Tihamér might be the right person to make the comment. But in 2003 the GVH had a “Leniency Plus” program. An amnesty program, do you want to continue, Tihamér, how successful it was? How many applications did you receive during that six-month period? Tihamér is saying: “zero.” I remember because that was in the construction sector and also the Dutch Authority had a similar one at the very same time and there was a major rush into the Dutch office. In our system the attempt was the same, and zero applications arrived in 2003.

Spencer Waller

So, let me flip this on its head and then turn it over to Anne. I'm thinking does a large number of leniency applications or any individual leniency application mean that the compliance is being taken seriously? Or is it proving the success of a compliance program? Or is it proving the failure? Now you don't have to answer that Anne, but it's your turn on the microphone.

Anne Riley

Personally, I don't think it proves either. But, that is a personal view. Going forward - and this is not speaking on behalf of my company - but a general observation, companies are going to find it increasingly difficult to balance the various conflicting issues around applying for leniency or immunity, given the growth of civil litigation. And I think civil litigation is going to put companies off because it's seen as a real danger. The benefit of going for immunity may be totally offset by the damages that you have to face. That's just a practical matter in reality. Another thing that I think is with the proliferation of immunity and leniency applications around the world, it's very difficult for a company to know where to go for immunity or leniency. The different procedures and processes and requirements and sometime conflicting requirements make it extremely difficult - and the ICC has suggested perhaps naively or innocently that maybe some soft convergence or harmonization within the ICN towards a single marker system may be a way to encourage more leniency or immunity for the future. I think the agencies are a victim of their own success. Because

2018

*Transcript: Third Panel*

199

now there are now so many systems that it's very difficult for a company to decide not only if to go because of civil litigation but where to go and on what basis. So, I think you guys have made it more complicated than it needs to be.

Mark Clough

Can I just bring up your civil damages point and bring in Philip here? Because the U.K. CMA in the context of class actions, has a very interesting procedure. I am not quite sure what's happened to it. It enables companies as part of the enforcement investigation process to say to the CMA, I am happy to pay compensation to the victims of my cartel behavior, can you give me a reduced fine? Then there is a process the CMA will set up whereby the companies pay for a form of arbitration, that is the best term I can use, to try and find an amount of compensation that's acceptable to the victims. Then that would be sanctioned by the CMA. I am just wondering, therefore, whether there is some discussion going on in the CMA that might lead to a greater package of exoneration being given to an immunity outlaw. Not just in the context of class actions.

Spencer Waller

Philip would you like to respond to that?

Philip Marsden

Yeah, sure. Thank-you Mark. Yeah, so the program Mark is talking about has some take-up, we have you know, one or two examples of situations where that kind of compensatory mechanism has been working. But I think before we expand it we want to see more of that, you know. But what we have noticed as well and this perhaps goes back to some of the discussion in the first panel is that kind of recognition that compensation is needed and even you know it is being driven by the threat of triple damages or double damages or whatever it has been with the regime. It's sort of inherently part of a recognition by the company, especially the board, that someone was harmed. Because if someone wasn't harmed than you wouldn't have to compensate them. So, there's some sort of softer sort of recognition morals or recognition than the authority can take in mitigation or even something stronger

than that. We need to see a bit more use of it before we can expand it.

Spencer Waller

So, the U.S. system may be the outlier, but it has among the more robust leniency applications and by far the most robust class action damages litigation. They're constantly tweaking the incentives. As most of you know the first in leniency applicant in modern times gets immunity from criminal prosecution as a company. Its executives get immunity from prosecution as individuals as long as they truthfully and fully cooperate going forward. And then with respect to the civil litigation, the company has the obligation to assist the plaintiffs, but in return gets single damages rather than treble damages limited to its share of the market rather than the entire scope of the conspiracy. So that is the balance, the current balance, of carrot and sticks.

Obviously there's a lot of disputes at the margin whether the leniency applicants/defendant is or isn't cooperating. But generally, they have to turn over documents, they have to make people available and that all gets sorted out. It also eliminates the need to litigate the discoverability of the leniency application. It's an interesting mix.

I think there's a separate issue whether the agencies are overly reliant on this. But that is the balance being struck. So, there is a way to have leniency extensively used and at the same time have the litigation that follows. Now, the thing that I think is missing is what Mark and Philip just alluded to which is in general when the companies or individuals either plead guilty or are found guilty they have to provide compensation. In general U.S. criminal law that is just the case, regardless of what are you are being convicted of. However, in the antitrust area it's a little bit of the special snowflake syndrome where the court on the criminal side doesn't typically require direct compensatory schemes because they know the class actions are coming or have already been filed. And I think that is a missing piece in the U.S. system that would be very helpful. Given our practice there's no reason why we can't finish up a couple minutes early. But I want to give the last word to Mark for his reflections and Csonger in light of the discussion.



2018

*Transcript: Third Panel*

201

Mark Clough

Thank you. I thought that the discussion is very interesting. Two main areas, the cultural point where we started off and we haven't of course got to the bottom of that. I think that is something that is very interesting and worth pursuing. It's clearly important because if business people don't want to blow the whistle, don't want to apply for leniency because of the culture (a) of their own countries and (b) of the business community, then leniency is not going to go anywhere. And that's a little bit of what we've seen in various countries. On the other hand, we have my point about legal certainty picked up by certain people and what, if you like, should be given to those who do want to apply for leniency to make it worth their while. I think again that is still with many question marks. Thank-you.

Csongor István Nagy

Thanks. Just a couple of words. I think the only reason why in the European Union private enforcement is not stifling leniency policy is that it's not working. I mean, private enforcement is not effective. But once it becomes effective we'll have to address this issue. Second, there is another issue we haven't addressed but I think is important, although it is not the top of the iceberg. It is the reduction of the fine (as opposed to the immunity from fines) and how it correlates to other immunities or reduced sanctions in other fields. Because it's easy to say and it's very logical to say that if the company gets immunity from the fine then employees should be immune from criminal liability. But what happens if there's a reduction of fine? Should this be mirrored in other fields saying that there's a slighter criminal sanction. Just because you as a director would never ever submit a leniency application for reduction of fine if you know that you are not fully cleared in terms of criminal liability. Actually, I don't think that this mirror approach would work in that case. Thanks.

Spencer Waller

Alright thank you, we have reached the thirty-kilometer mark. I can see that energy is lagging. Perhaps we're hitting the wall. Vincent hit it early so now he's powering through. So now it is time to refuel and to take a short break and we'll be back at 2:15

for that final push to victory and the finish line. We'll see you after a short break.