

CARTEL TALES

The Office of Fair Trading has intensified its campaign against price-fixing and is pressing for heavy penalties. **Neil Hodge** proposes ways to minimise the risk of prosecution – including blowing the whistle on suspected offenders.

While price-fixing has been an offence in the UK for only five years, lawyers believe that the increasing willingness of the competition watchdog to investigate alleged abuses and bring criminal prosecutions means that UK companies must learn how to comply – and fast.

Over the past year the Office of Fair Trading (OFT) has handed down large fines for anti-competitive practices and – for the first time – prosecuted directors with cartel offences. In December 2007 it charged three businessmen with dishonestly participating in a cartel to allocate markets and customers, restrict supplies, fix prices and rig bids for the supply of marine hoses and ancillary equipment in the UK over a four-year period. They face up to five years in prison and/or an unlimited fine for violations under section 188 of the Enterprise Act 2002, which made price-fixing a criminal offence for the first time

when it took effect in 2003. Their companies also face fines of up to ten per cent of annual turnover if they have infringed article 81 of the treaty of Rome, the European Union's founding document, which prohibits anti-competitive practices.

The OFT also made headlines by fining British Airways £121.5m in August 2007 after the airline admitted collusion in fixing the prices of fuel surcharges, while sending a “no-action letter” – in essence, an amnesty in exchange for information to encourage firms to inform on fellow operators – to Virgin Atlantic, which had participated in the price-fixing arrangement on six occasions before blowing the whistle. Criminal investigations regarding some of the individuals involved are still pending, according to the OFT.

Other investigations include an ongoing probe into some of the UK's largest supermarkets and dairies for their alleged collusion to





increase the prices of milk, butter and cheese between 2002 and 2003, which is thought to have skimmed £270m from British consumers. Several of the accused – Asda, Dairy Crest, Safeway, Sainsbury's, Robert Wiseman Dairies and The Cheese Company – soon admitted their involvement and in December were rewarded for owning up with a reduced collective fine of only £116m. But the OFT is continuing its case against the other parties involved.

As a result, lawyers are advising all companies to tread carefully and re-examine their business practices and compliance procedures, especially as a failure to co-operate with an investigation carries a range of penalties that include unlimited fines and imprisonment for up to five years. Lawyers also warn that fines are often increased for repeat offenders, and that under section 199 of the act the OFT can conduct intrusive surveillance of those suspected of involvement in a

Directors' duties

In terms of general risk management to avoid falling foul of the UK's price-fixing law, boards should do the following:

- Adopt an appropriate competition compliance manual and policy, which could address not only avoiding price-fixing, but also dealing with raids by the competition authorities.
- Be personally aware of the rules and risks and train relevant employees in competition compliance law (see *panel, page 31*).
- Establish an effective channel through which employees can express their concerns and raise problems.
- Make employees aware that careless exchanges, particularly via e-mail, on the telephone or at informal meetings, could be misinterpreted or used in evidence.
- Consider making compliance audits of staff and records, particularly in high-risk areas of the business.
- Take firm and decisive action if an employee is found to have breached the company's compliance policy. This may include dismissal.

cartel, including planting bugging devices in people's homes, hotel rooms and private vehicles. As if that were not enough, at the end of February the regulator said that it would pay up to £100,000 in return for information that would help it to identify and take action against illegal cartels.

"The law changed dramatically in 2003. Before then, companies in the UK cared little about complying with the legislation. They were right not to – it was a waste of time. I speak as someone who worked for several years 'enforcing' it for the OFT," says David Whibley, who's now a consultant at law firm Morgan Cole. "The bottom line is that until five years ago there were no sanctions for breaching the law, so cartels operated merrily across the land. If you were caught, the worst-case scenario was that the Restrictive Practices Court would issue an order saying that you mustn't do it again. There was no risk of imprisonment or fine, no potential disqualification as a director and no brand damage – all of which apply now."

Lawyers warn that the definition of price-fixing is very wide ranging and that firms can easily fall foul of the law. John Pheasant, a partner at Hogan & Hartson, says that the guiding principle "is that companies which are competitors in the market should act independently of each other when

“ The OFT can conduct intrusive surveillance of those suspected of involvement in a cartel ”

determining their commercial strategies". But Pheasant adds that it's not only explicit price-fixing agreements that are unlawful.

"An exchange of commercially sensitive information between competitors that enables one party to know what the other plans to do – say, increase its prices – will also be covered by the competition law prohibition and potentially attract fines," he warns. "Accordingly, companies that exchange information – for example, through a trade association – should carefully check that the information received is aggregated in such a way as to make it impossible to identify the data for individual companies."

Clearly, it can be relatively easy to infringe the act, so organisations would be well advised to have robust compliance procedures and programmes in place that are communicated to all staff, especially those involved in sales and marketing. The

OFT has said that companies are expected to demonstrate their commitment to ensuring compliance. According to Whibley: "This might take the tangible form of a presentation to the board on the law and a statement in a board minute making clear that the company recognises the importance of competition law."

The regulator also expects companies to perform an ongoing assessment of the success of their compliance policies, such as periodic reviews of the programme. A firm charged with breaching the legislation is likely to be treated more leniently if it can show that rogue individuals were taking it upon themselves to act uncompetitively and contravening company policy in the process.

"There is a difference between the personal responsibility of individuals, who may face prosecution if found to be knowingly part of a cartel, and general

Competition law compliance checklist

Peter James, a partner at law firm Clarkslegal, advises that companies should ensure that the following groups of employees are particularly aware of the legislation:

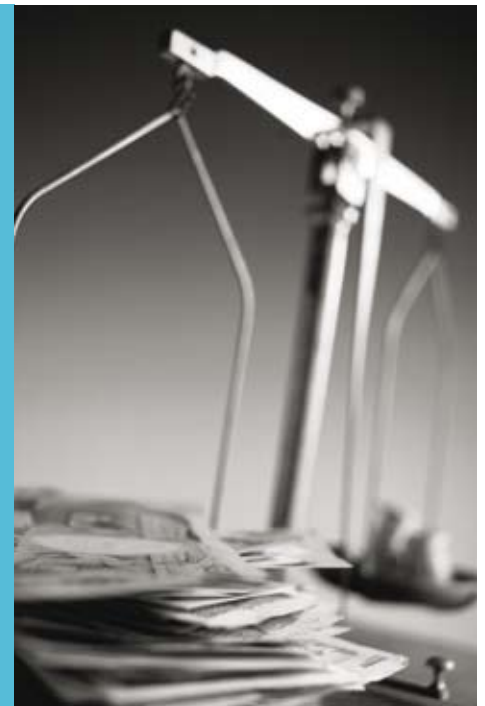
- Sales staff who are likely to have contact with competitors.
- Logistics managers who have contact with competitors.
- Business unit managers.
- Other staff with access to information on the prices charged or tenders submitted by the company who have contact with competitors.

All relevant staff should receive regular training in competition compliance, ideally by reference to a compliance manual adopted by the company.

James adds that, as part of their compliance policies, companies could consider sending questionnaires to relevant

employees covering such issues as:

- Do they get involved in any informal or formal discussions or arrangements with competitors regarding price-matching or anything similar?
- Do they ever share information included in a tender submitted by the company with any third party?
- Do they fix the prices charged by distributors or actively encourage them to charge the same price (whether by financial incentives or penalties or other means)?
- Do they ever share information with anyone outside the company about its pricing and discount policies?
- Has any third party ever approached staff with requests to share pricing, discount or other confidential information relating to the company?



“ Boards need to consider whether their firms can claim compensation from competitors that have been fixing prices ”

economic infringements by companies,” says David Marks, EU and competition partner at law firm Cameron McKenna. “If compliance procedures are in place and

The global scene

The UK is not alone in making price-fixing a criminal offence, but relatively few nations either recognise it as such or enforce their legislation.

In the US, price-fixing can be prosecuted as a felony under the Sherman Antitrust Act 1890 and in Canada it is an indictable offence under the Competition Act 1985. Price-fixing is also illegal in Australia and France, although there has never been a prosecution there. In some countries, such as Germany, rules on price-fixing are geared towards protecting small businesses, rather than simply preserving a competitive market or protecting consumers.

“UK competition law is very liberal,” argues Marjorie Holmes, a partner in the competition team at law firm Reed Smith Richards Butler. “It still allows companies such as Tesco to become national champions through effective strategies such as promotional pricing to attract the customers through the door and gain market share – sales of lager at discount rates for example.”

But she adds: “Competition laws in Germany are more interventionist. There, they act to protect small retailers, making cutting prices in this way illegal. So a mistaken understanding of the competition landscape when expanding across borders can cost your business more than just profits.”

infringements of the competition law occur, the company concerned would face only administrative proceedings rather than criminal action,” he adds.

In effect, the OFT guidelines remind companies that they should not restrict their briefings about price-fixing and competition law infringements to directors and that all relevant staff should receive regular training in competition compliance, ideally by reference to a compliance manual. As part of the compliance policy, companies could consider issuing questionnaires to relevant staff, covering such issues as whether they have ever had any involvement in any informal or formal discussions or arrangements with competitors about price-matching or anything similar, and whether they have ever shared information included in a tender submitted by the company to a third party.

But Jeremy Robinson, senior associate in the international competition group at law firm Bird & Bird, warns that directors should not rely wholly on a compliance programme. “Cartel activity is often covert and dishonest.

There may be some people who, despite knowing the law, will decide to take risks by flouting it. These people’s activities would not be stopped by your company’s compliance procedures alone,” he says. “Directors should be aware of this and take care to know what is happening on their watch. For this reason it’s often helpful to undertake regular audits or mock dawn raids of the business, not only to know how the company would react if there were a real dawn raid, but also to learn more about what activities are going on.”

Robinson also recommends that companies should blow the whistle at the

earliest opportunity once any hint of cartel activity is detected. “There is a difficult situation where a company receives unsolicited, commercially confidential data that would be useful in forming a cartel. If the company does nothing, it may be at risk later of being found to have participated in the cartel. The burden may fall on it to prove that it could not have been influenced by receiving that sensitive data,” he says. “In that situation, the safest course is to notify the anti-trust authorities and seek immunity from penalties.”

Stephen Rose, competition partner at Eversheds, agrees. “A director who suspects cartel activity should act immediately to put an end to the conduct, ensure future

compliance and consider blowing the whistle to the authorities in exchange for immunity from fines,” he advises.

“Compliance starts at the top and must be endorsed by senior management so as to change the culture of the

business. A token compliance programme may do more harm than good.”

Anthony Maton, a partner in the London office of law firm Cohen, Milstein, Hausfeld & Toll, says that boards need to consider whether their companies have a claim for compensation against competitors or suppliers that have been fixing prices or rigging markets. “Where your firm’s rivals or suppliers have engaged in such activities, your business will almost certainly have suffered a loss,” he says. “Typically, it will have been overcharged by ten per cent in a price-fixing case, so it is entitled to be compensated for that amount.”

Maton reports that law firms have even started offering to pursue anti-cartel damages claims on a “no win, no fee” basis. “Rather than simply concentrating on the risk of cartel claims being brought against them, companies should look at the opportunities to reclaim money lost in the market as a result of the anti-competitive practices inflicted on them,” he says. “The truth is that many such opportunities already exist in the market today.”

Neil Hodge is a writer specialising in business and regulation.

