

Competition law compliance in the EU: practical issues

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Agenda

- Overview of Competition Law in the EU
- Group and Transactional Issues
- OFT Competition Law Compliance Initiatives and Resources
- Discussion
- Questions

Competition Law in the EU

Two basic categories of competition law:

- laws that target anti-competitive agreements/arrangements – such as cartels (LCDs, DRAM, marine hose, dairy products . . .), but not only cartels
- laws that target the individual conduct of companies with a dominant market position – Microsoft, Intel, Google, but also smaller companies

Competition Law in the EU

Corporate risk:

- fines of up to 10% of group worldwide turnover
- actions for damages by parties who suffer loss
- unenforceable provisions in contracts
- impact on reputation, brand, recruitment
- management and legal cost

Competition Law in the EU

Personal risk:

- jail
- fines/confiscation
- director disqualification
- damages claim from the company
- disciplinary action
- impact on reputation

Competition Law in the EU

UK Office of Fair Trading (OFT) “cartel offence” completed cases:

- investigation into commercial vehicle manufacturers: closed December 2011
- investigation into automotive sector: closed October 2011
- Investigation into agricultural sector: closed August 2011
- R v. George, Crawley, Burns and Burnett (airline passenger fuel surcharge case): collapsed May 2010
- R v. Whittle, Brammar & Allison (Marine Hose case): convictions, disqualification, fines and confiscation orders June 2008

But, the OFT has *“more cases now on than in the previous seven years”*

Philip Collins, OFT Chairman, February 2012

Competition Law in the EU

Marine hose cartel as the classic example:

- European Commission (EC) investigated companies and OFT investigated individuals
- total €132 m. fines from EC on the companies
- plea bargain arrangement for individuals:
 - 3 UK citizens arrested in U.S. and allowed to return to the UK to plead guilty to price-fixing charges
 - sentenced to between 20 and 30 months jail time in the UK
 - also disqualification, fines, confiscation of assets
- private damages actions against the companies

Competition Law in the EU

Biggest issue is “cartels”:

- price fixing (including increases/decreases, discounts, rebates etc.)
- allocation of markets or customers
- limitation of supply or output (including agreeing “stock shortages” and quotas)
- bid rigging/collusive tendering
- common terms of trading

Competition Law in the EU

Also be careful of “information exchange”:

- RBS fined £29 m. by UK OFT in 2011 because: *“The OFT has concluded that between October 2007 and February or March 2008 individuals in RBS's Professional Practices Coverage Team disclosed generic as well as specific confidential and commercially sensitive future pricing information to their counterparts at Barclays. The disclosures by RBS took place through a number of contacts on the fringes of social, client or industry events or through telephone conversations.”*
- one meeting or call may be enough
- can be unilateral

Competition Law in the EU

Other high risk areas in the EU:

- resale price maintenance
- parallel trade
- dominance

Competition Law in the EU

The enforcement backdrop:

- regulators need cases
- leniency programmes
- own-initiative investigations
- tip-offs (disgruntled employees etc.)
- cash rewards for whistleblowers
- private enforcement

Competition Law in the EU

Philip Collins, OFT Chairman, February 2012:

- *“Companies need to see and read about [enforcement action], particularly if it involves large fines and jail terms. This stimulates companies”*
- *“[We need to make] cartels unstable, so [you] cannot trust anybody, therefore leniency programmes are vital . . the OFT receives dozens of applications each year”*
- *“the OFT has more own-initiative cases than ever before at the moment”*

Group and Transactional Issues

- Parent company can be liable even if it had no involvement or awareness of the breach and did not encourage subsidiary to commit it
- Only one criteria for parental liability: the “decisive influence” test
- Consequences of parental liability:
 - increase of the fine: 10% of group consolidated worldwide turnover
 - fine imposed jointly and severally.
 - recidivism
 - increase for deterrence

Group and Transactional Issues

- Decisive influence is presumed when the parent company owns all or almost all of the subsidiary's shares
- Presumption theoretically rebuttable but in practice very difficult to rebut

Group and Transactional Issues

- Only three cases where presumption has been rebutted and EU courts therefore agreed parent not liable
- Example of International Removal cartel (EU General Court; 2011):
 - parent's board of directors met for the first time more than two years after the end of the infringement
 - no meeting of shareholders during the time the infringement took place
 - joint directors of the parent and the subsidiary named before the parent company acquired the subsidiary's shares

Group and Transactional Issues

In transaction situations, consider impact from perspective of:

- parent selling its business/subsidiary
- infringing business/subsidiary itself
- acquiring parent company

There will be joint and several liability

Group and Transactional Issues

Some consequences on a share sale:

- subsidiary liable for its own pre- and post-sale activities
- vendor also liable for pre-sale activities of subsidiary
- purchaser also liable for post-sale activities of subsidiary

Group and Transactional Issues

Some consequences on an asset sale:

- vendor and its parent liable for pre-sale activities (unless cease to exist)
- purchaser and its parent liable for post-sale activities

But the position is complex and regulators have a discretion

Group and Transactional Issues

Other surprising situations:

- JVs: both parents jointly and severally liable for the conduct of the 50/50 JV (Chloroprene Rubber cartel (EU General Court; 2012))
- Agency: agent and principal can be one and the same economic unit
- Application to private equity structures

Group and Transactional Issues

Examples of private equity liability:

- Arques Industries AG, owner of a subsidiary which took part in illegal cartel behavior (Calcium Carbide cartel (EC, 2009))
- current investigation into Goldman Sachs Capital Partners based on an interest it once held in Italian cable manufacturer Prysmian

OFT Competition Law Compliance Initiatives and Resources

Steven Preece

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6 March 2012

Overview – Compliance and Directors

- **Background: OFT Research 2010**
 - **Drivers of Compliance and Non-compliance with Competition Law**
 - **Survey of Competition Law Awareness/Compliance**
- **Updated OFT Compliance Resources 2011**
 - **Interactive Version of the Compliance Wheel**
 - **How Your Business Can Achieve Compliance with Competition Law**
 - **Company Directors and Competition law**
 - **Quick Guide**
 - **Film: Understanding Competition Law**
 - **Available free at www.oft.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/**
- **Company Directors Guidance**

Background (1)

- **OFT qualitative research (May 2010): Drivers of Compliance & Non-Compliance with Competition Law**
 - to gain a better understanding of the practical challenges faced by businesses seeking to achieve a compliance culture:
 - what motivates businesses to comply and what has worked well in practice to achieve this
 - why competition law compliance challenges arise despite compliance efforts
 - to share current best practice in competition law compliance
 - to understand how we can best use our limited resources in order to help businesses to comply

Background (2)

- **OFT recognises that most businesses (and directors) want to comply with competition law**
- **OFT wishes to support businesses (and directors) seeking to comply, so that breaches of competition law are avoided in the first place (although will take enforcement action where necessary)**
- **Programme of research into competition law compliance and awareness in 2010**
 - Drivers of Compliance & Non-Compliance with Competition Law research (published May 2010)
 - Survey of Competition Law Awareness/Compliance (published June 2011)

Background (3)

Findings: Drivers of Compliance

'Sticks'

- Adverse reputational impact – company and personal
- Financial penalties
- Criminal sanctions
- Director disqualification orders
- Internal disciplinary sanctions

'Carrots'

- Management commitment to compliance crucial (ongoing, clear, unambiguous, from the top down)
- Competition law compliance can help to win business by being able to position as “ethical business” (often with competition compliance being joined up with other compliance activities e.g. health & safety, environmental, anti-bribery & corruption)
- Creating confident employees who know the rules of the game and can compete for business without fear of breaching competition law
- Internal promotions/lateral moves/bonuses linked to compliance activities

Background (4)

Findings: Drivers of Non-Compliance

- **Ambiguity or lack of management commitment (at any level)**
- **'Rogue' employees (as distinct from scapegoats)**
- **Confusion or uncertainty about the law**
- **Employee error or naivety**
- **Loss of trust in legal advice**
- **'Box-ticking' approach to compliance**
- **Competition law compliance having to compete for attention with other compliance activities**

Background (5)

Competition Law Awareness/Compliance Survey Research

- **2010 Research updating 2006 survey through telephone interviews in seven business sectors**
- **25% know 'a lot' or 'a fair amount' about competition law - higher in finance sector and among larger businesses**
- **Smaller businesses in particular confused about illegality of collaboration and market sharing**
- **20% claim to have directly come across competition law breaches by others - highest incidence in transport sector**
 - 13% thought there were anti-competitive agreements
 - 16% thought they had encountered the abuse of a dominant position
- **40% have heard of OFT enforcement action**
- **23% don't take action to ensure competition law compliance or don't know if they do**
- **57% are aware of consequences of non-compliance, especially fines**

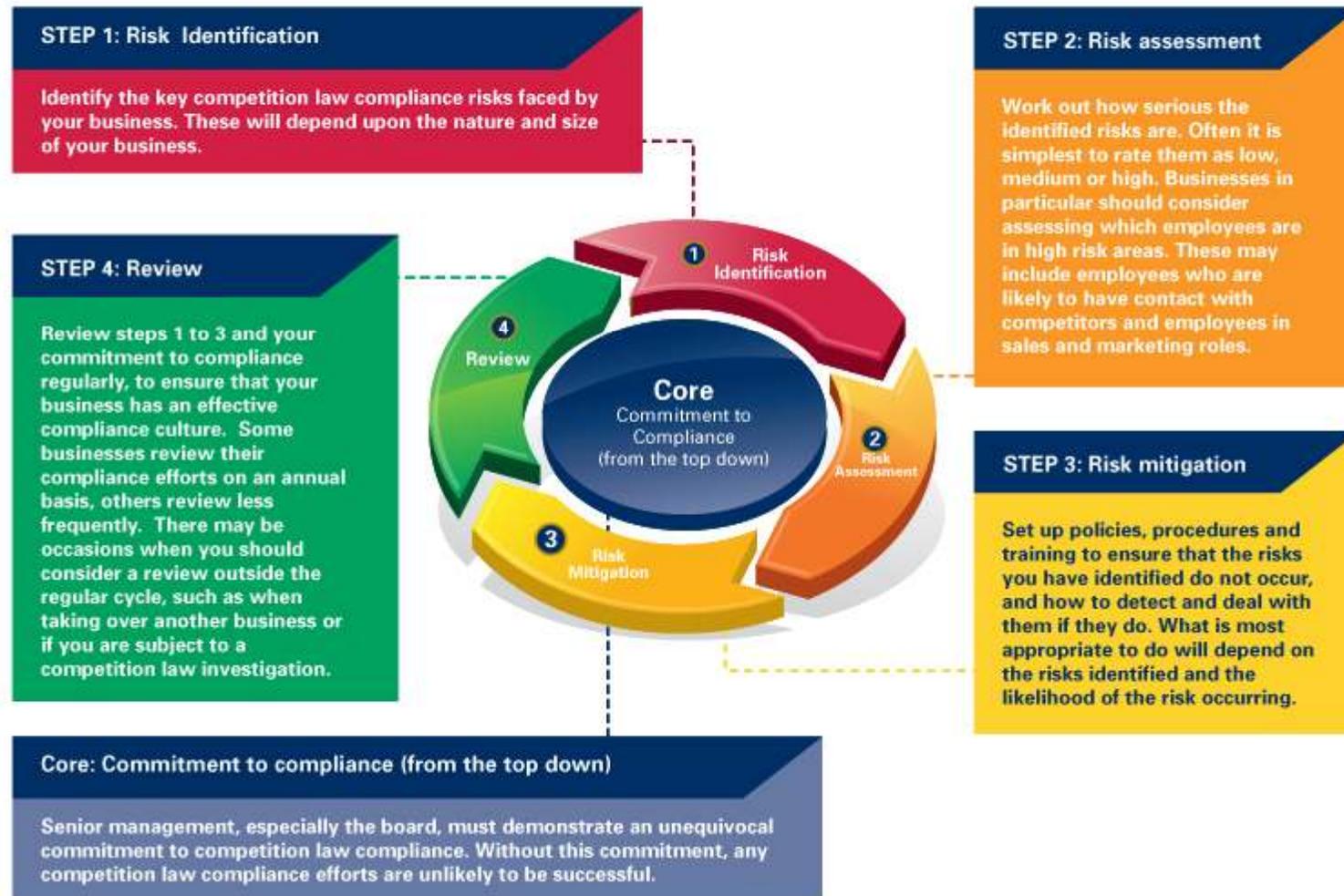
New guidance resources

- **Final guidance published June 2011, plus new DVD!**
 - Interactive version of the compliance wheel
 - How Your Business can Achieve Compliance with Competition Law
 - Quick Guide to Competition Law Compliance
 - Company Directors and Competition Law Guidance
 - Film: Understanding Competition Law
 - Available free at www.ofc.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/

Compliance Wheel (1)

Four-step competition law compliance process

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Compliance Wheel (2)

- This is a risk-based approach
- Recognises that one-size doesn't fit all
- Can sit comfortably with other compliance issues e.g. anti-bribery & corruption, health & safety, environmental concerns
- Wheel available in interactive format on OFT website:
 - ─ http://www.of.gov.uk/shared_of/ca-and-cartels/competition-awareness-compliance/of-interactive-wheel

How Your Business Can Achieve Compliance With Competition Law (1)

Step 1 – Risk Identification

- Business to identify the key competition law compliance risks it faces
- Our report highlight some examples of the way in which businesses approach this exercise.
- For some businesses the key risks relate to cartel activities
- For some abuse of dominance might be more of a concern
- Others face a broader range of risks
- Some may seek to identify the key areas of the business where risks might arise or may have known risk areas based on previous enforcement action

Step 2 – Risk Assessment

- Risks identified to be assessed as high, medium or low risks for the business based on the likelihood of the risks occurring.
- This enables the business to then tailor its compliance activities at Step 3 to fit both the type of risks (Step 1) and the level of risk (Step 2)
- For example, if a business has identified a potential risk from the arrival of new staff, this might be assessed as high if
 - the new member of staff is joining from a competitor,
 - is joining the sales and marketing department, or
 - will be undertaking a role requiring contact with competitors.
- Conversely, it might be assessed as low if the new member of staff will have a back room function with no contact with competitors or customers

How Your Business Can Achieve Compliance With Competition Law (2)

Step 3 – Risk Mitigation

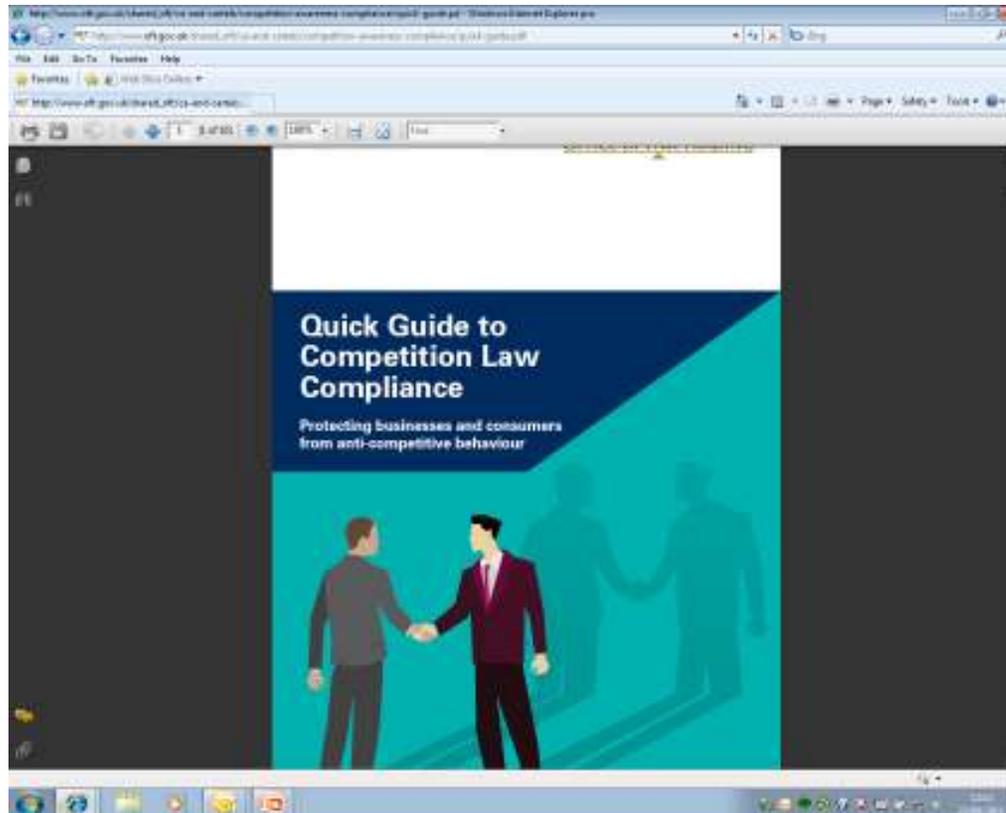
- Appropriate activities should be identified to mitigate against the risks identified and assessed at Steps 1 and 2
- These would generally include appropriate policies and procedures, and appropriate training activities
- There are examples in the report of the sorts of activities companies may consider
- The business should also consider how best to achieve behaviour change within the organisation to achieve an effective competition law compliance culture

Step 4 - Review

- This involves regular reviews of all stages of the process to ensure there is unambiguous commitment to compliance from the top down, that the risks identified or the assessment of them has not changed and that the risk mitigation activities are still appropriate and effective
- For example, a business's market share might grow over time so that it needs to address the potential risk of breaching the abuse of dominance rules
- Some companies find compliance audits and employee testing useful to assist in reviewing the success of their compliance activities

Quick Guide

- Primarily aimed at SMEs
- Incorporates content from both sets of guidance
- Short, user friendly style



OFT Film

OFT film “Understanding Competition Law”

Chapter 1 - Dawn raid

Chapter 2 - Cartels

Chapter 3 - Anti-competitive position

Chapter 4 - Abuse of dominant position

Chapter 5 - After the raid

Chapter 6 - OFT compliance process step 1: Risk identification

Chapter 7 - OFT compliance process step 2: Risk assessment

Chapter 8 - OFT compliance process step 3: Risk mitigation

Chapter 9 - OFT compliance process step 4: Review

Chapter 10 - Take action



Company Directors Guidance (1)

Background: OFT's Director Disqualification Order Powers

- **Directors can be disqualified by the court for up to 15 years**
- **Court must disqualify a director if:**
 - the director's company has breached competition law
 - The court considers that the director's conduct makes him/her unfit to be concerned with the management of a company
- **Court must have regard to whether:**
 - the director's conduct contributed to the breach
 - the director had reasonable grounds to suspect a breach but did not take steps to prevent the breach
 - the director did not know but ought to have known of the breach
- **OFT responsible for applying to the court**
- **Director can offer undertaking in lieu of an application to the court**

Company Directors Guidance (2)

- **Directors are important in driving compliance with competition law**
 - Key role in developing competition law compliance culture
 - Without full commitment of directors, any compliance activities undertaken unlikely to be effective
- **Wish to encourage directors to take active role in creating and sustaining a competition law compliance culture and not to ‘turn a blind eye’**
- **Most effective way to remove risk of director disqualification – make sure that the company does not breach competition law:**
 - Directors have a direct individual incentive to ensure competition law compliance!
- **Second best route – individual director can show that he/she is fully committed to competition law compliance and has taken reasonable steps to prevent, detect and bring to an end infringements of competition law**
 - Reasonable steps depend on the director’s role
- **Important note: link to leniency policy – immunity from director disqualification generally given to directors of leniency/immunity recipients**

Company Directors Guidance (3)

- **New Guidance covers key competition law risks of which directors should be aware and ways in which directors can minimise the risks of their company infringing competition law**
- **Recognises importance of the director's role in the company, in particular:**
 - executive or non-executive role,
 - director's specific responsibilities, and
 - the size of the company and wider corporate group.
- **Specific role is relevant to:**
 - level of understanding of competition law it is reasonable to expect of a director, and
 - steps it is reasonable to expect a director to take to prevent, detect or bring to an end infringements of competition law.

Company Directors Guidance (4)

Knowledge of competition law

● OFT expects all directors

- to understand that compliance with competition law important and that infringing competition law could lead to serious legal consequences for company and for them as individuals
- to be committed to competition law compliance
- to understand that cartel activity is a very serious infringement of competition law
- to have sufficient understanding of the principles of competition law to be able to recognise risks and to take appropriate steps to address risks identified (e.g. taking legal advice/make further enquiries)
 - Not expected to have detailed knowledge of competition law
 - If has taken reasonable steps to mitigate risks (e.g taken legal advice), very unlikely to apply for CDO if turns out to be breach later

● Compliance directors

- May need greater knowledge of competition law in order to identify/assess risks, but provided has taken reasonable steps to mitigate risks (e.g. systems/processes/policies) not expected to have any greater awareness of specific infringements than any other director

Company Directors Guidance (5)

Steps directors should be taking

● Executive directors:

- Need to be personally committed to competition law compliance and encourage their staff to be too
- Need to be aware of the degree of exposure of staff within their areas to competition law risk – identification and assessment of risks
- Need to ensure that appropriate mitigating activities (e.g. training, policies, procedures) put in place to bring about behaviour change necessary to ensure compliance
- Need to regularly review risks and mitigations
- May require director to ask questions and make enquiries as appropriate – turning a ‘blind eye’ not enough

● Non-executive directors:

- Expected to make reasonable enquiries of executive directors

Company Directors Guidance (6)

Questions all directors should ask:

- What are our key competition law risks at present?
- Which are the high, medium and low risks?
- What measures are we taking to mitigate these risks?
- When are we next reviewing the risks to check they have not changed?
- When are we next reviewing the effectiveness of our risk mitigation activities?