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## Why the U.K.'s New Approach to Competition Compliance Makes for Good Enforcement

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The U.K.'s competition law enforcement regime is still in its relative infancy. Anticompetitive conduct such as price-fixing has only been effectively investigated and punished for a little over a decade.<sup>2</sup> In that time, the Office of Fair Trading ("OFT") has focused on a small number of relatively high profile domestic cases. Infringements with a multijurisdictional dimension are generally investigated by the European Commission. While enforcement practice by the OFT has closely followed that of the Commission (bound in many respects by the supremacy of EU law), the U.K. regulator has significantly diverged in its approach to business compliance.

Neither the European Commission nor the U.S. Department of Justice Antitrust Division ("DOJ") reward infringing firms for their compliance efforts. In fact, it was only recently that the Commission announced it would not consider the existence of a compliance program to constitute an *aggravating* factor when calculating fines.<sup>3</sup> Previously, their position was "...it [was] not appropriate to take the existence of a compliance program into account as an attenuating circumstance for a cartel infringement, whether committed before or after the introduction of such a program."<sup>4</sup> The rationale for this approach appears to be that infringements represent failed compliance, and that rewarding "unsuccessful" compliance programs would be detrimental to enforcement and deterrence. Stiff sanctions, apparently, should be incentive enough for firms to prevent infringements and failure to do so deserves harsh punishment.

While there were some instances of the OFT rewarding firms which had made compliance efforts in the early days of the Competition Act 1998,<sup>5</sup> for some years its position on compliance appeared to harden in line with that of the Commission and DOJ. In its 2005 guidance on business compliance, it 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 example, the mitigation in having a compliance programme in place may be offset where it is blatantly ignored at a very senior level.<sup>6</sup>

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<sup>2</sup> Competition Act 1998 and Enterprise Act 2002.

<sup>3</sup> European Commission, *Compliance Matters: What companies can do better to respect EU competition rules*, 21 (November 2011).

<sup>4</sup> COMP/E-23/38.359 *Electrical and mechanical carbon and graphite products* OJ [2004] L 125/45 at 3131.

<sup>5</sup> *Arriva and First Group* CA98/9/2002 at 66; *Hasbro UK Ltd.* CA98/18/2002 at 92.

<sup>6</sup> OFT, *How your business can achieve compliance*, OFT 424 (2005); see also OFT, *Enforcement*, OFT 407 (December 2004).

This appeared to mirror the hardened approach in the United States where, in 2004, the sentencing guidelines were amended to prevent compliance from being treated as a mitigating factor where executives with price-setting power were involved.<sup>7</sup> As the acts of price-fixing, market-sharing, and output restriction generally require the involvement of senior executives,<sup>8</sup> such a policy essentially closes the door to rewarding effective compliance efforts in cartel cases.

The U.S. and EU approaches are also characterized by very little engagement with the business community, by the competition authority, to promote enforcement. The first contact most firms are likely to have with the regulators is investigation and penalties.

The assertion that such a restrictive approach to compliance will be deterrence-enhancing, is flawed in a number of respects:

1. It wrongly assumes that infringements are committed by the firm as an institution rather than by individuals. It is right that corporate fines be used to vicariously hold businesses to account for the actions of their employers. Indeed, the threat of sanctions should go some way in motivating firms to adopt compliance measures. However, our holding the firm to account should not preclude a consideration of the circumstances surrounding the infringement within that firm, when calculating fines.

Infringements can be instigated in diverse and varying ways. In some cases it will be operated or promoted at a corporate level; in others, it will involve a very small number of determined employees acting outside the institutional framework of the firm. Empirically, we know that individual price-fixers can invest as much effort into hiding their illegal actions from the firm as they do in hiding from the competition authority.<sup>9</sup> It would be unfair in such cases not to mitigate fines where the firm had made serious and comprehensive efforts to promote compliance. The discovery of an infringement does not mean a firm's compliance program is a failure. For example, it may have prevented other infringements or helped bring them to an end early.

2. Even if corporate fines in cartel cases were at levels considered to be optimal, they are unlikely to deter the most deliberate violations of competition law. These fines are typically imposed years after an infringement begins, or even ceases to operate, by which time the individuals responsible may have left the firm. The risk of corporate fines in the long run will be balanced against the prospect of quick profits in the short term through anticompetitive conduct.

Bonus schemes linked to the short-term performance of the firm will simply compound this problem. Many may even view price-fixing as a natural symptom of the free market, rather than something dishonest or immoral.<sup>10</sup> Business stakeholders taking part in an OFT study even argued that some highly entrepreneurial managers may feel that a competition law investigation demonstrates to their shareholders that they “are actively

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<sup>7</sup> United States Sentencing Commission *Guidelines Manual* (“USSG”), §8C2.5 (September 2008).

<sup>8</sup> A. Stephan, *See no evil: cartels and the limits of antitrust compliance programmes*, 31(8) COMPANY LAWYER 3-11 (2010).

<sup>9</sup> *Id.*

<sup>10</sup> Survey evidence suggests the majority of people in Britain recognize that price-fixing is harmful, but do not equate it to theft or fraud: A. Stephan, *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain*, 5(1) COMP. L. REV. 123-145 (2008)

pushing the boundaries.”<sup>11</sup> In any case, it is the business as a whole that bears the risk of punishment in Europe, not the individual. His or her willingness to engage in anticompetitive conduct is far more likely to be shaped by the prevailing culture within the firm, than by any estimation of the likely penalty or probability of detection.

3. Information about competition law enforcement and the size of fines will not necessarily disseminate far beyond the industries involved in an infringement decision. The OFT study found that compliance is partly driven by high sanctions and high profile cases.<sup>12</sup> Yet, 85 percent of large and 73 percent of small businesses questioned cited lack of knowledge of the law as the main driver of non-compliance.<sup>13</sup>

A study conducted before and after an investigation into bid-rigging in the U.K. construction industry found that the prohibited practices in many cases continued after the case was concluded. 80 percent of firms cited media coverage as their main source of information about the enforcement, and many were unaware of codes of conduct relating to competition that had very recently been adopted by their trade bodies.

In June 2011, following a public consultation, the OFT announced a fresh approach to competition law compliance. This approach incorporated two key features. First, new compliance guidance was published for business<sup>14</sup> and directors,<sup>15</sup> as well as simple advice in the forms of a *Quick Guide*,<sup>16</sup> *Four Step Compliance Wheel*,<sup>17</sup> and a compliance film.<sup>18</sup> Second, the OFT set out a willingness to grant a fine discount of up to 10 percent where appropriate compliance efforts are taken.

This new approach recognizes the importance of building a competition culture within the British economy, beyond simply enforcing the law. It demonstrates a pro-business commitment to helping and incentivizing firms to prevent infringements, rather than simply waiting to dish out punishment once an infringement has taken place. Contrary to the dominant view described at the beginning of this paper, encouraging compliance efforts should complement effective enforcement and deterrence. It will help widen understanding of the law and penalties, as helping to prevent infringements and bringing them to an end sooner.

The OFT’s new approach should be welcomed as a good start, but there are outstanding issues which still need to be addressed in order for British firms to become more compliant with competition law:

1. The OFT needs to actively publicize and promote its compliance materials, to ensure information disseminates to parts of the economy so far unmoved by the threat of enforcement action.

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<sup>11</sup> OFT, *The impact of competition interventions on compliance and deterrence: Final Report*, OFT 1391 at 4.7 (Dec. 2011).

<sup>12</sup> *Id.* at 1.19 and 1.16.

<sup>13</sup> *Id.* at 4.4.

<sup>14</sup> OFT, *How your business can achieve compliance with competition law: guidance*, OFT1341 (June 2011).

<sup>15</sup> OFT, *Company directors and competition law: OFT*, OFT1340 (June 2011).

<sup>16</sup> OFT, *Quick Guide to Competition Law Compliance: Protecting business and consumers from anti-competitive behaviour*, OFT 1330 (June 2011).

<sup>17</sup> Available at: [http://www.of.gov.uk/shared\\_of/ca-and-cartels/competition-awareness-compliance/staticwheel2.pdf](http://www.of.gov.uk/shared_of/ca-and-cartels/competition-awareness-compliance/staticwheel2.pdf).

<sup>18</sup> Available at: <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/competition-compliance-film/>.

2. Competition lawyers have indicated that not enough cases are being brought by the OFT for enforcement to be taken seriously.<sup>19</sup> Even civil cartel cases against the firm have been infrequent in the United Kingdom, averaging less than one infringement decision a year.
3. There is a perception that senior management is often not committed to serious compliance.<sup>20</sup> The 2007 Deloitte report on deterrence found that only 24 percent of companies with at least 1,000 employees had a dedicated competition compliance officer.<sup>21</sup> This is a measure that is considered of central importance to ensuring effective compliance, especially at the top level of the firm.<sup>22</sup>
4. The absence of a mixed approach to punishment risks highlighting a lack of risk for those thinking of infringing competition law. When British businesses were asked to rank factors that motivated compliance, they placed criminal penalties and disqualification at the top, followed by adverse publicity.<sup>23</sup> Corporate fines were placed fourth. This reflects firms' ability to absorb even very high levels of antitrust fines with relative ease.

It is the threat of personal sanctions that most focuses the minds of employees undertaking compliance training. Unfortunately, criminal sanctions do not exist on the EU level and successful prosecutions on the national level have been far and few between.<sup>24</sup> Disqualification orders are a U.K. innovation and have so far remained unutilized because the OFT will not disqualify the directors of firms cooperating with an investigation in return for a leniency discount.<sup>25</sup>

5. There is a lack of compliance best practices. For example, innovative training methods, such as computer-enhanced learning, may be more effective than the traditional compliance manual.
6. Legal privilege in Europe doesn't adequately cover communications with in-house lawyers; currently many firms prefer to deal only with external counsel.
7. There is a question as to whether a 10 percent discount is adequate to incentivize compliance. The OFT should consider a more formalized appraisal of compliance programs, with the availability of a wider range of concessions to reflect the variance in compliance measures undertaken by different firms.

There is, therefore, still much to do in the United Kingdom to champion compliance so as to strengthen competition enforcement and deterrence. The OFT has taken the hardest steps in both recognizing the importance of compliance and acknowledging that the existence of an infringement should not render a firm's entire compliance program a failure. There are a limited number of competition authorities that are following a similar path, but it remains to be seen whether a progressive view of compliance becomes the norm in antitrust. It is certainly

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<sup>19</sup> OFT 2011 Report (n. 11) at 4.6

<sup>20</sup> OFT 2011 Report (n. 11) at 4.4

<sup>21</sup> OFT, *The deterrent effect of competition enforcement by the OFT: A report prepared for the OFT by Deloitte*, OFT962 at 80 (Nov. 2007).

<sup>22</sup> E.g. J. Murphy, *Promoting Compliance with Competition Law: Do Compliance and Ethics Programs Have a Role to Play?*, OECD DAF/COMP(2011)5, (Oct. 7, 2011).

<sup>23</sup> Deloitte Report *supra* note 21, f.n. 3.

<sup>24</sup> See A. Stephan, *How Dishonesty Killed the Cartel Offence*, 2(6) CRIMINAL L. REV., 446-455 (2011).

<sup>25</sup> See A. Stephan, *Disqualification Orders for Directors Involved in Cartels*, 2(6) JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE: 529-536 (2011).

encouraging that the European Commission has softened its stance slightly and has even published its first compliance guidance paper.<sup>26</sup>

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<sup>26</sup> European Commission, *supra* note 3.