

Hear no evil, See no evil:

Why antitrust compliance programmes may be ineffective at preventing cartels

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Why the stakes are high for firms

Cartels as the ‘supreme evil’ of antitrust

Fine of up to 10% of worldwide turnover in all operations

€2.27 billion imposed by DG Competition in 2008 alone

€896 million on single undertaking (*Saint-Gobain, Car Glass*).

Seriousness, leniency, deterrence

The ease with which breaches can occur (telephone, email)

Incentive for firms to ‘keep their ship in order’; heightened by leniency, publicity and loss of reputation

The 'model' Competition Law Compliance Programme

ABA Antitrust Compliance: Perspectives and Resources for Corporate Counselors

Statement of policy and ethical standards expected by firm

Training: understanding cartel laws; DOs and DON'Ts; how to behave at Trade Association meetings; appropriate language.

Above all: the consequences of a breach

The Antitrust Audit: edge in leniency race; generally undertaken by external counsel; focus on pricing, sales and output; red flags.

Support of Senior Management: considered essential to ensure sufficient resources / time / effectiveness / compliance culture.

Why compliance programmes are ineffective at preventing cartels

Cartelists know what they are doing is illegal, but do it anyway

“Our customers are our enemies” – *Lysine*

“...never put anything in writing, it is highly illegal and it could bite you in the arse!!!” – *Hasbro / Argos (Toys)*

“Confidential please, so we aren’t accused of being a cartel” – *Sevenoaks Survey (Private School Fees)*

In *Arriva and FirstGroup* managers colluded despite undergoing very recent compliance training.

Problem compounded by promise of enormous profits and mechanisms which link income / career progression to profit.

Why compliance programmes are ineffective at preventing cartels

Lengths individuals go to avoid detection

Staggered price announcements; communicating through private email accounts and unregistered mobile phones; encrypted messages; avoiding secretaries / admin staff; avoiding use of documents in meetings or destroying them immediately.

Complex codenames used in *Graphite Electrodes*

In *Carbonless Paper*, *Vitamins* and *Citric Acid*, evidence so successfully suppressed that Commission could not be sure infringement had ended.

Hotel rooms, private conference rooms, restaurants

Why compliance programmes are ineffective at preventing cartels

Lengths individuals go to avoid detection

Trade Associations are a common cover for cartel meetings

Legitimate travel to same location.

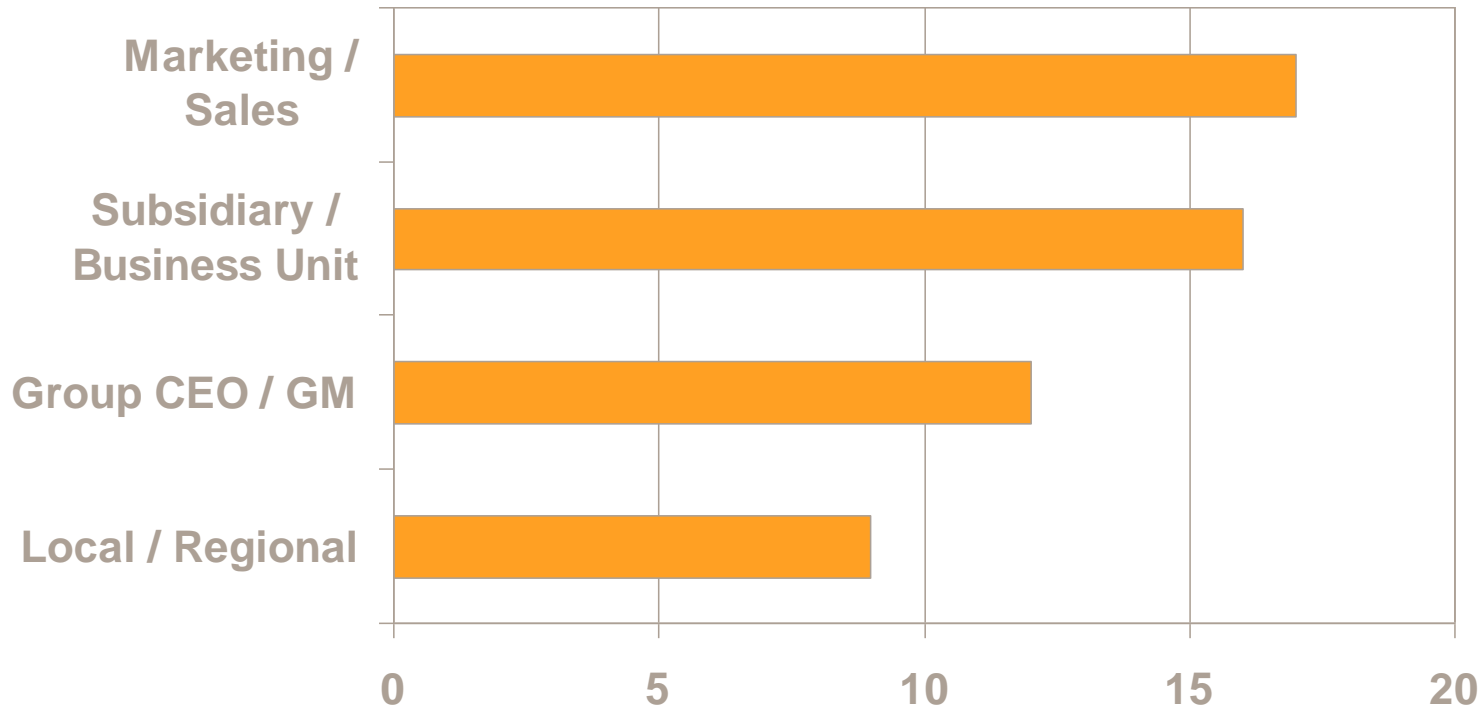
Meetings either hidden within TA (e.g. *Lysine* created working group within FEFANA, *Carbon and Graphite* within ECGA)

...or occur in social activities which surround TAs. (e.g. *Citric Acid* meetings held evening before ECAMA events).

Very difficult for antitrust audit to uncover collusive behaviour.

Why compliance programmes are ineffective at preventing cartels

The level at which collusion occurs



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The level at which collusion occurs

The danger that senior managers will either underfund compliance efforts or create facade of compliance.

Also makes it less likely that employees will report collusion

Shareholders may pursue these managers through **derivative actions**. However, if audits are ineffective cartels may not come to light for years. Also, little incentive for shareholders to pursue such actions: not covered by Directors and Officers liability insurance (intentional breach of duty); worry about impact on share prices.

Weak business attitudes towards collusive practices (in Europe at least).



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Biography

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Andrew Crawley **Director Sales and Marketing**

Andrew Crawley is Director of Sales & Marketing at British Airways.

The role is on the Management Board and reports to Willie Walsh, Chief Executive Officer. Andrew is responsible for the airlines worldwide passenger sales, marketing and distribution along with the revenue management function and overseas airport operations.

He joined British Airways in 1992 and has worked in a variety of sales, marketing and operational roles in the UK, Europe and Asia.

He was one of the five senior managers who prepared the airline's recovery plan 'Future Size and Shape' in 2002 and is also a Board Member of Airmiles and British Airways Holidays.

Prior to joining British Airways, Andrew spent two years in advertising after graduating from London University with a degree in chemistry.

Andrew is 42 and married with two daughters. His interests include windsurfing and sailing.



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Why compliance programmes are ineffective at preventing cartels

Compliance programmes do not mitigate cartel fines

US Sentencing Guidelines have (since 2004) not rewarded compliance programmes where 'high-level personnel' involved.

EU Commission has discretion, but has chosen not to reward compliance.

In UK, OFT granted 10% discount in both *Arriva and FirstGroup* and *Hasbro*, but in its 2005 guidance on compliance signalled a movement to US / EU policy.

ABA warns many firms deterred from bothering with compliance

Criminalisation and leniency as key to effective compliance programmes

Educational aspect of compliance is important: *Marine Hoses*

But risk of corporate fines falls on corporation, not individuals. In *Car Glass* imposed 11 years after cartel instigated.

In absence of threat of imprisonment, compliance training may simply highlight how worthwhile infringements are.

Immunity makes it more likely individuals will report to employer and to competition authority.

Problem: US only jurisdiction that regularly imprisons cartelists.

In UK, compliance efforts should be designed to assist convictions