Competition Law Compliance: The CMA 2015 Study, Compliance Rationales and the Need for Increased Compliance professionalism and Education*

Introduction

Competition law, its implications for the economy and its consequences for industry are particularly topical and controversial. There are numerous examples of price-fixing cartels being uncovered by the competition authorities both internationally and domestically, and there have also been recent and ongoing investigations and sanctions imposed under the EU abuse of dominance rule in Article 102 in relation to the unilateral conduct of global organisations such as Microsoft, Intel, and more recently Google and Amazon. The potential implications for UK industry of competition law and policy can be fairly dramatic, as stressed in the first brief part of this note. This sets the scene for the second part which will focus on the outcomes of a recent study of compliance with competition law by UK businesses commissioned by the Competition and Markets Authority, and allows us to reflect on compliance research more generally and what can or should be done to further facilitate, cajole and encourage competition law compliance.

Potential Competition Law Sanctions

Administrative Fines

UK businesses are potentially subject to both EU competition law rules, set out in Articles 101 and 102; and the UK domestic equivalents in the Chapter 1 and II prohibitions of the Competition Act, and enforcement by either the Commission or the CMA (and indeed other NCAs where conduct impacts on markets of other Member States).[1] The following is a brief outline of key aspects of the potential fines under EU and UK enforcement mechanisms for infringement of the competition rules.

EU

Article 23 of Regulation 1/2003 allows the European Commission to impose fines of up to 10% of the undertaking's total turnover in the preceding year. Periodic penalty payments can also be imposed under Art 24 for continued infringements. The largest fines imposed have tended to be for price-fixing agreements and agreements which divide up the internal market in the EU.[2] The Commission enjoys a wide discretion in imposing fines and generally takes into account such factors as the gravity of the behaviour, its duration, the size of the market in question and the likely deterrent effect of a fine. To improve transparency the Commission published its first Notice on the setting of fines in 1998.[3] According to that Notice the basic amount of the fine was to be set according to the gravity and duration of the infringement.

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1 See the Commission Network Notice, [1997] OJ C313/3. See B Rodger and A MacCulloch, *Competition Law and Policy in the EU and UK*, (Routledge, 2014), Ch 2, pp35-37 in relation to case allocation under the Notice.

2 The largest fine imposed under Art 101 TFEU to date is €1.71bn, and the largest fine under Art 102 TFEU to date is €1.06bn. See Commission Press Release IP/13/1208, 'Antitrust: Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry', 4 December 2013, and Commission Press Release IP/09/745, 'Antitrust: Commission imposes fine of €1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practices', 13 May 2009.

3 Guidelines on Method of Setting Fines, OJ 1998, C9/3.

The 1998 Notice was revised in 2006 to enhance deterrence.[4] Subsequently, there has been a dramatic increase in the overall fines imposed by the Commission, particularly in relation to cartels, following the 2006 Notice. To date, the largest fine imposed under Art 101 TFEU was €1.71bn, and the largest fine under Art 102 TFEU was €1.06bn.[5]

The CMA can also impose fines for breaches of the EU prohibitions, and its Guidance on Fines allows the CMA to take into account anti-competitive effects in other Member States when determining a penalty.[6] The UK and EU prohibitions have been applied together on a number of occasions; for example, *Airline passenger fuel surcharges for long-haul flights*,[7] and *Reckitt Benckiser*.[8]

UK

The UK competition law framework has undergone remarkable substantive and institutional changes over the last 15 years as a result of the introduction of the Competition Act 1998, Enterprise Act 2002, Regulation 1/2003 and the Enterprise and Regulatory Reform Act 2013. From 2004 to 2014, the OFT, as the NCA for the UK, had a duty to apply both domestic prohibitions and the EU rules in Articles 101 and 102 TFEU, often simultaneously. Following implementation of the Regulation 1/2003, and in order to ensure harmony between the enforcement of Arts 101 and 102 and the domestic prohibitions under the 1998 Act, a number of amendments were made to that statute and OFT practice;[9] for instance, the extension of the appeals process to the appeal tribunal, CAT, in relation to OFT decisions on Articles 101 and 102 TFEU, and the alignment of calculation of fines with Commission practice.[10] As of 1st April 2014, the OFT's role in the enforcement process has been taken over by the CMA, following the passing of the Enterprise and Regulatory Reform Act 2013. Given that the substantive rules and maximum penalties for infringement of either set of prohibitions remained unchanged, aside from the minor changes to the Procedural Rules and Guidance to reflect the changes introduced by Enterprise and Regulatory Reform Act 2013 (ERRA13) and developments in OFT practice, the CMA has effectively adopted, at least for the short term and subject to review, the existing OFT guidance on most aspects related to substantive assessment, and the investigation and enforcement regime.[11] It is clear that the OFT was particularly active in its dealings with cartels.[12] This is an area of enforcement practice which has become increasingly significant and is likely to remain the focus of the CMA's enforcement activities in the coming years. The most important sanction, in practice, is the power to impose penalties under s 36 of the 1998 Act. Section 36(8) provides that no penalty may be imposed which exceeds 10% of the turnover of an undertaking, calculated in accordance with the Competition Act 1998 (Determination of Turnover for Penalties) Order

4 Guideline on the Method of setting fines imposed pursuant to Article 23(2) of Regulation 1/2003, OJ 2006 C 210/2. See Case C-413/08 P *Lafarge v Commission*, [2010] ECR I-5361, at paras. 65-67.

5 Supra n2.

6 The CMA will continue the follow the OFT's 2012 Guidance on Fines: OFT 423, 'OFT's guidance as to the appropriate amount of a penalty', September 2012, para 2.10.

7 OFT Decision No CA98/01/2012, 19 April 2012.

8 OFT Decision No CA98/02/2011, *Abuse of a dominant position by Reckitt Benckiser Healthcare (UK) Limited and Reckitt Benckiser Group plc*, 12 April 2011.

9 See the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004/1261; the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259; the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004, SI 2004/1260; the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751.

10 'OFT's guidance as to the appropriate amount of a penalty', OFT 423. It should be noted that the Commission subsequently revised their equivalent Notice and practice in 2006 as discussed above.

11 CMA12.

12 See Rodger and MacCulloch supra n1 Chapter 7 for a fuller discussion.

2000.[13] The revised 2012 Guidance on the Appropriate Amount of a Penalty sought to broadly mirror the Commission's 2006 Guidance and sets out a six-step approach for the CMA to use when calculating financial penalties.[14] There have been a considerable number of cases in which fines based have been imposed for breach of one of the prohibitions, for example:- price-fixing agreements, in relation to games and toys, and resale price maintenance in the market for replica football kits.[15] In more recent years, we witnessed a dramatic increase in the levels of fines imposed by the OFT under the 1998 Act. For instance, in 2007, the OFT imposed a then record fine of £121.5m on British Airways, in an early resolution agreement, for colluding with Virgin Atlantic in increasing prices payable for long-haul passenger fuel surcharges, although this was subsequently reduced in the final decision to £58.5m.[16] The Decision on *bid-rigging in the construction industry in England* was also notable,[17] with a collective fine of over £129m on 103 undertakings involved in a particular form of bid-rigging comprising cover pricing. These decisions, together with other cases, highlight the important role played by the new fining powers under the 1998 Act, in particular to seek to deter future infringements.[18] The fining powers and Guidance have been used most frequently in relation to anti-competitive agreements, although in 2011 Reckitt Benckisser, were fined over £10m for abusive behaviour in withdrawing and de-listing its heartburn medicine, Gaviscon original liquid from the NHS prescription list. CMA fining practice has been limited to date with no major fines imposed as yet but it has adopted and will work in accordance with the 2012 Fines Guidance.

Personalised Sanctions

In addition to the 'administrative' sanctions available to the CMA against businesses which infringe the domestic or EU prohibitions, there are also specific sanctions targeted at individuals who are involved directly in the anti-competitive behaviour- to enhance the likelihood that organisations will institute and maintain effective competition law compliance programmes.. The cartel offence introduced in ss 188 and 189 of the Enterprise Act 2002 criminalised individuals who 'make or implement' horizontal cartel arrangements within the UK.[19] The aim was to enhance the deterrent effect by increasing personal incentives to comply, and to increase the destabilising impact on cartels by the possibility of immunity from prosecution for individuals who 'whistleblow' on a cartel. There has only been one

13 SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259. Section 44 of the ERRA13 introduced a new section 36(7A) to the CA98, setting out statutory provisions to which the CMA must have regard when fixing the level of a fine for an infringement as follows: a) the seriousness of the infringement concerned, and (b) the desirability of deterring both the undertaking on whom the penalty is imposed and others from infringing the domestic and EU prohibitions.

14 OFT 423 'OFT's guidance as to the appropriate amount of a penalty', September 2012. Note also s38 requires the CAT to have regard to the Guidance in calculating penalties.

15 OFT Decision CA98/8/2003, Case CP/0480–01 Agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd Fixing the Price of Hasbro Toys and Games, 21 November 2003. On appeal, the CAT, in Argos Ltd & Littlewoods Ltd v OFT, upheld the OFT decision on liability ([2004] CAT 24) but reduced the fines to Argos to £15m, and to Littlewoods to £4.5m respectively ([2005] CAT 13). See also Argos Ltd /Littlewoods Ltd/JJB v OFT [2006] EWCA Civ. 1318, where the Court of Appeal upheld the CAT. DGFT Decision CA98/06/2003, Case CP/0871/01 *Price-fixing of Replica Football Kit*, 1 August 2003. On appeal, the CAT reduced JJB's fine to £6.7m, Manchester United's fine to £1.5m, and Umbro's fine to £5.3m ([2005] CAT 22). See also *Argos Ltd /Littlewoods Ltd/JJB v OFT* [2006] EWCA Civ. 1318, where the Court of Appeal upheld the CAT. REDUCE and see book chapter

16 See http://www.oft.gov.uk/news-and-updates/press/2012/33-12.

17 See http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/bid_rigging_construction.

18 See for instance the application of the minimum deterrence threshold ('MDT') in the latter case, although its application was reviewed successfully in various appeals in that case eg *GF Tomlinson Group Ltd and others v OFT* [2011] CAT 7.

19 Enterprise Act 2002, s 188(1). See Cartel Offence Prosecution Guidance, CMA9, March 2014.

successful prosecution under the UK cartel offence. Three men pled guilty, in 2008, to charges in relation to international bid-rigging in the marine hoses cartel and were initially sentenced to two and a half to three years imprisonment.[20] Notwithstanding the convictions in the Marine Hose case the cartel offence was not widely considered to be a success. The only other prosecution at this time that reached trial, the BA Four case, resulted in the trial collapsing after it was revealed that the OFT had failed to disclose a considerable amount of potentially exculpatory evidence to the defence.[21] Subsequently, the UK Govt published a consultation paper in 2011 which, *inter alia*, included significant reform to the cartel offence.[22] The option that was eventually enacted in the Enterprise and Regulatory Reform Act 2013 was the removal of the dishonesty element from the offence,[23] and, as a result, the introduction of a number of new defences. Accordingly, for the offence to apply now an individual must only 'agree' to 'make or implement' a cartel arrangement. The most controversial, and relevant in a compliance context, of the new defences is the provision in s 188B(3) which is available where an individual can show that:' before the making of the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation'. It appears that any individual can now seek to escape the criminal cartel sanctions in the UK by simply consulting a lawyer. There is no requirement that the advice of those legal professionals is heeded, or behaviour altered as a result of any advice received. The Enterprise Act also introduced another form of individual penalty, the Competition Disqualification Order. The Company Directors Disqualification Act 1986 was amended – adding s 9A – to allow for a court to disqualify an individual from being a Director as 'unfit' where they were a Director of a company that has breached competition law.[24] This would include any breach of Arts 101 or 102 TFEU, or the 1998 Act prohibitions. A disqualification under this provision can be for up to 15 years. This gives the CMA the opportunity to seek an individual sanction against a company director in relation to their involvement in a wide range of anti-competitive conduct.

Private Enforcement

Businesses may also have to consider the private law consequences of any potential infringement of the competition rules. Although public enforcement of EU competition law is the norm, the basic EU doctrine of direct effect ensures that certain EU Treaty rules create rights and obligations which can be enforced in the domestic courts. In an early Article 267 TFEU ruling, the Court confirmed that the doctrine applied to the TFEU competition rules.[25] Furthermore there have been a number of important developments over the last twenty years to encourage private enforcement of competition law, such as the Commission Notice on Co-

20 See OFT Press Release 72/08, 11 June 2008. The sentences were reduced somewhat on appeal see *R v Whittle & Ors* [2008] EWCA Crim 2560.

21 See Stephan, A, 'Collapse of BA Trial Risks Undermining Cartel Enforcement' CCP Competition Policy Blog, 12 May 2010, & Joshua, J, 'Shooting the Messenger: Does the UK Cartel Offence have a Future?', The Antitrust Source, August 2010.

22 BIS, 'A Competition Regime for Growth: A Consultation on Options for Reform', March 2011. See also Wardhaugh, B, 'Closing the Deterrence Gap: Individual Liability, the Cartel Offence, and the BIS Consultation' [2011] Comp Law 175.

23 See the most recent criminal trial under the old 'dishonesty' test where two directors were acquitted in relation to a cartel involving galvanised steel tanks for water storage:- see https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage.

24 See OFT Guidance, 'Competition Disqualification Orders', OFT 510, June 2010.

25 See Case 127/73 *BRT v SABAM* [1974] ECR 51.

operation with the National Courts in 1993,[26] the European Court's *Crehan* and *Manfredi* rulings and the emphasis on the effectiveness of EU substantive rules in the national legal systems,[27] the introduction of Regulation 1/2003,[28] and the adoption by the EU of the Antitrust Damages Directive.[29]

In the UK, it was clearly intended that the 1998 Act prohibitions should be enforceable by means of private law actions through normal court processes. The Enterprise Act 2002 ('2002 Act') made further provision for encouraging private actions in relation to breaches of the 1998 Act prohibitions. Under s 47A of the 1998 Act,[30] the Competition Appeal Tribunal ('CAT'),[31] can award damages and other monetary awards where there has already been a finding by the relevant authorities of an infringement of the Chapters I and II prohibitions, or Arts 101 or 102 TFEU. Section 19 of the 2002 Act added section 47B to the 1998 Act, allowing damages claims to be brought before the CAT by a specified body on behalf of two or more consumers who have claims in respect of the same infringement[32] – a form of 'consumer representative action'. In recent years there has been an increase in case-law judgments, and the anecdotal evidence is that there has been a considerable increase in private litigation over the past ten years, with the majority of cases settling.[33] There has been considerable litigation in the High Court in relation to a number of major international cartels.[34] The award of over £33k (plus interest) in lost profit and, perhaps more significantly, an additional award of £60k for exemplary damages in *2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd*[35] was the first successful final award of damages by the CAT. It was followed by a subsequent £1.6m damages award in March 2013 in *Albion Water v Dwr Cymru Cyfyngedig*.[36] There is some evidence of an increase in the number of claims being raised before the CAT, and it has delivered some important judgments to date. Nonetheless, in 2012 the Department for Business, Innovation and Skills in the UK ('BIS') consulted on proposals to reinforce the system of private enforcement in the UK through important reforms.[37] There has been considerable academic commentary and critique of the effectiveness of those earlier provisions,[38] and there are important litigation

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[26] [1993] OJ C39/6.

[27] Case C-295/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619**.**

[28] [2003] OJ L1/1.

[29] Directive 2014/104/EU (2014) OJ L349/1. See for example, C F Weidt 'The Directive on actions for antitrust damages after passing the European Parliament' [2014] 35(9) ECLR 438-444; A Singh, 'Disclosure of Leniency evidence: examining the Directive on damages actions in the aftermath of recent ECJ rulings' [2014] 7(4) GCLR 200-213.

[30] As introduced by s 18 of the Enterprise Act.

[31] For a fuller discussion of the CAT, its role, functions and case-load, see D. Bailey 'The early case law of the Competition Appeal Tribunal' Chap. 2 in Rodger (ed) 2010 supra.

[32] Section 47B(1) and (4). Subsections 9-10 make provision regarding the specification of a body by the Secretary of State.

[33] See Rodger, B 'Private Enforcement of Competition Law, The Hidden Story: Competition Litigation Settlements in the UK 2000-2005' [2008] ECLR 96.

[34] B Rodger 'Why not court? A study of follow-on actions in the UK' (2013) 1(1) Journal of Antitrust Enforcement 104-131.

[35] *2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19. See C Veljanovski 'CAT Awards Triple Damages, Well Not Really- Cardiff Bus, and the Dislocation between Liability and Damages for Exclusionary Abuse' [2012] ECLR 47-49.

[36] [2013] CAT 6.

[37] See BIS 12/742, 'Private Actions in Competition Law: A Consultation on Options For Reform', April 2012, and BIS 14/556, 'Consumer Rights Bill: Statement on Policy Reform and Responses to Pre-Legislative Scrutiny', January 2014.

[38] See Robertson, A 'Litigating under the Competition Act 1998: The early Case-law' [2002] Comp. L. J. 4(1) pp335-344 and 'Litigating under the Competition Act 1998: recent Case-law: Part 2' [2004] Comp. L. J. 3(2) pp85-100. Rodger, B. 'Competition Law Litigation in the UK Courts: a study of all cases 2005-2008'- Parts I and II [2009] 2 Global Competition Litigation Review 93-114 and 136-147 and 'Competition Law litigation in

strategy reasons why many follow-on claims have not been raised before the specialist court, the Competition Appeal Tribunal.[39] The revised provisions of the Competition Act 1998, following the passing of the 2015 Act, will enhance the role of the specialist court, the CAT by extending its competence to hear stand-alone actions as well as follow-on actions, and allow parties to seek injunctions as well as monetary awards.[40] Furthermore, he clear limitations of the specialist representative action introduced in 2002 under section 47B of the 1998 Act, notably the low participation rates in opt-in schemes due to a lack of incentives,[41] led to the adoption by the Consumer Rights Act of an opt-out representative collective action for consumers and businesses (in follow-on and stand-alone claims),[42] together with mechanisms for CAT approved collective settlements to enhance collective redress possibilities in the UK.[43]

Compliance

It is clear that these potentially significant corporate and individual sanctions and avenues for redress on the part of competition authorities and private parties should make businesses concerned about potential infringements and consider the issue of compliance seriously. Both the EU Commission and the Competition and Markets Authority have sought to reinforce the importance of business compliance with competition law and have website material dedicated to this purpose.[44] There has been sporadic attempts to study competition law awareness and compliance efforts by the UK business community, most recently by a study finalised for the CMA in March 2015.

Prior UK Compliance Research

Empirical research in relation to competition law is to be encouraged in providing valuable data and information to better inform legal changes, policy reforms and education initiatives. The background to the debate on compliance strategies in the UK business community is the dramatic reform of UK competition law since 1998 outlined above. Perhaps unsurprisingly, there was very little research prior to the 1998 Act in relation to business attitudes towards UK competition law. In 1992 Aaranson suggested that "business does not take competition

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the UK Courts: A study of all cases 2009-2012' [2013] 6(2) GCLR 55-67; M Furse, 'Follow-on Actions in the UK: Litigating Section 47A of the Competition Act 1998' (2013) 9(1) Euro C.J. 79-103.

[39] Ibid and see in particular P Akman, 'Period of limitations in follow-on competition cases: when does a "decision" become final' (2014) 2(2) JAE 389-421.

[40] These key changes to the role and competence of the CAT have been addressed by A Andreangeli, 'The Changing structure of competition enforcement in the UK: The Competition Appeal Tribunal between present challenges and an uncertain future' (2015) 3(1) JAE 1-30. Note that the power to award injunctions only relates to proceedings before the Tribunal in England and Wales and Northern Ireland, and an interdict is not available in relation to Scottish proceedings.

[41] See M Hviid and J Peysner 'Comparing Economic Incentives Across EU Member States' Chapter 6 in Rodger (ed), Competition Law: Comparative Private Enforcement and Collective Redress Across the EU (Kluwer Law International, 2014).

[42] See 'Private Actions in Competition Law: A consultation on options for reform- government response' Jan 2013 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf at paras 5.11-5.23.

[43] For early discussion of the proposed reforms- see S Wisking, K Dietzel, M Herron 'The Rise and Rise of Private Enforcement in the United Kingdom- Government Announces far-Reaching Overhaul of the Competition Law Private Actions Regime' [2013] 6 GCLR 78-77. See also Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Consumers: A Class Act?' (2015) JAE forthcoming.

[44] See https://www.gov.uk/government/publications/how-your-business-can-achieve-compliance-with-competition-law; and http://ec.europa.eu/competition/antitrust/compliance/index_en.html.

policy adequately into account" and his experience was that companies did not plan rationally around the constraints it imposed.[45] Frazer's subsequent empirical work, prior to the adoption of the 1998 Act, sought companies' views on certain propositions as to why they might comply, concluding that the purported deterrent effect of the potential imposition of fines was not clear-cut.[46]

The OFT set up an education initiative to enhance awareness and promote compliance, particularly in the period between the Act being passed and the prohibitions coming into force. In order to provide a measure against which to evaluate the success of the education programme adopted by the OFT in increasing awareness of the 1998 Act, the OFT conducted a survey on Competition Act awareness in March 1999. [47] In the March 1999 survey, 2% of respondents were considered to be immediately aware of the Act. This increased to 6% after some nominal prompting, but rose to 23% after a fuller description of the Act. The vast majority of those aware of the Act said that they did not know very much about it (92%).[48]

Subsequently, in 2000, the author developed a research project to assess business competition law compliance culture in the UK.[49] Questionnaires were mailed to all companies in the UK with a turnover of over £10 million.[50] The overall response rate for returned and completed questionnaires of 141 questionnaires, or 9.5%, was disappointing, but did provide some useful insights for policy-makers, companies and the legal profession. 84.4% of respondents claimed to be aware of EU Competition rules. A particularly positive response was received in respect of whether respondents were aware of the implications of the Competition Act 1998. 56% claimed to be fully aware, the figure for partially and fully aware combined was 82.3%, and this figure increased to 93.6% including those simply aware of the Act. This was a significant increase from the 1999 OFT study where 77% claimed they were not aware of the Act and 21% did not know very much about it, although one must bear in mind the different formats, response rates and type of respondents for each study. The 2000 study asked about compliance programmes, and 59.6% responded that they had changed or planned to change their compliance programme to take account of the 1998 Act. This compared favourably with the OFT study of 1999 in which 52% had stated that they had neither taken nor intended to take any compliant action in relation to the Act. The improvement suggested a degree of success in the OFT's strategy of both enhancing awareness of the Act and its implications and of their policy of encouraging firms to take appropriate compliant action, given the sanctions available under the Act for breach. 51.8% responded that all relevant staff received training on competition issues and while there is room for improvement, this figure is encouraging. It has been suggested that evaluation of compliance programmes is the most

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[45] A Aaranson, 'Do Companies Take any notice of Competition Policy' (1992) 2 *Consumer Policy Review* 140.

[46] T Frazer, "Big Boys' Games, Big Boys' rules: Compliance, Competition Law and the Criminology of the Corporation' paper presented at Socio-Legal Studies association Annual Conference March 1995 and T Frazer, "Monopoly, Prohibition and Deterrence" (1995) 58 *Modern Law Review* 846.

[47] See, for instance, OFT, Competition Act Awareness Report, 2000, by Sample Surveys Ltd.

[48] The OFT commissioned a study into the deterrent effect of UK competition law enforcement, which noted *inter alia* that average consumer savings from Competition Act 1998 infringement decisions between 2004 and 2007 were £64mill per year- The deterrent effect of Competition enforcement by the OFT, A report prepared for the OFT by Deloitte, November 2007, OFT 962 at para. 2.5, available at http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf.

[49] B Rodger, 'Compliance with Competition Law; A View from Industry' [2000] *Commercial Liability Law Review* 249.

[50] Based on turnover for 1998/1999. The sample upon which the research was based covered 96% of the FTSE Allshare Index and extended to more than half of the FTSE Fledgling Index, capturing slightly less than 96% of the Listed Market Capitalization of UK companies. The overall response rate for returned and completed questionnaires of 141 questionnaires, or 9.5%, was disappointing.

fundamental issue for organisations to take on board,[51] given both continual developments, changes and reforms in the law and the policies and practices of the organisation. Disappointingly, given the importance attached to this element, only 41.1% of respondents undertook evaluation as part of their programme.

CMA 2015 Compliance Study- Awareness and Training

IFF Research[52] recently undertook research on UK businesses' understanding of competition law on behalf of the CMA,[53] and their findings have been published on the CMA website. The IFF study was a telephone-based survey of 1,201 private sector businesses in the UK, designed to be representative of the UK private sector business. The central issue concerned awareness of competition law. The study discovered that businesses were more concerned about compliance with other areas of law, for instance health and safety and employment law. The study found that only 19% of firms had discussed the legal requirements of company compliance with competition law, and overall there was a lower level of awareness of competition law with 23% stating that they knew competition well and 3% very well. Furthermore only 6% had held competition law training sessions for staff. Nonetheless, the study identified a significantly greater degree of awareness and staff training by larger businesses (identified as businesses with 250 or more employees) with 61% of large businesses holding discussions on competition law. Furthermore the study demonstrates a link between the size of business and awareness, with 37% of medium-sized businesses (identified as those with 50-249 employees) and 57% of large businesses claiming to know Competition Law well. This was also reflected by the data that 41% of large businesses ran competition law compliance training sessions. The study concluded that there was a significant compliance gap in relation to competition law, with limited understanding of specific anti-competitive infringements and potential penalties, particularly outside London and Scotland, and that size influenced business awareness and understanding of competition law.

The research methodology was different from the previous study and therefore one must be wary when comparing results and drawing conclusions from any 'changes' in awareness during the interim period. Nonetheless, the findings in this early survey do allow for some tentative comparisons to be made. In particular it is disappointing that the levels of awareness of and training in competition law are so low across the business community despite 15 years of experience and publicity, although inevitably levels of awareness and training were higher in larger businesses. The report also provided an interesting section on awareness of the role of the CMA[54] although it did not consider the mechanics of compliance programmes, in particular the crucial role for ongoing evaluation of compliance within business.

Compliance Rationales

The IFF study did look at reasons for compliance by business. The study identified 'pull' and 'push' rationales for compliance; the former based essentially on moral and ethical reasons for compliance and the latter essentially reflecting the 'stick' of fines and other punitive sanctions. Interestingly, the study found that pull motivations were the more important

[51] See for instance C Parker, 'Evaluating Regulatory Compliance: Standards and Best Practice' (1999) 7 *The Trade Practices Journal* 62.

[52] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses__understanding_of_competition_law_-_report.pdf

[53] Ibid.

[54] We will not be focusing on that aspect in this article.

reasons for compliance for the vast majority of businesses[55] and 'push' factors were the most important reason for compliance by very few respondents (eg 4% for the risk of fines) even among companies with greater awareness of the potential sanctions for competition law infringements.[56]

Despite the limited work in a UK, and European, context, there has been fairly extensive research into competition law compliance in Australia.[57] For over twenty years the Australian Competition and Consumer Commission ('ACCC') has sought to become more strategic, particularly by focusing on 'nurturing compliance'. The Australian *Enforcement and Compliance Survey* considered compliance programmes, practices and attitudes to enforcement by the ACCC under the TPA.[58] One of the principal findings of the Australian compliance study, in addition to the importance of an embedded corporate compliance culture,[59] was that commitment to compliance was demonstrably greater where a business had already been the subject of TPA enforcement action by the ACCC. Following the Australian compliance study, the author undertook further research in relation to companies which had already been subject to infringement action in the UK under the Competition Act 1998.[60] The research sought to ascertain levels of compliance commitment in this defined business group where one would have expected greater awareness and a more coherent approach to compliance. It provided us with further understanding of the links between regulatory enforcement strategies, industry compliance and other motivating factors generally, while also indicating the disappointing level of compliance system implementation among the respondents. There were, as the research identified, potentially pluralistic motivations for compliance with legal rules,[61] and in line with earlier research,[62] there is some limited support for the three key theoretical frameworks underpinning the promotion of

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[55] At para 5.6.

[56] At para 5.7.

[57] Prof Christine Parker has been at the forefront of a number of research initiatives in this area. For instance, in 1999 she focused on the question how companies and regulators will be able to determine whether a compliance programme is effective;- C Parker, 'Evaluating Regulatory Compliance: Standards and Best Practice' (1999) 7 *The Trade Practices Journal* 62. See also "Compliance professionalism and regulatory community: The Australian trade practices regime" (1999) 26 *Journal of Law & Society* 215; C Parker and Connolly, 'Is there a duty to implement a corporate compliance system in Australian law?' (2002) 30(4) *Australian Business Law Review* 275; C Parker, 'Regulator-required corporate compliance program audits" (2003) 25 *Law and Policy* 221; see also C Parker *The Open Corporation*, (Cambridge University Press, Cambridge, 2003). See also more recently Parker, C., Gilad, S., Internal corporate compliance management systems: structure, culture and agency, in Explaining Compliance: Business Responses to Regulation, eds Christine Parker and Vibeke Lehmann Nielsen (eds), (Edward Elgar Publishing, Cheltenham UK, 2011) at pp. 170-195.

[58] C Parker, and VL Nielsen, 'Do Businesses Take Compliance Systems Seriously?: An Empirical Study of the Implementation of Trade Practices Compliance Systems in Australia' (2006) 30 *Melbourne University Law Review* 441; C Parker, and VL Nielsen, 'What do Australian Businesses Really Think of the ACCC, and Does it Matter?' (2007) 34 *Federal Law Review* 1; Nielsen, V., Parker, C., 'To what extent do third parties influence business compliance?' (2008) 35/3 Journal of Law and Society [P], vol 35, issue 3, 309-340. Hereinafter, this work shall be referred to collectively as the 'Australian compliance study'.

[59] As Parker notes in *The Open Corporation* supra at p83: - 'organizations may also be provoked to adopt habits of compliance leadership by obvious changes in community values, by changes in laws that threaten to affect the reputation and legitimacy of the organization, or to place it in danger of litigation or enforcement action and stakeholder requirements' .

[60] Rodger, B., 'A study of compliance post-OFT infringement action', (2009) 5(1) European Competition Journal, 65-96.

[61] See C. Winter and P.J. May, 'Motivation for Compliance with environmental Regulations' (2001) Journal of Policy Analysis and Management' 20(4) 675-698, regarding their threefold typology of compliance motivating factors:- 'calculative', 'normative' and 'social'. See also OFT 2010 study, discussed further briefly infra.

[62] B Rodger 'Competition Law Compliance Programmes: A Study of Motivations and Practice' (2005) *World Competition* 349, involving detailed study of three sample companies in the UK to assess the extent to which a compliance culture had developed within those companies

effective compliance- rational-choice based deterrence, moral corporate citizenship based on normative affirmation of the legal principles; and managerial (in)competence based on the (non-) adoption and implementation of effective compliance systems.[63] It was also argued that in addition to purely formal, enforcer-led sanctions, deterrence may extend to broader social and economic sanctions which may impact on compliance, a context in which third party stakeholders may play an important role in developing compliance culture by exercising a combination of businesses' calculative, social and normative motivations to comply.[64]
In 1999, before the prohibitions came into force the OFT developed a compliance policy, comprising *inter alia* the publication of guidelines under s52 of the 1998 Act, and the OFT sought to increase awareness and compliance by launching an education programme through its Education and Compliance section. At that stage, it was suggested that the OFT had adopted a three-pronged strategy or an "enhanced carrot and stick" approach;[65] incorporating a deterrent strategy; an educative strategy; and a third "legitimising" strategy, involving OFT officials touring the country to explain the nature and rationale of the new legislation. The OFT website latterly a dedicated page on compliance, and they also had related publications and a CDROM called 'Compliance Matters!' The OFT undertook a qualitative study into compliance drivers in 2010,[66] and although the findings were not conclusive, a range of issues were identified as potential drivers for compliance, and the study led to revamped guidance on competition compliance issue by the OFT in 2010, primarily focused on risk management.[67] The most recent study on behalf of the CMA unfortunately suggests that the compliance message is not getting across and that the CMA should channel more resources to the educational and informational strategy which was fairly prominent and pro-active at the time the Act was introduced.

Concluding Remarks

The CMA 2015 Report outcomes, in particular the disappointing levels of awareness of competition law in the UK business community, were reaffirmed more generally by the Competition Culture Project Report (2015) by the ICN Advocacy Working Group.[68] That report noted in relation to the business community that, compared to larger firms, competition culture may be weaker among SMEs where they are less familiar with competition law and its implications, and have less resources to devote to obtaining specialist competition law advice. The report suggested that competition authorities could raise awareness and promote compliance with competition law by enhancing their engagement with the business community and providing more effective guidance and support. Moreover, as has been suggested earlier, more work could be done to encourage compliance professionalism generally in this country.[69] This message has been reinforced recently by Sokol in advocating the merits of more effective practical and business-oriented compliance education in law

[63] Also supported by the later OFT 2010 study discussed further infra.

[64] This suggests that the CMA may have a bigger task in seeking to encourage and enhance the role of such third parties in promoting better compliance by those businesses in which they are stakeholders.

[65] B Rodger, 'Compliance with Competition Law; A View from Industry' [2000] *Commercial Liability Law Review* 249 at 280 -281.

[66] OFT 1227, 'Drivers of Compliance and Non-compliance with Competition Law' An OFT Report, May 2010 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf

[67] OFT 1341, 'How your business can achieve compliance with competition law', June 2011 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf

[68] Available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1035.pdf

[69] See C Parker, 'Compliance professionalism and regulatory community: The Australian Trade Practices regime' (1999) 26 *Journal of Law & Society* 215.

schools which should subsequently lead to better in-house competition compliance by the business community.[70]

[70] D Sokol, 'Teaching Compliance' University of Cincinnati Law Review 2015 forthcoming available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616884.