OFT consultation on competition compliance guidance

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1. Introduction

The two guidance documents published for consultation demonstrate the OFT's commitment to engaging with businesses, so as to facilitate greater compliance with competition law. The value of diligent compliance efforts such as effective training, clear and safe procedures for reporting potential violations, and monitoring within the firm, should never be underestimated. Competition law is far from straightforward and there is significant scope for violations being committed purely out of ignorance, or in the belief that no real harm is created by cartel behaviour. An individual's moral compass does not automatically extend to anti-competitive conduct. Many may view such behaviour as a natural consequence of target-driven business practices, the damaging effects of which are not necessarily obvious. The comments contained in this submission are restricted to compliance in relation to 'hard-core' cartel practices.

2. Deterrence: who do we want to punish?

Many cartel infringements are not committed within the institutional framework of the firm. Corporations are by their very nature rule-following bodies. We know empirically that the most serious cartel infringements are committed by a small number of senior employees who know what they are doing is illegal.[1] Secret meetings in hotel rooms, the use of codenames and unregistered mobile phones are not unusual. Moreover, technological advances make it easier to

[1] A Stephan, 'See no Evil: Cartels and the Limits of Antitrust Compliance Programs' (2010) *The Company Lawyer* 31(8), 231-239

communicate discreetly with one's competitor. A compliance programme, no matter how well designed or well intended, is unlikely to prevent such deliberate breaches of competition law by rogue employees, although they will improve the potential for early detection. The main sanction that we have – corporate fines – is typically imposed on the firm years after the cartel agreements were instigated. By this time, the individuals involved may have moved on or retired. It is current shareholders who ultimately suffer. If meaningful deterrence is to be achieved, it is extremely important that *individuals* are targeted with sanctions such as Director Disqualification Orders and the Criminal Cartel Offence.

3. Where does this leave compliance programmes?

Although compliance efforts are unlikely to prevent deliberate and sophisticated breaches of cartel laws, they still have important roles to play. First, they help communicate the consequences of breaching cartel laws within the business community. Competition authorities struggle to maximise information dissemination about breaches of competition law. Most media coverage tends to be buried in the business pages or restricted to cases involving well known consumer brands. For this communication role to be successful, it is important that effective sanctions against individuals are frequently imposed on cartelists. Relying purely on corporate fines – typical in most cartel cases – may simply serve to reinforce a perception that the firm will always bear the risk for its employees' anticompetitive conduct. Corporate fines are, in any case, often described as a 'charge' in undertakings' annual reports, reflecting the loss of any moral lesson learnt. Compliance programmes may also reach those who are willing to raise red flags with the compliance personnel, or those who might otherwise inadvertently cross the line.

Finally, effective compliance programmes will ultimately promote a culture of competition. They can make competition 'the right thing to do'. This is especially important to industries with a long history of cartelisation, or where the combination of a non-substitutable homogenous product with high barriers to entry, makes practices such as price fixing particularly attractive. Compliance efforts will also serve to strengthen the legitimacy and continued support for competition law.

4. Corporate fines and the incentive to comply

Even if corporate fines punish shareholders rather than perpetrators, they do serve an important role. They signal the seriousness of cartel practices to the wider business community and encourage firms to take their compliance responsibilities seriously. Although the proposed 10 per cent cap on discounts in reward of compliance is entirely arbitrary (it is a number we European competition folk seem to be very fond of!), it is important that such a discount be capped. There are problems and costs associated with accurately assessing the value of a compliance programme. Relying on a rigid checklist would demonstrate a misunderstanding of effective compliance, which will vary according to the characteristics of the industry in question. Checklists may also make it easier for firms to present a façade of compliance for the purposes of window dressing. Conducting a case by case analysis is also problematic because a competition authority may struggle to accurately and consistently determine whether a firm should be rewarded a 15, 25 or 60 per cent discount. Such an assessment is also likely to be time and resource consuming.

5. Perverse incentives: rewarding compliance post-infringement?

In the OFT's *Construction Bid-Rigging* decision in 2009[2], compliance discounts of five to ten per cent were granted to around 80 parties (out of 103) for,

> '…adequately demonstrate[ing] that they have taken positive steps to introduce a formal compliance policy that is appropriate for the size of the undertaking in question… and to ensure that all appropriate staff have been made properly aware of their competition law obligations.[3]

While the purpose of these discounts was to incentivise investment in compliance, it came at a time when the OFT seemed reluctant to reward ex ante compliance efforts. In its 2005 guidance on compliance, the OFT stated:

> We will view very seriously the involvement of directors or senior management in any infringement and may treat such involvement as an aggravating factor when setting the level of financial penalty. For

[2] OFT Decision CA98/02/2009, 'Bid rigging in the construction industry in England' 21 September 2009 (Case CE/4327-04) at VI.279
[3] Ibid, at VI.317-8

example, the mitigation in having a compliance programme in place may be offset where it was blatantly ignored at a very senior level.[4]

As price fixing usually involves someone with price setting powers, it is difficult to see how a compliance discount could have been granted for a pre-existing compliance programme, however heavily invested in or well intentioned. The discounts thus risked creating the perverse incentive of it being more worthwhile to invest in compliance *after* being caught. Rewarding post-infringement compliance in this context was potentially counterproductive.

6. Legal Professional Privilege

If effective compliance is to come from within the firm, a serious problem is created in Europe by the existing rules on legal professional privilege. In contrast to the US, where communications with in-house lawyers are protected, legal privilege in Europe only extends to external counsel.[5] This makes it very difficult for firms to encourage internal reporting, as any correspondence with a compliance officer could later be used by the competition authority as evidence of an infringement. The effectiveness of relying purely on external lawyers (especially in encouraging ordinary employees to report any concerns) is highly questionable.

[4] OFT, 'How your business can achieve compliance' (2005) OFT 424; see also OFT, 'Enforcement' (December 2004) OFT 407.

[5] *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* v *European Commission* (Case C-550/0 P) [2010], at paragraphs 89 and 101 *AM&S Europe* v *Commission* case 155/79 [1982] 2 CMLR 264; *Hilti AG* v *Commission* case T-30/89A [1990] 4 CMLR 602.