Compliance

**Compliance:**
Generally refers to the functions, resources, and procedures implemented by a company to comply with the laws and regulations applicable to it.

The OECD has a wealth of legal and policy instruments designed to promote responsible business practices, including the OECD Guidelines for Multinational Enterprises, the OECD Principles on Corporate Governance, the OECD Anti-Bribery Convention, and OECD anti-cartel recommendations.
Compliance

It is not only for governments to create a sound framework for business activity, but also for undertakings to adhere to it. Only if both sides match we can rely on markets to work properly in order to:

- Enhance productivity
- Increase efficiency
- Push for innovation
- Provide better and cheaper products
- Decrease inequality

Trust in (global) markets will boost investment and will ensure sustainable growth with widespread participation in the benefits.
Compliance Targets - Risk Areas:

- Employment and industrial relations,
- Human rights,
- Environment,
- Information disclosure,
- Bribery and corruption,
- Consumer interests,
- Science and technology,
- Taxation

and

Competition Law Compliance
Risks of Non-Compliance - Competition in 2015

Global fine levels

Statistics from selected jurisdictions are approximate and reflect fine levels and exchange rates at the time of writing and may not be exhaustive. 2015 U.S. statistics are for the U.S. fiscal year, October 1 2014 to September 30 2015. All other countries’ statistics cover the 2015 calendar year. No fines were assessed in Australia or Singapore in 2015.

From: Allen & Overy, Global Cartel Enforcement 2015
Risks of Non-Compliance -
Competition in 2016

From: Allen & Overy, Global Cartel Enforcement 2016
Risks of Non-Compliance - Competition

On top:
- Prison sentences in some jurisdictions (17 OECD jurisdictions – US, UK …)

From: Gibson Dunn; 2015 YEAR-END CRIMINAL ANTITRUST AND COMPETITION LAW UPDATE
Risks of Non-Compliance - Competition

On top:

➢ Actions for damages – compensation for harm suffered by cartel victims – direct and indirect

Europe's top truck makers could face 100 billion euro cartel damages claim

Banks and brokers face new US rate-rigging litigation

Sugar Cartel Leaves Sour Taste

The global sugar industry is in turmoil as several sweet and chocolate makers take action against what they claim are sugar cartels. Damage claims in Germany alone are already running in the hundreds of millions of euros.

MasterCard faces £19 billion opt-out class action
Risks of Non-Compliance - Competition

On top: Director disqualification and Reputation damage

CMA disqualifies company director for price-fixing

From: The Economist, 29 March 2014
Enforcement Areas:

- Illegal horizontal agreements – cartels & bid rigging
- Illegal vertical agreements
- Abuse of dominance
- Mergers
Competition – Bright Line Rules?

**Merger Control:**
- Pre-notification where required; compliance with prohibition/remedy decisions.

**Abuse of Dominance:**
- Dominant undertakings have special obligations not to further deteriorate market conditions or exploit customers/suppliers.

**Illegal Vertical Agreements:**
- Agreements that foreclose markets.
- In many jurisdictions: Resale Price Maintenance.
Competition - Cartels

CEO SUMMIT

Do you collude? Sometimes.

Are you colluding with anyone now, because I’d sure like to collude with you.

What are you into? Maybe a little price-fixing?

This is all happening so fast.

Dilbert.com

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Probably one of the most often used quotes in our trade:

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. ....”

What is a cartel?

Many competition laws closely mirror Art. 101 TFEU:

The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, …..

⇒ Price fixing, market sharing, customer allocation, bid rigging

…
Any agreement between bidders that limits or reduces competition in a tender.

The agreement may be between a bidder and a potential bidder that does not actually submit a bid.

The agreement may be written or oral.

The agreement may work well and last a long time, or only happen once.

In most countries, all bid rigging agreements are illegal, and in some countries criminal.
Bid Rigging – Common Forms

Cover Bidding
A competitor agrees to submit a bid that is higher than the bid of the designated winner or agrees to submit a bid that contains terms that are known to be unacceptable to the buyer. It is the most common form of bid rigging as it gives the appearance of genuine competition.

Bid Suppression
One or more companies agree to refrain from bidding or to withdraw a previously submitted bid.

Bid Rotation
Conspiring firms continue to bid, but they agree to take turns being the winning (i.e., lowest qualifying) bidder.

Market Allocation
Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas.
Cartel Detection - Authorities

Cartel Detection - Authorities

- The Guidelines have two checklists:
  - Design Checklist
  - Detection Checklist
- The Guidelines were approved by the OECD Competition Committee in February 2009.
- The Guidelines are a nonbinding document and reflect the best practices of OECD member countries.

- They are available in 25 languages
Checklist for Detecting Bid Rigging

Section 1  Warning signs and patterns when businesses are submitting bids
Section 2  Warning signs in bid documents
Section 3  Warning signs and patterns related to pricing
Section 4  Suspicious statements
Section 5  Suspicious behaviour
Section 6  Cautionary note about indicators
Section 7  Steps to take when bid rigging is suspected
Your job:

- Prevent illegal horizontal agreements by all means

How?

- Information about common forms of cartels
- Information about typical characteristics of cartels
- Information about typical occasions for formation of cartels
- Information about typical markets
- Information about signs for cartels
- Information about incentives for employees to enter into cartels

⇒ It must be communicated without any doubt that the company will not tolerate any form of cartel conduct, whether attempted or successful.

⇒ This has to apply to the CEO as well as to the last sales person with outside contacts.
Factors that facilitate collusion:
- High concentration
- Product homogeneity
- Symmetric firms
- Price transparency
- Stability of demand
- Little innovation
- Little entry or exit

Factors that may hinder collusion:
- Large number of competitors
- Competitive fringe is present
- Easy entry
Cartels - Typical Markets?

Homogenous products, mass market goods:
- Cement
- Flour
- Sugar

But also on technology markets with expansion and innovation and difficult products like financial markets:
- DRAM’s
- LCD’s
- DVD/Computer monitor tubes
- Smart card chips
- Optical disc drives
- Euribor
- Libor
• Do you “own” customers – and competitors “own” theirs? – Same for regions/times of the year/products ….

• Do you often enter into joint bids with competitors or use subcontracts?

• Variations in prices that you offer in certain geographic areas/to certain customers or groups of customers, not explained by cost differences?

• Large offer price variation from one offer to the next, not explained by cost differences?

• Suspicious statements – “we agreed with x”; “it was confirmed by y”; “this is the standard price”; “we will have the next contract”; “we just throw in a number as a favour”; …

• Sales staff/managers meet regularly with competitors, even outside the usual (and also risky) contacts at trade fairs, trade association meetings etc.

• Staff communicates strategically sensitive competitor information/refers to it.

• Co-operation with industry consultants that work on similar projects with competitors or public procurement agencies.
Cartels – When You Have a Problem

Please choose a strategy:

- This is highly profitable. Always was. Make sure all traces are destroyed/covered. Continue.
- Stop it and withdraw from the cartel. Destroy all traces/evidence. Make sure your competitors do the same.
- Stop it and withdraw from the cartel. Destroy all traces/evidence. Make sure your competitors do the same. Fire the responsible employees.
- Do a careful internal investigation. Collect all evidence and make sure nothing is destroyed. Be the first to apply for leniency. Do not alert your co-conspirators.
A leniency programme:

- Offers a reward in the form of total or partial exoneration from the fines that would otherwise have to be paid.
- To cartel members that report their membership and provide evidence to prosecute and/or prove the violation of competition law.
- Often limits follow-on damages claims.
In order to secure the immunity status or the place in line for reduction of the fine, many regimes use a **marker system**:

- Reserves a place in the queue for the time it takes to perfect the leniency application
- Encourages a “race” to contact the competition authority
- Markers can be set orally or in writing

Immunity/reduction in fine and rank will always only be granted on a conditional basis, the final decision is with the authority – based on value of contribution, role in the cartel, co-operation effort.

Confidentiality requirements for applicants and confidentiality commitment by the authority as long as in line with statutory provisions.
Leniency Programmes

Progress of amnesty/leniency programmes:

Source: Borrell, Jiménez and García, “Evaluating Antitrust Leniency Programmes”, 2012
Leniency Programmes

Source: Borrell, Jiménez and García (2012)
Leniency: Effective Cartel Detection Tool

90%+ of fines imposed since 1996 can be traced to leniency applications

88% of cartel decisions from 2002 through 2008 were triggered by leniency

Any attempt to cover a cartel, even when the participation is stopped, gives the wrong signal internally.

If you do not report, your competitor might outrace you.

Evidence destroyed cannot be used in a leniency application.

A credible compliance culture does not leave any other option than disclosure of the cartel to the relevant authorities – and subsequently benefitting from available leniency programmes.
Will Compliance be Rewarded?

➢ US and EU position:

A functioning compliance programme will help you avoid competition law risks and conduct business legally. If you are nevertheless involved in an illegal cartel this proves that the programme did not work. Not an aggravating factor, though.

➢ Others: May be seen as a mitigating factor and can reduce the fine.
Conclusions

- Competition law compliance and a functioning compliance programme are essential.
  - Non-compliance can be costly.
  - Non-compliance will undermine trust in business and markets.
  - Non-compliance supports other crimes like corruption and money laundering.

- Countries with a good competition culture have more investment and higher growth rates.