

TRANSCRIPT: TRADE ASSOCIATIONS, INFORMATION EXCHANGE, AND CARTELS

*Panel Speaker: Spencer Weber Waller**

Philip Marsden

Welcome back! This is the final push, you all had your second wind, you've gone through the wall, this is a time to push—drive, drive, drive to the finish line. So, that's what we always tell ourselves when we're at the 20-mile mark and that's what we're going to do now. And we're not just going to speak about compliance because we are making it very close to the ground now in terms of trade associations and information exchange. We've talked around about these subjects and when Anne Riley showed her card of the simple rules that it is so hard sometimes to inculcate into people's minds, especially when they have, sometimes, reason to meet their competitors, legitimate reasons; whether it's trade association or conferences. But also, when they've got it, sometimes it can be quite difficult for them to try to keep those simple rules in their minds when they are commission based. And when they've got quarterly statements that they've got to show that they've been able to increase sales and what an easy way to increase sales by talking to your competing sales director and say, "lay off for a few months," "lay off the client or that customer for a bit and do something else." Anyway, we're going to have a discussion with Professors Waller and Tóth about the kinds of dynamics within trade associations meetings, the kinds of rules that are usually laid down for those kinds of information exchanges. Most of us in the room will be familiar with the broad framework of those kinds of rules, but then also there will probably be a discussion of the kind of meeting dynamics that happen in these kinds of rooms and what you need to do, at least in the Competition Authority's view, to actually show that you have not fallen prey to some form of concerted practice or agreement. With that, Spencer.

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Spencer Waller

Thank you, Phil. Thank you everybody for your patience. So, for the last session I am going to speak very briefly and I'm hoping we can really have a conversation. This is a hypothetical that is based on matters that I handled in practice, both as an enforcer and in private practice before I became an academic. And this is something that I use in the classroom as well, both on campus and in the online course that I talked about earlier in the day. So, what I'm hoping is that I can layout the hypothetical, talk very briefly about three issues and then we can have a discussion more than a lecture. I'm not going to call on anybody, but what I'm most interested in is your perspective – you know how these issues are handled in your jurisdiction or should be handled. So, the issue paper that you have presents this hypothetical problem that illustrates many of the issues that we confront in representing a trade association, or its members or one of the individuals who work for one of those members. And again, the paper lays out a U.S. perspective and I'm hoping we can kind of look at the, compare and contrast. Think about how your jurisdiction will handle these things and, again to tie it back to the theme of our conference, let's consider how the best legal advice possible can be subverted unless there is a true culture of compliance for everyone in question. This is the proverbial widget manufacturer's association, it could be anything. It could be vitamins. It could be bicycles. It can be video games, or whatever.

In this Association, there are five principal members and a handful of associate members. The five manufacturers are full members and where two of them are the largest companies and have about 25% each. The three smaller firms have about 10% each. There are some fringe and niche manufacturers and then all these various associate members. The five big members of the WMA all tend to sell mass-market widgets through large retail firms including firms like Walmart, Target and their local equivalents. The larger firms and particularly the smaller firms also sell through dealers. The smaller firms tend to make more expensive widgets, more high-tech items. And there are a growing number of imports in this market. The WMA holds quarterly meetings in the capital of the country. Members meet for dinner and they discuss current events relating to the industry and they often have a prominent after-dinner speaker, who is really just talking about current events.

Once a year, the Association also holds an annual meeting at a fancy resort, where there is often golf and related activities. At their annual meeting they elect their officers, they hold an annual business meeting and they have a golf tournament. And there are always brief written agendas circulated before the meeting.

To the extent that it is relevant, the WMA has been investigated from time to time by competition agencies. No actions have ever been taken. But, the Association and its members have incurred very substantial legal fees in responding to these investigations. The most serious one was when it came out that the representatives of the two big firms were meeting on a regular basis, at each other's offices, claiming they were doing Association business but not following any of the regular procedures or having anyone else present, including counsel. And again, part of that investigation included allegations that the WMA was reaching out to its foreign competitors for some kind of a price fixing agreement. For example, maybe, we won't file an anti-dumping case if you will raise your price, stop selling to Sears and doing this sort of thing. But no action was ever taken, it was never clear that an agreement was reached.

We are the law firm, the global law firms, that represents the WMA. They have asked for our best advice on four issues: First, they would like to institute an information exchange to gather and share privately on a password protected website—whatever industry information that would be helpful to its members without getting them into trouble or trouble again. Second, they want to share information about imports because they are investigating whether or not to file an anti-dumping petition with the government, to impose anti-dumping duties if imports are coming in at too low a price. With respect to the information exchange and the investigation to file anti-dumping, they would like to know if it makes sense to seek an advisory opinion from the Competition Authority where there are procedures like that in effect. And then finally, they would like our advice on compliance issues with respect to the quarterly and annual meetings to ensure that the WMA and its members comply with the antitrust laws. They have asked us specifically about our advice about whether legal counsel should be present for the meetings and what role legal counsel should play at the meetings and the related social events.

With that in mind, I am just going to offer three main thoughts and then turn it over for the discussion, where Tihamer can begin with his own personal perspective as a practitioner in Hungary and a former enforcer. I see three important issues. If I

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have this sort of a client in the United States, there are pretty well-known rules of the road in the United States. It's on page five of my paper that is part of this symposium.

In general, we would tell them – “you want to do information exchange: first question, why are you doing this?” The second question would be “what is it that you want to exchange?” But the first is “why are you doing this?” Once we figure that out and if we were reasonably convinced this is not an attempt to go beyond into agreements on price and production, and that sort of thing, we would tell them something as follows: “here are the do's and the don'ts. Do use past transactions that are sufficiently old as to not be competitively sensitive. Depends on the product, (but widgets are just fake, so we don't know). 3-6 months old information is usually pretty safe unless there is something unusual about the product. Avoid information about current or future transactions or prices. Anything that is certainly brand new or projections into the future is thin ice. We would recommend aggregating the data so that anything that is ultimately exchanged is on an industry-wide basis, averages. Avoid the use of individual transactions or transactions that are sort of easy to break out who is the buyer and the seller. Whenever possible have a third party collect and process the data, an accountant, perhaps a staff person at the Association who knows not to talk to the members about each other's contributions. But avoid direct exchanges between competitors. Not a biggie, but in general, better if you make the data publically available. Mildly problematic if it's just kept for the members. That's based on some old case law. Better, if a heterogeneous product is involved because it is less likely to result in facilitating a cartel. More problematic if it's a homogenous or commodity type product or service. Better, if a clean record on competition law, not so good if you have a lot of skeletons in the closet. Better if you have a written information exchange plan about all of this above that is signed onto by all the members, monitored by counsel and actually adhered to by the firms and the association. Not so good if there are simply ad hoc unmonitored exchanges between the information and the Association members.”

I am not going to spend a lot of time on the request to lobby the government. In the U.S., lobbying the government is not an antitrust problem. It's immune under our Noerr-Pennington Doctrine.¹ I understand that's not always the case in every jurisdiction. So, you might get a different answer on that than I would give.

¹ Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,

Seeking an advisory opinion? It really depends on the client and their appetite for risk. If you are following the rules of the road in the United States that I laid out, most clients do not really care enough to spend the extra money to have me write up this letter, send it to either the FTC or the Justice Department. They have slightly different procedures but it's the same basic idea. You send them the request, ask them what their present intention would be – it has to be for future conduct only, and cannot apply to mergers. And then, you know, if the client is squeamish for any reason or they just want an extra layer of protection besides my opinion, I am more than happy to charge them a certain amount of money as long as they understand that the Agency is free to look at anything and talk to anybody. Regardless of whether they pass on this behavior, they might find something else if your client really has other things to worry about. The only other time that I've really ever been involved with advisory opinions and business review letters is if the company is not necessarily doing information exchange but is doing some very public joint venture or some other kind of joint collaboration between competitors where it's perfectly obvious to everyone that they are doing it, it's publicly reported, and it's expensive and risky. Like, a joint venture between two aircraft jet engine manufacturers where there are high concentrations and high entry barriers and the clients think they have a good story, but they don't want to go through the risk until they know in advance with the government's position is going to be.

I think the most interesting issue is how do we advise the Association on their day-to-day operations and their meetings when competitors are together. And I titled this section of the paper, this is entirely from a friend of mine named Jim Mutchnik from Kirkland and Ellis. I give him all credit. If you are a fan of the book or the movie "The Informant," he was a government lawyer at the time, he is now a partner Kirkland and Ellis in Chicago and he says "golf + beer = price fixing." He believes this is the iron law of antitrust. So, picture competitors who see each other occasionally but are gathered quarterly, and now annually, at some fancy resort in the United States or if they're smart outside the United States. And they are spending time in a room like this, but they're also spending time in the hallway, like we did for lunch, during the breaks and when you have to go to the bathroom. And

365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

when you're at dinner, when the meeting is over, or at the golf course and when you're at the bar at the hotel in the evening.

What is the proper role of counsel? In my experience, especially in an association that has a history of issues; you know they haven't been convicted of anything, they've probably settled some cases—at least my response, and my law firm's response, would generally be have somebody there who is a lawyer for the Association or at least the bigger clients. Have that person know something about antitrust law. It's probably not worth the money to have the big partner of the firm or maybe it is, that's fine if they want to pay the fees. Mark Clough would be fantastic [laughter] When I was a mid-level associate I would occasionally go to these meetings with a clipboard or a whistle or sometimes they even give the lawyers literally a red flag. So, as discussions around the table veer off course and move away from the agenda, perhaps into subjects that are uncomfortable. The lawyer will stand up wave the flag, blow the whistle and then just gently say "I understand your intentions are innocent, it is time we return to the agenda, not why we're angry at so-and-so for cutting their prices."

The real issue as we've talked about all day, is not what goes on around the table, but what goes on, on the golf course and in the bars and wherever else people who know each other, and perhaps have some reason, who have mixed incentives between complying with the law and reaching some agreements that would be problematic. That's where that stuff can play out and there's only so much you can do. You can of course instruct your clients about making a noisy exit, where they are supposed to knock over their coffee cup or cough loudly or get up and walk out so everyone knows that if there was something that is illegal, this firm or your client isn't part of that. Perhaps that will lead to a leniency application, perhaps it won't. But at least it minimizes the chance they will be liable in an enforcement proceeding and perhaps liable for a private damages sort of thing.

I thought it was interesting that the U.S. government doesn't have anything like this on its website to my knowledge specifically relating to trade associations. Australia does and it's pretty good. I believe Canada does and it's pretty good. For better or for worse the U.S. has sort of privatized that and the American Bar Association has a 10-page, little spiral-bound book that costs about \$18.² But it's fantastic and it has 13 pages on cartel behavior, who's

² American Bar Association, Section of Antitrust Law, *Cartel Law Basics for Executives* (2017).

at risk, and trade associations, information sharing, wage fixing, socializing and apropos of our last discussion, page 10 is “how to report.” It literally can fit in your pocket. You could take it with you, carry it in your briefcase or purse or wherever you want. Of course, that’s great. If somebody is of goodwill and really trying to do the right thing this can help if you’re seeing some borderline situation. But it isn’t going to matter for somebody who’s really bent on violating the law, and again we are back to the issue of culture of compliance. So, I have given you a super high-level summary of how a U.S. lawyer would approach many of these issues. And I’m happy to be challenged by people who are in the U.S. system and I’m fascinated to hear your reactions to any or all of these issues for the time that we have remaining before we hit the finish line.

Philip Marsden

Thanks so much, Spencer. So just to give a very brief, little bit of color from this side of the Atlantic, to remind everybody obviously that in European law there is an offense that doesn’t relate to agreements, it’s an offense related to concerted practices, it doesn’t require a meeting of the minds, it just requires contact between the competitors an exchange of information. So, you’re on the golf course together and exchange some information that you probably shouldn’t have exchanged but it might be within some of the categories that we talked about and that there was some sort of action afterwards—that it was probably inappropriate. And related to that, we have the T-Mobile case which says that in one meeting, depending on what was discussed at that meeting, if it’s something sensitive, one meeting can be enough. The U.K. Competition Markets Authority released a decision very recently echoing that which surprised some people, I think. But we did have something on video which was a lot of fun to play to the Competition Appeals Tribunal. Of a video of the meeting, just one meeting, a little bit of an exchange of information—even by somebody who was supposedly helping the Authority. And that was enough to have a significant fine upheld by the C.A.T. last week. So, there’s that aspect of concerted practice, object defense, one meeting is enough—that kind of thing. Second point is, there is an assumption that business people are rational and that if you receive some information you will act on it. Now, it’s not a very useful assumption to assume that everyone is rational, but I think it does make sense that if you receive some information for the authorities to assume

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that you will use that in some way. Unless, you distance yourself. And so, we will get into that public distancing debate when we talk about meeting dynamics. Thirdly, there is a development in European law, which is too late in my mind, but at least it happened, holding trade associations liable themselves. So, these nice, usually Swiss operations, with one or two employees who have no idea what they're doing other than "let's get people together and let them go for it." And with no restrictions on aggregating data or anonymizing data or anything like that are being held liable as well. So that's just a little bit to give a slight flavor of the European aspects of it. But from all the different cultures that we come from we are going to come at this in a different way, including the use of counsel, privileged information or not. Does that just mean that the counsel is the sheep dipper and just having them present in the room is enough or do they actually have to do something. And I am very interested to hear what professor Tóth has to say from his perspective as an enforcer. And then we will go around the room and collect all of the views in our final dialogue. Tihamér...

Tihamér Tóth

Thank you, Phil. Just a couple of words about our experience regarding the importance of this topic in Hungary. When I recall my time here at the Competition Office, I was working as a member and later the chairman of the Competition Council. We had many cartel cases that either involved public procurement cartels or we had cases against associations. So, we had lots of cases like this. There were two kinds of cases involving associations. There would be the situation where there was an honest-minded official working for the association, like a secretary, organizing all these meetings, believing to serve the interests of the association. Of course, members of the association were not competition experts, so they did not realize what they were brought in for. In this case, as far as I can recall, the infringement was established, but the fines were rather symbolic; acknowledging the special situation of associations. On the other hand, we also had cases where we felt that the association was used as an umbrella, as a cover. There were a couple of big players, who knew the rules, and intentionally broke the rules using the association to cover their genuine cartel meeting. In those cases, huge fines were imposed on both the association and the cartel members.

Also, recently the Hungarian Competition Authority is pretty much focusing on these associations and information exchange cases. The two most recent record-breaking fines relate to banking associations, financial services markets with information exchange between bankers. In one of these cases the competition authority imposed fines totaling 9.5 billion Hungarian Forints. It is not that much in euros or dollars, but here in Hungary, that was a shock to many. Risk assessment experts of most banks had regular meetings called “Business Breakfasts” discussing usual business things like: what was developing out in the markets, in politics. It was also a highly political case as well, involving housing loans issues affecting many citizens, even causing social problems. Converting Euro-based housing loans into Forint-based housing loans was supported by the government. Banks didn’t like this idea, obviously, they lost lots of money and they obviously discussed these new laws during the meetings. They, tacitly, maybe even have agreed that it is a bad policy, we don’t like it, it’s not in our interest to convert existing loans into Forint. They even exchanged information on a number of their clients. That was the sort of serious infringement deserving a record-breaking fine. There was no old-fashioned price agreement, boycott, or market sharing. Obviously, the companies were big, all the big banks were present around the table.

The second case was even more interesting, that involved the banking association that received a major fine in the case, more than 4 billion Hungarian Forints. The infringement involved collection of data, a huge amount of data. I can’t recall exactly, more than 100 rows in an Excel sheet. Lawyers wouldn’t even understand the implications of all that data, totals and figures. The point is, that this practice has been going on for 15 years or so, maybe even 20 years. Furthermore, this data management had been initiated with knowledge of the Hungarian Central Bank. The Excel tables that were shared included individual information about the banks participating in this process. While they did not relate to planned future price increases (which would be a hard-core infringement under EU law), yet the competition authority was able to argue that all of this was sensitive information, “business secrets,” exchanged over a long time. This was established to be a kind of hard-core anti-competitive action as well; without, really looking into the actual anti-competitive effects.

So, it is indeed an important topic. It’s an area where we can recall some of the messages of the morning sessions, that what

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business, what lawyers would expect from Competition Authorities to create a great compliance program is to get legal certainty. Information exchanges is perhaps the only area regarding cartels, where we have huge uncertainties. I just looked to the wonderful “SME Targeted ICC Guidelines.” There was a reference on what to avoid, what not to do relating to cartels. Giving precise and realistic advice about information sharing is a challenge though. It is clear that exchanging information with your competitors regarding pricing and future pricing is usually found unlawful. However, beyond this, involving other topics discussed among competitors, most practicing lawyers are struggling with what’s the best advice they should give.

One problem with the practice of the Hungarian Competition Office is that they seem to argue that whenever companies exchange secret information or confidential information, it almost automatically equals to a hardcore cartel. I have some doubts there. I mean, for legal certainty it’s great. You may not like the content of the rule, but it is clear at least. I guess that most bankers know what is confidential and what is not confidential. Legal certainty is provided, but at the expense that the outcome might be flawed, catching too many acts as anti-competitive, even though they are not. The effects of exchanging business secrets may depend upon markets, the structure of the market, and the nature of the product

Just a couple of more personal experiences. Márk, from Telenor, mentioned that they have a policy to push their suppliers to adopt a compliance program. This creates a rather positive domino effect. Our law firm was approached by an association requesting a compliance program for the Association. Why? Because one of their new members was a U.S. based company, who was pushing the Association to have a compliance program in place, otherwise it would not join. So, American companies can change the culture, at least formally, also in Hungary.

Next, the presence of the lawyer, that can be really important too. Here I had the recent experience where I was the lawyer visiting a gathering of salesmen of a company at Central-European level. At the beginning of the meeting, I was introduced by the Chairman of the Company. I had to stand up, everyone was shocked, “who is this stranger among us?” “who is this guy in a black suit?” They told me later on that my very presence there, even without any intervention, was sufficient to distract the members from discussing any anti-competitive issues, so it had a genuine chilling effect. They didn’t try to raise questions, at least

openly, that could have been problematic from a competition law point of view. It may cost a little bit to ensure the presence of a lawyer, but it may be worth the price.

One other example for information exchange and associations is whether their members can discuss, well, not pricing, quotas, and similar items, but the interpretation of a recently adopted regulation? It was an association representing the interests of their members being active in a regulated industry. The issue is that the joint interpretation of the law may lead to joint actions in the market. It is good? Is it bad? At first, I didn't know what to answer. It was a difficult question where some guidance from competition agencies would be helpful.

We, at least at the European level, have this great possibility of guidance letters since 2004, yet, it has never been used by the Commission. Not even in cases bringing new novel legal issues. And that would be a great thing to have. Either for SMEs, small companies or for associations representing the greater good. So that's a good topic. And I would just encourage competition authorities to think about this and apply this great instrument whenever they can. Thank you.

Philip Marsden

Thank you. Just a couple of reflections as we're opening up the discussion: (1) is that I noticed with respect to some trade associations, especially ones who are comprised of some members who have been hit with significant fines over the years, especially if they're recidivists, so I'm thinking about the fast-moving consumer goods market, in particular. That some of these trade associations will not allow a meeting to happen unless antitrust counsel is present because the members would not come to the meeting unless antitrust counsel is present. So, the members' legal departments have said, especially sales directors getting together, "you are not going to that meeting unless you have an external lawyer." Not a paid employee by the association. So that is a nice recognition of the market changing a little bit. That companies are actually requesting it. In addition to some of the members being surprised.

The second reflection I have is a point that Spencer made. That I think is really important here is, wearing my CMA hat, when we're investigating a company, especially for some sort of new information exchange that might not fall within the safe boxes that we've been talking about (anonymized loss and aggregated

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data). I always ask the companies, “why are you doing this?” And sometimes the law firm, if they’re sophisticated, come back and say, “that’s for article 101(3), we’re still arguing whether this is within article 101.” And I say, “no, no—thank you lawyers but let’s ask the business people why are you doing this? Why are you exchanging this information?” And who knows, they may come up with all manner of reasons: saving the world, reducing deforestation in Indonesia, whatever it is. Fine, it could be perfectly valid and we know from the BIDS case in Ireland,³ that having an environmental objective for solving a crisis cartel is a legitimate objective, but, we can still find an object cartel infringement if the object of the agreement, let alone the intent, if the object of the agreement was distortion. But I always find it interesting, that the business people come up with some reason. And it may indeed be the real reason they were getting together. Something actually, one might think is procompetitive or fulfils another policy objective. And most usually in this day-in-age, it’s some sort of environmental initiative to save costs (refrigeration costs, CO2 emissions, get the price of alcohol up so the binge drinkers stop binge drinking, that sort of thing). And I don’t think that kind of answer should be held back until the Article 101(3) phase because if you think about competition authorities, they’ve got limited resources and if you can come up with a legitimate reason and it can be backed-up by contemporaneous Board documents of why you’re meeting and why you’re exchanging information – then the authority might de-prioritize the case and issue a warning letter. You know? So, it can be a much better way of dealing with things.

So, I don’t think people need to segment this into the burden of proof is on the investigators and the burden of proof is on the other side. It can be a dialogue like we’re having today, but especially “Why are you doing this?” with a little bit of a raised eyebrow. And then hear them come back and see what they say. And it really does help. And if they can’t explain why they’re doing it, in a business-incentive-compatible way, i.e. why would a business do this, then you know, we can draw our own conclusions about whether it’s exploitative or exclusionary. So, with that, I open up the discussion with Anne Riley first and then Gabor.

Anne Riley

³ The BIDS case, Irish Competition Authority v Beef Industry Development Society Limited and Barry Brothers (Carrigmore) Meats Limited.

Okay, thanks very much. In the spirit of true competition, I would like to point out that the ABA is offering their offering for a value of \$18 and the ICC is offering “Why Applying the Competition Law is Good for your Business” for nothing—it’s free. And another little plug, if I may, the ICC is writing a similar, very short, lots of fun cartoons, tool-kit for trade associations which we hope to launch in June 2018 for free.

May I be permitted to say one or two more important things? If information is exchanged via a trade association, I think you need to ask, “is the person in the trade association who is collecting the data really independent?” Because I think if you look at a little bit at the Trade Associations you’ll probably find that many of the officers of trade associations are actually appointed by their members. So, is the Trade Association (as an information gatherer) really independent of its members? Perhaps some more independent benchmarking collection of information might be really helpful.

In terms of independent consultants - watch out because they obviously have to be truly independent and must also not facilitate collusion.

And you mentioned, perhaps not by name, Treuhand AG, and suggested that they may not know what they were doing. But, for those of us whose careers go back into, sadly, the 1980s, Treuhand used to be called FIDES (ironically meaning “truth” in Latin), which was the facilitator of the plastic cartels of the 80s, so old habits die hard.

Use of lawyers: I think it's better that people at the trade association know what's right and wrong. I think using lawyers in meetings could be a bit of a false insurance policy, because I think when you look at the cases involving discussions at or around trade associations, many of the more interesting discussions from the agency perspective occur *around* rather than *at* the official meeting. I agree with you that the most important question in antitrust is “why.” “Why are you doing it?”

If I may just also mention two other things. First of all, trade associations - whatever they're called, it doesn't matter. The question is, is an industry getting together to talk about industry things? They could be called “Business Breakfasts,” they could be called “Policy Forums,” it doesn't matter what they're called, “roundtables,” “think-tanks.” The question is what are they *doing* rather than what are they called.

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Do remember that governments themselves, not just agencies obviously, but other bits in government, can actually encourage inappropriate exchange of information. And I think it's very important for you guys (in the agencies) to let your other departments know that such Governmental encouragement causes problem.

And the other thing that I would just mention for those of you who may not be familiar with it, is in October last year the DOJ and FTC issued a Policy Statement for HR Professionals about remuneration and benefits benchmarking. And it gives me enormous pleasure to tell HR that antitrust does apply to them as well.

Philip Marsden

Thank you. Your point about government advocacy reminds me of when we were talking earlier this morning about if you have a competition lawyer walk up to the client with a slideshow that says, "the first prohibition says this and the second prohibition says that," it's not going to work and when we deal with our other government ministries in the UK, which as in every country, no matter how independent the Competition Authority is – as we all know – it's a very small beast compared to some of these big ministries out there, especially the finance one. And these big ministries have a policy objective they're trying to achieve. It could be environmental, it could be financial, whatever, and it may well be a legitimate point, and if we find out about the fact that they've been leaning on business to go into a room together and agree to something to achieve this policy objective, it doesn't help if we show up with our PowerPoints and say, "chapter one this says this and this is bad..." So, what we do is we do the 'why question.' We go in and go "why are you doing this? Why are you (a) being cowardly and making business do what you should do through taxation and subsidization?" (Because that would be totally fine and part of a democratic process). But, "(b) what is your objective? What are you trying to achieve?" Because we, the little tiny competition authority, can probably give you some advice about how to achieve that in a way that doesn't screw consumers. But, we are not always listened to – as you know. But that's why that "why discussion" is best; must better than a slide deck of the law.

Gábor Fejes

Thank you very much. Maybe four comments. The first about the banking cases Tihamér was mentioning. Just a very brief comment, but it comes back to the first panel, I think it was a major compliance failure of all those banks to be present in those meetings and to have discussed what they did. And not being able to stop it a certain way through their internal compliance systems. Second, and that's more a technical legal point, but that leads back to the leniency issue. Philip, you mentioned that there are a number of cases where both the companies, the members, and the Association receive a fine. [Marsden, "Correct"]. The members may be involved in an agreement or a concerted practice. The association might be found liable either as a result of a decision of an association or kind of as an easy Treuhand supporter. I'm a leniency applicant, then. Sorry for these boring stuffs but that is on my table every day. If I am a leniency applicant, I report something that has been going on where it is actually the undertakings that are primarily responsible, and the association is only helping and I am a member of that association. I am confident that I will get \$0 fine as a member. But isn't that in every law? Certainly, in Europe, also in Hungary. If an association cannot pay – we'll pay the fines for those who are involved in the wrong doing. Is there an exception for a leniency applicant? Under UK law? Under Hungarian law? No? A directive? Is it reasonable then for me to be a leniency applicant if an association is involved? I get \$0 as a member, the association get a high fine, maybe up to 10% of its members. And I get my share of it as liable if the association does not pay. Still to be fixed, I guess. And if I am the deep pocket then they all come after me. Still to be fixed.

Philip Marsden

Just to add to your point: What's very nice about that example is that it shows a hole in the law, a mechanism failure. But what you don't also get away from is the fact that there will be a massive reputational hit as well. Because you know, it's never some headline that says, "Unknown European Policy Forum Hit with Fine." It's "Unilever Hit with Fine" or whoever, and you know or "Pharma Industry in the dock." It's something which is also in the minds of these people when they come for leniency is also "my name is going to be in the press somehow, in a negative way."

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But it's good if only my name is in the press, but if I have to pay a hefty fine despite the fact that I believed I would get \$0, that's even worse.

Third point, I think there is also uncertainty in Hungary and I do encourage our Regulator to consider that position, for perhaps the future. We have a number of cases where the case was dealt with on an effect basis, as your paper rightly suggests. If there is nothing on the "Don'ts" column then it should be an effect-based case. Now, in Hungary we have cases where actually the Authority was unable to find any negative effects. Actually, the Chief Economist Paper concluded no negative effects were to be found. And still, an infringement was found on the ground of potential effects. And that also adds to uncertainty; something that businesses don't like.

And the fourth point is, I think these kinds of questions show that I think, in general, the tendency in Europe of actually denying guidance letters, ever since in Hungary the possibility stopped in 2005. I think I was the last for an individual exemption, I filed it on behalf of, you might remember, on behalf of the concrete association for a very good blacklist. People wanted to blacklist very known, boycott known paying customers. That made a lot of sense. And I think it was capable of fulfilling the individual exemptions. But, it was just too late. We filed but then the possibility of individual exemptions ceased to exist. But I find it kind of odd that we talk a lot about encouraging companies to run into leniency applications once there is a wrongdoing. But there is no comparable help when they want to receive guidance on whether or not it will be a wrongdoing. So, I think in the long run, European legislators or regulators, will have to think it over again.

Philip Marsden

Thank you. Max...

Max Huffman

Yes, thank you Philip. I continue to come back to this idea that I felt percolated this morning. This paper, this discussion topic, makes clear the distinction between the pure law enforcement idea and the collaborative, the cooperation idea, between the regulated entities and the enforcement agencies. The phenomenon of information exchange is sort of precisely at the area of ambiguity where you want to have some sort of collaboration with regard to,

as Philip pointed out, this question of, “why are you doing this thing,” and everything really flows from that. It raises to me the question, I don’t see it mentioned here and it’s only a bare recollection of mine, that there have been consent decrees in which agencies have been permitted to send their lawyers to participate in trade association meetings. And that seems to be a fairly elegant solution to this problem. Precisely because everything that is innocent, there is no harm in having an agency lawyer present to observe the conduct. And everything that is impermissible is precisely why you don’t want the agency lawyer present. Again, sort of a very binary thing. There is no cost to adding this person in.

When I think about the problem of collaboration as a model for trying to deal with these ambiguities, there are two places where I would think collaboration would be a concern. Place one, if the collaboration is expensive for the regulated entities. The idea of pre-merger clearance is an area of expensive collaboration where the firm gets an involvement of the agency but has to delay everything and spend a lot of money in order to hire the lawyers to get the documents together on the pre-merger submissions. But this would not be such if you just invited somebody to participate in your conversation, to be a fly on the wall as opposed to being a lawyer we hire (the agency sends a lawyer). Frankly, that would be a costless way in which to ensure that you’ve got the appropriate oversight.

But the other place where you can see a reluctance to engage in that type of collaborative engagement would be where the regulated entity is deliberately trying to tread close to the line. And you want the permission to sort of be risky and take the chance that maybe you can do something that is novel and might get challenged if it were seen. Knock on wood that it wouldn’t be a per se or cartel violation. So, there’s where you wouldn’t want to have the agency lawyer present. You want to be able to have the conversation, and please let’s hope this conversation doesn’t get me in trouble if anybody finds out about it.

Of these two, I think the former is one that is more likely that the regulated community would confess to. Firms are concerned about cost. But again, I don’t think that implicates what I’m talking about with the idea of an agency lawyer’s being involved in conversations. The latter, I doubt—I’m curious—it’s really a question, whether the regulated entities would admit to the idea that they’re really trying to flirt with illegality in these processes without actually crossing the line into the area of criminal or punitive damages kind of conduct. I suppose I’m really only

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thinking about to what extent is there greater room for this kind of collaboration and can we find a way to do that without raising costs, but also without violating the principals that somebody is trying to be innovative or creative.

Philip Marsden

Thank you, Max. And some of the examples I can think of are when at the CEO level or very senior level of companies they say, “we are absolutely compliant with all laws around the world.” And then when they get through to trade associations or something, they won’t necessarily be saying, “let’s get as close to the line as possible,” but they’ll be saying, “let’s have a lawyer present so that we can feel safe, we can have as creative of a discussion as possible and the lawyer will put the red flag up or knock over the coffee or whatever.” You know, to give them that room to press because they realize they are trying to deal with some sort of increasing cost base or whatever and how can they channel that through the industry. But it’s something where there are very different views. You see bullish law firms saying, “just go ahead and we’ll give you a piece of paper that says that we were there.” And then there are other people that say, “no, we have to be in the room and we have to tell you where the line is—even though the line is gray and moving.” There’s also the case where, I think sometimes, some companies think this might sound good, they think, “we can go into the room with our rivals and then everything will be fine as long as we don’t discuss price.” Because that’s the one sort of message that they’ve got from childhood, I don’t know. But, that’s, as we all know, a very important tip of the iceberg, but there is a whole manner of other things that they can’t do either. Yes, Amadeo...

Amadeo Arena

I would like to provide the Italian prospective on information exchange within trade associations. In order to do so, I have to recall my earlier equation: “ $E[I] = R \cdot P_1 - S \cdot P_2$ ”. Now, P_2 is equal to the probability of detection of the infringement (P_D) multiplied by the probability of conviction (P_C), multiplied by the probability of reduction of the fine upon appeal (P_R). So “ $P_2 = P_D \cdot P_C \cdot P_R$ ”. Considering that those three factors are percentages that are multiplied against one another, the value of P_2 tends to be rather low. So, in my humble opinion, the Italian Antitrust

Authority has attempted, with the consent of our administrative courts, to increase the value of P_2 by re-characterizing information exchanges from mere evidence of another antitrust infringement to a self-standing antitrust infringement, namely a restriction of competition by object, which does not require proof of anticompetitive effects and is subject to heavier fines.

Maciej Bernatt

So, this is a thought that came to my mind when you were asking this “why question.” I was thinking basically about the intent because the antitrust liability is not based on intent. So even if they say to an enforcer, “there were some good reasons for our behavior” I think you would, as an enforcer, go after it anyway. For example, we observe that firms cooperate as part of their social responsibility programs and while doing so they may exchange sensitive information. You may believe that what they do really serves a good goal. And still I think you would go after it unless you believe that competition law serves other goals than consumer welfare. This is my feeling, but I am asking why this “why question” is so important at this stage of talking to private firms?

Philip Marsden

I am very grateful to hear others views around the table, I mean the reason I like to ask the “why question” is not so that the lawyers who are very clever can come back and say, “intent is not part of the offense and so we’re not going to tell you our intent and you might be getting us to incriminate ourselves by asking us on record why we did this.” And it’s not to have the discussion about exemption and Article 101(3), it’s about trying to address in a way the point that was raised this morning about the belief in business that we are in competition authorities, lawyers and economists who have no business experience whatsoever, we have no idea what we’re doing, we have no idea of the pressures that are on industry at all. This is actually changing, there is a number of people – with some business sense in competition authorities. But let’s assume that we are in just some sort of academic silo. We want to understand this business, we want to know “why are you doing this? Just tell us.” And if they can’t tell us, that’s interesting. But if they can tell us something, then we begin the discussion. But it’s not in any way trying to incriminate them. It’s just to say, “help us

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understand this.” Sometimes they come along with some very sophisticated lawyers who will have a big description of why they’re doing it. And it will usually be structured in a nice antitrust-friendly way of explaining it. But, then I like to say, “can I see the email? Can I see the genesis of this agreement? Can I see how this happened?” and if not, we’ll just get the document ourselves. And then we can see what the genuine intent was. But it’s not to try to build the case, it’s to say, “we can make this go away if you just tell us why you’re doing it.” But of course, some companies will say that they don’t trust the competition authority at all, “I don’t know what they’re going to do with this information.” I find it very interesting if a business can’t tell me why they’re doing something. Because, you know, businesses are supposed to be there to serve their business interests and if they can’t explain it I go “oh that’s interesting.” But if they can explain it, I go “okay fine, then let’s move on to whether that is an offense or there is a justification.” So, you have chosen some way of doing that which we have a problem with – could you not have done something a little bit less intrusive. Could you not have obtained that through some other means? It depends, of course, how much of a process you have with the companies in question anyway. But, that’s really what it is. It’s not to incriminate them or create an intent offense. But I am interested to know the people’s views about that, and whether the “why question” is helpful or limiting. Mark Clough please...

Mark Clough

Thank you, Philip. I just want to go back to the question of fines on trade associations. In my new role as standing counsel to the CMA, I’d like to have a little bit of advice. I have happened to have read for my sins this wonderful directive proposal, I can refer you to Article 13 as it is the calculation of fines. Article 13 paragraph 2, if the UK wants to approve this directive and then implement it, it says as follows: “member states shall ensure that when a fine is imposed on an association undertakings, taking account of the turnover of its members and the association is not solvent, the association is obliged to call the contributions from its members to cover the amount of the fine. Where necessary, to ensure the full payment of the fine, member states shall ensure that national competition authorities are entitled to require the payment of the outstanding amount of the fine by any of the undertakings whose representatives are members of the decision-making bodies of the

association. To the extent that it is still necessary, national competition authorities shall also be entitled to require the payment of the outstanding amount of the fine by any of the members of the association which were active on the market on which the infringement occurred. However, payment shall not be required from those members of the association that did not implement the infringement, and either were not aware of it or had actively distanced themselves from it before the investigation started. Plenty of room for litigation there! [Laughter].

Philip Marsden

That's perfectly sensible to me. So, do other people want to come back to this discussion of the "why?" or about the nice case study Spencer has given on the password-protected website, the use of counsel or even some of the discussions we had earlier with respect to mitigating or aggravating factors relating to compliance schemes. And I welcome any of your remarks. Tihamér...

Tihamér Tóth

Just a couple of thoughts, as regards this interesting concept of the Court's case law requirement regarding 'distancing yourself from the concerted action of others.' As far as information exchange is concerned, I am really confused about what timing is needed to avoid the infringement. I mean, Spencer would raise his hand and tell us that he would raise his price by 5%. Shall I immediately stand up and shout and leave the room? My point here is, even if I do that, I still heard his intention, and I could take that information into account when I decide about my business account. Regardless whether I leave the room or not, I did hear that point. The other scenario is, when I'm just typing on my laptop and I don't hear what Spencer told us, maybe he was not that loud or not that clear or I just didn't care what he was talking about. When I am back into my office and I'm reading the summary or minutes of the meeting, I suddenly realize that there was a sort of invitation to a cartel. Shocked, I'm immediately writing an email to the fellows present at the meeting. Is it sufficient? Is it a good way of distancing yourself? So, I have some open questions with this EU Court case law. I believe the court members, however wise they are, have never been to a business meeting and they can't imagine the dynamic and psychology of such meetings. And that's bad. It's a point of competition law which you can hardly explain

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to directors when you deliver a compliance training. They would laugh; they would not believe you. Some of them might even think: 'So, is competition law really so far from reality? Then I don't care what this lawyer is telling me.' That would be a bad outcome.

Philip Marsden

No, I quite agree. I think that the way the law has developed is in such a way that the competition law officials think that that's the appropriate way, this sort of immediate distancing. It takes no account of meeting dynamics. It takes no account of the reality that we're human beings and subject to various pressures. And indeed, may not be paying attention and hearing something or whatever. And also, the aspect that they might not even realize that they received some sort of information that they shouldn't have. It might not be my prices are going up 5% Monday, it might be something a lot more vague. So, I quite agree that it's very difficult to explain to business people that that's what they're required to do. And indeed, I've seen some cases where somebody does get up and publicly distance themselves and make sure that it's minuted, and that's just a cover because they just say, "oh I have to object to what my friend has said and I want that minuted." And they're all smiling and chuckling. It's very difficult but it's definitely an area where the law is not taking true effect of the dynamics and that's why it's so important to inculcate a culture of compliance earlier on so that these kinds of artificial legal constructs can't sort of somehow be imposed in a way that's not really going to work in every case. Spencer...

Spencer Waller

So, I think all these points are great and I really appreciate it. It highlights for me some of the dynamics that I was trying to get at in the paper, which is—what do people of good faith, how do they approach these issues in terms of their relationships with their competitors, their relationships with their own counsel and then relationships with the government if they ever get to the question of whether or not to report. And I think these have been important themes that we've touched on all day.

I just wanted to end my only additional contribution for today, with the quote that I ended the paper with, which is what not to do. As you may know, the Sherman Act became a felony around

1974 in the United States which meant that it elevated the penalties to more than a year in jail. It's currently 10 years, but it's been bumped up a couple times since then.

This was the first case prosecuted as a felony in the United States. It related to real estate brokers in the suburban Washington D.C. area, so of course it literally affected the pocketbooks of the antitrust enforcers, as well as everyone else in the Washington area. It involved a man named Foley. I don't remember his first name. Here is the quote: "At the dinner of the trade association, Foley [one of the realtors] rose, made some prefatory remarks and then stated that his firm was in dire financial conditions. Saying that he did not care what the others did, he then announced that his firm was changing its commission rate from six percent to residential real estate to seven percent. Testimony as to what was said by various persons in the ensuing discussion is greatly in conflict, but there was evidence from which the jury could find that each of the individual defendants and a representative of each corporate defendant expressed some intention or gave the impression that the firm would adopt a similar change. The discussion also included reference to the earlier unsuccessful effort by some realtor to adopt a seven percent policy, from which the jury could infer that the defendant knew that their cooperation was essential."

This was the first person to serve jail time for a felony anti-trust violation. This behavior went beyond the nudge and the wink, the Monty Python sketch. At least the court held that a jury could find that they had reached an agreement and that would be certainly upheld as a rational finding supported by the evidence. So, I appreciate the discussion.

Philip Marsden

Any further points that people would like to make at this stage? Well if not, I'll just say some closing remarks and then hand it over to Spencer. So, you know, I want to thank you all so much for participating in the discussion today. The antitrust marathon series is very dear to our hearts and it's not just some sort of ephemeral discussion that takes place in a room and is forgotten. As we know, it will be published and a matter of record. And we like doing that because not only do we endure these discussions, but we want the discussions to endure. And to facilitate greater academic and official debate in this area. This is, I think, one of the antitrust marathons that we've had that has been closest to the business sort of realities and human dynamics. We try to change

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behavior here – what works, what doesn't work. There are some business people that will say this is all still quite high and removed from the business realities. On the other hand, other business people are saying we're taking this really seriously and we're trying to find the best motivators within our companies to allow this to continue so that our company can thrive, work legally and so the sector isn't tainted by investigations or fines. And so, it is something that is a live issue and will endure in and of itself, but I think we've had some really nice discussions today relating to behavior, relating to incentives, relating to who's responsibility, is it? Is it the company officials, is it the boards, is it the shareholder, is it the authority itself? Is it the lawyers, the advisors, wherever you go and also what kind of clarity of message can you have? We also have mentioned, often, this idea of creating a culture of competition but also recognizing we're all from different cultures with different legal traditions. Very different histories. Whistle blowing itself has meant many different things in the last 200 years or so in many of our countries. And that is an echo that can hamper leniency programs. But what we're all trying to do, as Spencer mentioned, is taking off our running caps and we're not trying to argue for one particular issue as an enforcer, as a company or as an academic. We are trying to create an understanding so that enforcement can be more effective and therefore markets can work better.

So, I'd just like to thank all of you so much for participating in discussion and I'd like to thank the Authority for hosting us in such a fabulous room and great food and fuel at the eight stations. And I'll let Spencer close. Thank you.

Spencer Waller

I want to echo Philip in thanks. We are trying to create a community of people who know each other whether or not they're going to run on Sunday in the marathon or not. Connections have been made over these six different marathons, this one has been wonderful. Thanks to Tihamér and the Authority for really being our on-the-ground partners for which none of this could happen without their hard work. I hope it has been helpful and useful to you we can stay in touch with each other about these issues. As Ben and the others have said, this will be published over the course of the next few months and we will need your cooperation on turning in the final versions of your papers and then eventually looking over, editing and likely footnoting things you've referred to in your remarks over today. If you're interested in receiving a hardcopy of

the eventually published symposium issue, that can certainly be arranged. But it is our normal process to post all of these SSRN.com. It will also be listed on the website for the Loyola Consumer Law Review.

We have medals for you that Tihamér, Phil and I will greet you at the finish line as you leave through each of the doors. But I also want to say, this is Antitrust Marathon Six and the bidding is open for the location and topic of Antitrust Marathon Seven, which we hope to conduct in, if not 2018, 2019. And I'm not sure if we are really endorsing the way FIFA awards its locations [laughter] but if there is anything that your authorities can do to make Phil and I welcome, and perhaps do a site visit, we would welcome all of that [laughter]. But we would also like your suggestions as to the best place and best topics to do.

Thank you, guys, you've been wonderful! [Applause].