

July 2009

 Why Antitrust
 Compliance
 Programme may
 be Ineffective at
 Preventing
 Cartels

CCP Policy Briefing

Hear no Evil, See no Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels

BACKGROUND

- Cartel practices include price fixing, market sharing, bid rigging and output restriction.
- Colluding with a competitor need involve little more than an exchange of emails or the odd telephone call, motivated by the promise of higher profits through less competition.
- Cartels are considered the most serious breaches of competition law and so attract by far the greatest penalties in terms of pecuniary fines.
- It is thought that the threat of large corporate fines provides a strong incentive for firms to 'keep their ship in order' by maintaining effective internal compliance programmes.
- The danger to firms is intensified by the use of leniency programmes by competition authorities. These provide immunity to the first firm to self-report an infringement, leaving the other companies involved exposed to steep pecuniary fines.

METHODOLOGY

- The author reviews the objectives of competition law compliance programmes in the US and the EU set against the empirical evidence from infringements uncovered in the recent past.

KEY FINDINGS

- Competition law compliance programmes ostensibly protect firms by reducing the scope for future infringements through training, and uncovering potential current infringements through the periodic auditing of company activities. It is thought that the support of senior management is fundamental to a successful compliance programme.
- However, compliance programmes may be ineffective at detecting and preventing hardcore cartels.
- There is little doubt that the employees responsible for cartel activity generally know what they are doing is illegal, but they choose to do it anyway in the pursuit of collusive profits.

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- Moreover, the cartelists uncovered and punished in the last 20 years show that:
 - (i) cartelists go to great lengths to disguise their collusive activities and avoid detection by competition authorities and compliance audits;
 - (ii) most cartels are coordinated by individuals holding senior managerial positions, making it difficult for firms to deal with such breaches of competition laws internally; and
 - (iii) compliance efforts provide no mitigation of fines in the US and the EU, even where an effective compliance programme is in place.
- It can be argued that compliance programmes serve an important educational role: they harden attitudes towards cartel practices in the long run and create a culture of compliance within the business community.
- However, compliance programmes will only succeed in preventing serious infringements where cartel behaviour carries direct consequences for the individual.
- In the absence of the threat of criminal sanctions against individuals, compliance programmes may simply highlight the fact that the corporation as a whole bears the risk of breaches of competition law by individual employees.

POLICY ISSUES

- If compliance programmes are to communicate a credible threat to individual cartelists, a combination of imprisonment, and immunity to the first whistle-blower, will be essential.

THE CCP

The ESRC Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

FOR MORE INFORMATION

The full working paper (CCP Working Paper 09-9) and more information about CCP and its research is available from our website: www.ccp.uea.ac.uk

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