Drivers of Compliance and Non-Compliance with Competition Law

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Overview

● Background and aims of research

● Findings:
  • Drivers of Compliance
  • Drivers of Non-Compliance
  • Best Practice in Competition Law Compliance

● Respondent suggestions for OFT:
  - Penalties policy
  - Other suggestions

● Further OFT compliance work
Background and Aims of Research

Background

- OFT recognises that most businesses want to comply with competition law
- OFT wishes to support businesses seeking to comply, so that breaches of competition law are avoided in the first place (although we will take enforcement action where necessary)
- Build on previous OFT work relevant to compliance (Deloitte and London Economics research reports; previous OFT compliance guidance, OFT 424)

Aims of Research

- 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
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
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
Findings – Best Practice in Competition Law Compliance

● Risk-based approach
● One size doesn’t fit all
● Examples included in report to provide ideas to businesses designing or refreshing their competition law compliance strategy and share best practice
  - No suggestion that all or any of them would be necessary
● Insights provided in report on issues such as:
  - Identifying risks
  - Obtaining management commitment and demonstrating this to staff
  - Identifying appropriate compliance activities e.g. training, accessible legal advice and guidance, mechanisms for employees to report concerns, mock dawn raids, compliance audits
  - Encouraging behaviour change e.g. through getting business units to ‘own’ compliance risks, compliance passports
  - Monitoring and following up compliance activities
Respondent Suggestions for OFT

Penalties Policy:

- Give substantial penalties discounts for compliance programmes
  - In the range of 10 to 30 per cent
  - ‘I think that the fact that you can have a compliance policy and get no credit for it is basically unfair.’
- Give discounts where infringement committed by a ‘rogue’ employee
- Don’t treat the existence of a compliance programme as an aggravating factor

Other suggestions included:

- Update current guidance: *How Your Business Can Achieve Compliance*
- Provide more guidance on unclear areas of the law/ Provide increased opportunities for businesses to seek informal guidance
- Develop a range of compliance tools to assist businesses (e.g. a competition law helpline or training materials)
- Encourage the development of international best practice
Further OFT compliance work – two new guidance documents out for consultation

(1) Updated guidance on how your business can achieve compliance – proposed four step approach
Further OFT compliance work – two new guidance documents out for consultation

(2) Guidance for Directors – against background of enforcing UK director disqualification rules

● Required knowledge will depend on the role of the director but there are some things all directors should be aware of

● Most serious types of infringement
  - Cartel agreements
    ● Price fixing
    ● Bid rigging
    ● Market sharing
    ● Agreements between competitors to limit production
  - Sharing commercially sensitive information with competitors
  - Resale price maintenance

● Sufficient understanding of principles to recognise risks
  - Abnormal contract terms
  - Know that special rules apply if dominant and whether dominance is likely