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Outreach and Compliance

CONTENTS

1. Introduction	1
2. Cartel Awareness	2
2.1. What is cartel awareness?	2
2.2. Importance of raising cartel awareness	2
2.2.1. Prevention of anti-competitive practices	3
2.2.2. Intelligence gathering	3
2.2.3. Support for competition law development	3
2.3. Approaches to raising cartel awareness	4
2.3.1. Awareness through publicity	5
2.3.1.1. Press conferences	5
2.3.1.2. Electronic media	6
2.3.1.3. Print media	6
2.3.1.4. Broadcast media	6
2.3.1.5. Competition Events	7
2.3.2. Awareness through education	7
2.4. Impact of cartel awareness efforts	8
2.5. Conclusion	9
3. Outreach	10
3.1. What is outreach?	10
3.2. Outreach priorities	10
3.2.1. Targeted outreach	10
3.2.1.1. Agency goals	10
3.2.1.2. Risk	10
3.2.2. Relationship building	11
3.2.2.3. Maintaining relationships	11
3.2.2.4. Duration and timing	11
3.2.3. Format of Outreach	12
3.2.3.5. Educational goals	12
3.2.3.6. Written guidance	12
3.2.3.7. In-person meetings	13
3.2.3.8. Formal agreements	13
3.3. Target groups	14
3.3.1. Legislature	14
3.3.2. Other Law Enforcement and regulatory authorities	14
3.3.3. Public procurement authorities	15
3.3.4. Courts	15
3.3.5. Consumers	16
3.3.6. Business and trade associations	16
3.3.7. Other private organizations	17
3.3.7.1. Communication with journalists and media	17
3.4. Conclusion	17

4. Compliance	18
4.1. What is compliance?	18
4.2. Individual counselling vs. general guidance	19
4.3. Importance of compliance	19
4.4. Elements of compliance culture (program)	20
4.4.1. Identification of individual risks	21
4.4.2. Assessment of identified risks	21
4.4.3. Eliminating or reducing the risks	21
4.4.4. Training	22
4.4.5. Compliance policies and procedures	22
4.4.6. Effective control, audit or review	23
4.4.7. Commitment	23
4.5. Conclusion	24
5. Case Studies	25

1. INTRODUCTION

Competition agencies globally employ a diverse range of methods to generate awareness of competition laws, educate the public through outreach activities and foster general compliance amongst the public. This chapter gives an overview of cartel awareness, outreach and compliance efforts undertaken by competition agencies from around the world. It highlights some of the available tools and focuses on the experiences of a number of International Competition Network (ICN) members. This chapter is based on previous ICN Cartel Working Group work products and input from ICN Cartel Working Group members.

Many of the issues outlined in this chapter were discussed during the 2010–2011 ICN Cartel Working Group call series on cartel awareness, outreach and compliance. Through this series of ‘roundtable’ discussions, ICN members and non-governmental advisors (NGAs) were able to share expertise and exchange practical ideas on effective anti-cartel enforcement. The roundtable series was complemented by a collection of examples of public messages and materials used by competition agencies from around the world in their respective cartel-related outreach efforts.¹

This chapter is intended to be a reference for competition agencies that are seeking new methods of cartel awareness, outreach and compliance, and is not intended to be a comprehensive guide. Therefore, the sections on cartel awareness, outreach and compliance can be read independently and do not necessarily build on each other. The ICN Anti-Cartel Enforcement Manual is a work in progress and all chapters may be updated in the future.

References to “competition law” throughout this chapter are done so via the perspective of the ICN Cartel Working Group. This chapter does not intend to address awareness, outreach, or compliance efforts or policies outside of the cartel context. The information in this chapter may not always correspond to other antitrust enforcement topics.

1 -The Cartel Awareness and Outreach compilation is available online at: <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness.aspx>

2. CARTEL AWARENESS

2.1. What is cartel awareness?

Cartel awareness is the general public's knowledge or perception of anti-cartel laws and possible sanctions. Raising cartel awareness may include educating the general public on matters such as: the harmful effects of cartels, warning signs of cartel conduct, and the benefits of cooperating with an agency's investigation (e.g. leniency programs). The term, "raising cartel awareness" is often used to describe the process of bringing information on these issues to the general public.

2.2. Importance of raising cartel awareness

The detrimental effects of cartels on economic growth and efficiency, and the competition laws in place to prevent and punish cartels may not always be well known to the general public. The Organisation for Economic Cooperation and Development (OECD), in its book entitled "Hard core cartels: recent progress and challenges ahead" acknowledged the importance of raising cartel awareness. It stated that, in working towards the goal of enhancing public support for the anti-cartel enforcement efforts, competition agency officials should consider "conducting expanded and vigorous "public relations"² campaigns designed to inform consumers, businesses and governments of the nature of cartels and the dangers that they pose".³

A number of competition agencies surveyed identified cartel awareness as a key priority and that it is an important way of educating the public about cartel policy and law, and an integral part of promoting acceptance of competition as an important value in society. Other agencies surveyed recognised that the deterrence of cartel conduct is a factor in economic development in some sectors.

Young agencies that were surveyed also emphasized the importance of engaging in outreach with consumers, businesses and other government departments, to get buy-in from these stakeholders.⁴ It is particularly important for young agencies to undertake cartel awareness efforts early on, as they are often dealing with a public that is learning about competition laws for the first time. It is crucial that the public should learn of the existence of competition law, how it operates, appreciate how it may benefit them and understand the role that they can play in competition law enforcement.

As a competition agency gains enforcement experience, its cartel awareness efforts continue to be an important objective, but the focus and strategies of those efforts may evolve to suit the objectives and specific needs of each jurisdiction. For example, with more informed stakeholders, cartel awareness efforts may transition from a general explanation of the public detriment caused by cartels to targeted efforts that explain the detriment cartels can cause to specific categories of stakeholders. More attention may also be given to explaining benefits of compliance to cartel participants and potential leniency applicants. For example, one agency surveyed observed that, at the inception of a competition regime, a young agency will tend to take a soft approach towards cartel awareness as it seeks to understand and clarify the concept of competition. As the competition agency matures, it tends to rely increasingly on its growing body of case law to raise cartel awareness, and the agency's objective shifts to incorporate the deterrence effect of enforcement into its awareness strategy.

Regardless of level of experience, through their awareness efforts, agencies strive to reinforce awareness of the benefits of competition for consumers and businesses as this serves as the fundamental justification for the sustained fight against cartels.

² "Public relations" campaigns refer to awareness programs conducted by competition agencies.

³ The OECD's "Hard core cartels: recent progress and challenges ahead" is available online at: http://www.oecd.org/document/36/0,3746,en_2649_40381615_2516132_1_1_1_1,00.html

⁴ See Section 3 for further information on outreach efforts.

2.2.1. Prevention of anti-competitive practices

One method of encouraging compliance and deterring anti-competitive practices is to raise the profile and deepen the public's understanding of cartel laws. This includes educating businesses about the legal consequences of engaging in cartel conduct and educating consumers about the adverse impact that cartels may have on them and their national economy.

For example, the Competition Commission of South Africa (CCSA) managed to raise awareness amongst consumer organizations and trade union federations through its investigation into a price-fixing cartel of bread manufacturers. The CCSA did so by inviting these organizations to participate in the competition tribunal hearings into the cartel, in an exercise aimed specifically at raising awareness amongst stakeholders. It found that the stakeholders spoke out on how fixing the price of bread, a basic necessity, contributed to increasing poverty in South Africa and thus championed the message that cartel conduct has a deleterious effect on society. The CCSA found that their awareness efforts galvanized the South African public toward eliminating cartel conduct.

In another example, the Australian Competition and Consumer Commission (ACCC) has, through its awareness efforts, sought to change public perceptions and build the corporate stigma associated with being involved in a cartel. It has promoted the understanding that cartel conduct goes beyond a mere misdemeanour and results in significant detriment to consumers. It explains that cartel conduct is viewed by the ACCC as a very serious offence, and should therefore be regarded in the same way by the general public.

2.2.2. Intelligence gathering

The Cartel Case Initiation chapter of the Anti-Cartel Enforcement Manual recognized that “it is good practice for agencies to engage in education and outreach programs to raise awareness about anti-cartel laws and the harmful effects of cartels, to educate people about the operation of the law and the typical signs of cartel conduct, and to generate leads about cartel activity which may be a source for the initiation of a formal investigation.”⁵

By educating the general public and businesses on how cartel law operates, providing tips on how the public can detect cartel conduct and providing information on how the public and business may cooperate with the competition agency, an agency's cartel awareness efforts may provide a source of intelligence and help to generate leads on cartel activity.

Given the limits on resources and the challenge in uncovering cartels, which are secretive by nature, the opportunity to gather information from the public presents a valuable tool. This form of intelligence gathering may identify cartels, provide evidence that may incriminate cartel members or at minimum, provide helpful leads which the competition agency may follow up on in the course of its investigative work. Several agencies surveyed indicated that many investigations are initiated by complaints made by consumers, businesses, informants or whistleblowers. For this reason, competition agencies often include information on complaint-making process, leniency programs, and protection available for whistle-blowers in their cartel awareness materials.

2.2.3. Support for competition law development

Some agencies may also seek the support of relevant stakeholders such as policy makers for anti-cartel enforcement actions and policies.⁶ They engage with policy makers to highlight the harmful effects that cartels have on competition and on consumer welfare and the need for strong anti-cartel laws and enforcement resources. In addition, support from policy makers can help ensure that government policy at the broader level is aligned with the objectives of competition policy.

⁵ The Cartel Case Initiation chapter is available online at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc628.pdf>

⁶ This may be of particular importance to younger agencies.

2.3. Approaches to raising cartel awareness

Competition agencies utilise a variety of channels to raise awareness about the impact of cartels. Among competition agencies, a common objective in designing activities and programs is an emphasis on simple and engaging messages. For instance, in the case of the ACCC, one of the promotional tools being used to highlight the morally reprehensible nature of cartel conduct is a ‘tagline’ that the ACCC devised – “Businesses compete, cartels just cheat”. This catchy tagline is applied across the ACCC’s awareness raising activities as it is informative, easily understood and leaves a deep impression in the readers’ mind. Similarly, Brazil’s anti-cartel enforcer created an awareness campaign containing a simple, straightforward and powerful message, that read, “companies that participate in cartels get dirty”, accompanied by images of a businessman in a suit splattered with mud.

Agencies often use public information from their cartel enforcement actions to demonstrate the pernicious nature of cartel conduct and the need for strong enforcement. One notable example is the awareness efforts by the United States Department Of Justice Antitrust Division (US DOJ) making available to the public the audio and video tapes of secretly recorded meetings of the worldwide lysine cartel.⁷ The tapes provide an insider’s view of the inner workings of an international cartel, capturing the cartel in the act of fixing prices and carving up the worldwide market for lysine. They also vividly demonstrate the warning signs to look for in order to detect international cartel activity.

Where appropriate, competition agencies may also design activities or programs to reach out to specific target groups. From the perspective of some competition agencies, certain programs targeted at specific groups can be categorized as outreach activities. Competition agencies surveyed have stated that they do not necessarily draw a strict distinction between awareness and outreach activities, but instead adopt a strategy of continuous engagement, highlighting competition law and its benefits to the consumers, businesses and policymakers. However, it is also possible to define two kinds of general cartel awareness, one aimed at the public and one aimed at targeted groups. In both instances, general cartel awareness programmes aim to inform the audience of the existence of competition law and policy, the harm it aims to prevent and the sanctions for non-compliance. This can be distinguished from outreach, which would entail specific messages to specific groups.⁸

However, some agencies surveyed have cautioned that in conducting awareness there is a need to be mindful of maintaining confidentiality of current and past investigations. Materials and events designed for awareness efforts should utilise broad message and examples used to illustrate the messages should not contain information that would otherwise be confidential. Agencies may also consider training officers who participate in awareness efforts on how to avoid inadvertently disclosing confidential material. Awareness materials that are published on agencies websites should be vetted for confidential information before publication.

Competition agencies have found that cartel awareness activities designed with specific target groups in mind are more effective because agencies are able to tailor strategies to the interests of those particular groups. For instance, agencies may position cartel awareness efforts in a way that maximises viewing by the target groups and explains how cartels affect the interests of those groups specifically. Such a strategy helps stakeholders to relate the impact of competition laws to their particular concerns and to better understand how competition law can benefit them, thus making them more likely to take an interest in eliminating cartels. Specific target groups may include businesses (key personnel, senior managers and in-house counsel), government procurement officers, and the general public. Some agencies create publications that are engaging and directly relevant to the target audience, for instance, separate guides on cartels for consumers, government procurement agencies and businesses.

⁷ See “Caught in the Act: Inside an International Cartel” available online at: <http://www.justice.gov/atr/public/speeches/212266.htm>.

⁸ See Section 3 for further information on outreach efforts.

Academics are another group that some agencies have tailored their awareness efforts towards. One agency indicated that they reach out to academia in order to “provide established or future professionals with comprehensive material and with the tools to understand not only the technicalities of competition law, but also the underlying goal it pursues and principles upon which it is based”. Some agencies have cultivated relationships with professors in different research or academic centers through holding joint workshops, conferences or discussion forums and have used these to promote cartel awareness amongst students. For instance, the Japan Fair Trade Commission (JFTC) organized a conference at Nagoya University where its top officials had a discussion with graduate school students.

In geographically large countries, competition agencies have found that one way to reach more people is to increase the competition agencies’ presence on a local level. The Competition Bureau of Canada (CBC), as well as the ACCC, have regional branches located throughout their respective countries. This enables the CBC and the ACCC to address local competition issues, while also enabling officers to establish closer links with key stakeholders and increase the visibility of the competition agency. This strategy aims to increase the opportunities for officers to detect cartels.

As resources are limited, some agencies highlighted the need to be mindful of the financial and human resources they expend on cartel awareness.

2.3.1. Awareness through publicity

Agencies employ a wide range of cartel awareness strategies and tools to promote awareness of cartels and competition law. Many agencies recognize that ‘hard’ enforcement tools such as the exercise of investigative powers can be complemented by several other ‘soft’ tools for raising cartel awareness through publicity. Soft tools, such as press conferences, electronic media, print media and broadcast media aim to raise the profile and visibility of the competition agency, disseminate information to the general public to create or increase the public’s understanding of competition law, the penalties for cartel conduct, and methods of cartel detection and procedures for contacting the national competition agency about cartel concerns.

2.3.1.1. Press conferences

Competition agencies recognize the importance of publicizing the exercise of investigative powers and case resolutions. This increases the visibility of competition agencies and emphasizes the gravity of cartel behaviour. Publicity of completed cases where corporations or individuals have been sanctioned for engaging in cartel conduct is an important method of raising awareness by agencies. Most agencies indicated that press conferences after a decision relating to a cartel infringement highlights the ills of cartel conduct, and spreads a strong anti-cartel enforcement message to the general public. Some agencies have noted a spike in complaints of cartel behaviour following such press conferences. Many competition agencies have also found that, when issuing press releases, it is often helpful to publish a succinct account of the issues raised in the case. Given the complex nature of cartel cases, this ensures that key messages are accessible to the general public. One agency surveyed indicated that they conduct weekly interviews attended by news media and uses this forum to provide updates on its activities.

Some agencies, while recognizing that the media is an important and effective tool for enhancing cartel awareness, exercise some caution with respect to using the media as a communication tool, as any information is subject to interpretation by the press. These agencies emphasize that a balance should be sought between caution and candor when speaking to the media, in order to avoid any misinterpretation of the information. Agencies should also bear in mind issues of confidentiality regarding ongoing cartel cases when engaging in its cartel awareness efforts.

2.3.1.2. Electronic media

Most competition agencies use electronic media to transmit information on cartel awareness. Websites can be used as a platform to publish tools such as pamphlets and multi-media presentations, and provide technical guidance documents for reference. Other agencies use e-mail notices to provide regular updates to its subscribers of the recent activities that the agency has engaged in. Many agencies make available an extensive range of materials online, such as speeches, interviews and enforcement decisions. Often, settlement documents and court decisions are accompanied by easy to read press releases, in order to give a full picture of the anti-cartel enforcement process. The Competition Commission of Singapore (CCS) has a Facebook page dedicated to enhancing awareness of competition laws in Singapore.⁹ The Facebook page contains links to an interactive online game and several YouTube videos. CCS created both the interactive online game and the YouTube videos in order to educate consumers about CCS, the work it does, and competition concepts.¹⁰

The Directorate General of Competition of the European Commission (DG Comp) has recently produced a new video and designed a quiz aimed at raising awareness of cartels and the harm they do.¹¹ The video, titled “Fighting Cartels” explains what cartels do and highlights the ills they cause in a simple and relatable manner by drawing on examples from everyday life. The video illustrates anti-cartel concepts and provides examples of its application through light-hearted animation. Interviews with a leading academic and a senior enforcer are featured on the video and finally the video describes actual cartel cases investigated by DG Comp and the penalties imposed. The quiz, which is on competition law concepts, has three levels of difficulty aimed at making it accessible to laypersons as well as competition law practitioners. After a question has been answered the quiz provides more detailed information about the question and topic of competition law quizzed on.

2.3.1.3. Print media

Some agencies also use print media, such as magazines and newspapers, to disseminate cartel awareness information to a wide audience. Articles on competition law are also often published in specialized legal journals and trade press. Many of the competition agencies surveyed have specially designed cartel awareness materials, such as pamphlets, brochures, newsletters and handbooks, which are publicly available. Some of these materials contain general information about the competition agency and relevant competition laws, while others are designed specifically to promote certain areas of focus, such as leniency or bid-rigging. One agency indicated that they make available a DVD, which aims to raise businesses’ awareness of how they can comply with competition laws, different ways in which competition laws can be breached, and information on how to report suspected breaches of the law. Other agencies reported that they produce easy to read summaries of the annual reports, which provide overviews of the competition work that has been carried out by the agency.

2.3.1.4. Broadcast media

Several competition agencies have used broadcast media in their cartel awareness efforts, by producing videos, radio and television advertisements, short films and animations. Many additional agencies are currently exploring the use of social media, such as posting short films on YouTube and using Twitter to communicate its anti-cartel message, to encourage the reporting of suspicious activities.

Between 2004 and 2009, the Swedish Competition Authority (SCA) conducted a stakeholder survey, which revealed that company directors and business lawyers were relatively unaware of the SCA’s leniency program, despite the availability of information on the SCA website. Due to the low level of awareness, in 2010, the SCA produced a film entitled “Be the first to tell”, with the aim of raising company directors’ and

⁹ <https://www.facebook.com/ccs.sg>

¹⁰ <http://www.youtube.com/watch?v=ZDfsbZ5-Gsc&context=C3db8227AD0EgsToPDskLNRCKje7VKvCzLHq0IWOH>

¹¹ http://ec.europa.eu/competition/consumers/index_en.html

business lawyers' awareness of the leniency program.¹² The film was supported by a very comprehensive communications plan to facilitate maximum distribution; press releases were issued and English subtitles were added, and a special Swedish TV version was produced. The film was first released on YouTube and played on a daily basis on the train between the airport and city. The Swedish public service television also broadcast the film. The SCA indicated that, due to the comprehensive communications plan, high media coverage, and easy access, allowed the film to reach a wide audience. The success of the film was clearly shown in the results of the SCA's yearly evaluation, which displayed a higher awareness of the leniency program after the film was released.

2.3.1.5. Competition Events

The use of competition-related events as an awareness tool is becoming increasingly popular amongst competition agencies. The event forum enables agencies to share their anti-cartel message and raise the profile of the competition agency. In recent years, Brazil has focused its cartel awareness efforts on a national level through a yearly Anti-Cartel Enforcement Day. The idea of a yearly campaign stemmed from the observation that Brazilian citizens were generally ill-informed about the harm caused by cartels and the importance of anti-cartel enforcement. During the campaign period, brochures and materials were handed out in eight Brazilian airports to disseminate information on competition. Advertisements were placed in magazines and postcards were sent to key executives of 1000 companies in the country. The postcards designed for the campaign contained a key message, which read, "companies that participate in cartels get dirty". The main objectives of the initiative were to prevent companies from engaging in cartel activity and to raise awareness of the pernicious nature of cartel behaviour, including how it affects the lives of consumers.

In Singapore, the CCS organized an exclusive movie premiere of *The Informant!* in collaboration with a movie distribution company and a local book retailer. The movie is a corporate satire, based on the United States prosecution of the worldwide lysine cartel, which narrates the true story of a senior business executive who decides to 'blow the whistle' on his company's illegal cartel activities. Apart from the movie premiere, CCS also developed a trailer on price fixing, which was then shown prior to every public screening of *The Informant!* in Singapore.¹³ Through the movie premiere and trailer, CCS hoped that the public would learn about CCS and how its work can potentially help businesses stay competitive through uncovering cartels. The CCS also designed bookmarks and gave them away with the printed version of the story.

2.3.2. Awareness through education

Competition agencies also increase awareness by educating stakeholders on cartels. Often, this is achieved through seminars, conferences and debates, which promote interactive learning by allowing participants to engage in discussions with the speakers.

Agencies have also stressed the importance of educating government policy makers about competition law. Apart from conducting seminars, workshops and conferences on competition law for government officials, some agencies have also made reports on competition law issues available to other government departments. The dissemination of these reports has helped government officials understand how competition law is applied. Competition agencies also seek to educate businesses and often do this by engaging trade or professional associations as an association's membership can be very large. In addition, agencies also encourage associations and businesses to provide responses to public consultations on the competition law issues as this allows these stakeholders to play a part in the development or refinement of competition law.

¹² http://www.youtube.com/watch?v=_r99qzC8aHA

¹³ The trailer, "CCS Corporate Trailer" can be found at <http://www.ccs.gov.sg/content/ccs/en/Media-and-Publications/Publications.html>

Many competition agencies recognize that there is value to educating their society's youth in the benefits of competition law and the ills of cartels. They have designed awareness programs (targeted at students of various ages) which aim to introduce the students to competition law and reinforce their understanding of its benefits. For instance, some agencies hold lectures and classes for students at their schools and other agencies have organized debates on competition policy issues which allow the audience to consider the issues in a more critical manner.

2.4. Impact of cartel awareness efforts

Impact studies on an agency's cartel awareness efforts may assist in identifying effective channels of awareness and may help an agency tailor its strategies.

Effective cartel awareness programs may be expected to increase deterrence and increase the number of cases reported and cartels uncovered. The majority of agencies surveyed observed an increase in the number of leniency applications, complaints from consumers and businesses, informants and whistleblowers, which could at least partially be attributed to its cartel awareness efforts. Through awareness efforts, agencies may have added to a climate of mistrust within cartels, thereby leading to their exposure through leniency applications. The increase in the number of complaints is also testament to the impact of the awareness efforts on the minds of the recipients who are more likely to act on their observations of market anomalies and contact the relevant agency.

Competition agencies may also be able to monitor the impact of cartel awareness through the number of hits an agency's website receives after the announcement of a cartel investigation, the number of national news outlets or forums that pick up and publish the announcement, as well as public reactions and comments to the announcement. Competition agencies that provide awareness to specific target groups may also find it helpful to conduct a survey to evaluate the effectiveness of such programs and the participants' increased sense of awareness of competition matters.

The effectiveness of cartel awareness programs may also be established from the support that a competition agency receives from key stakeholders. For instance, one agency noted that the ability to obtain anti-cartel amendments relating to fines and leniency programs may be a positive indicator of the success of its awareness efforts. The ACCC shared that in late 2010, as part of its Cartel Project, the Melbourne Law School, University of Melbourne, issued a report on the findings of a July 2010 survey of public attitudes in Australia towards the criminalization of cartel conduct. Some of the findings included the presence of a high level of awareness of competition and cartel related topics among the public, particularly amongst older people and businesspersons, and a high level of support from the public for treating cartel conduct as illegal. The report findings helped the ACCC to focus its awareness and compliance efforts and identify areas for future work.

As a result of its impact assessment of its seminars and lectures and feedback received from the public, the JFTC shared that it is better able to modify and improve on its cartel awareness activities to suit the needs of the public. For instance, the JFTC received feedback that press releases on reported cases had to be explained in a more easily understood manner with simpler words and visual illustrations. Since then, the JFTC has devoted efforts to improving their press releases through more graphic representation of content, where possible.

After embarking on a consumer awareness campaign to educate consumers on competition law, the CCSA conducted an impact assessment. They engaged a private service provider to conduct a survey and the results disclosed that South African consumers, especially in urban areas, were aware of the work of the agency and how to benefit from it.

2.5. Conclusion

In conclusion, it is considered good practice for competition agencies to develop and implement a program to increase awareness of anti-cartel laws and the related sanctions. Agencies have stepped up efforts to increase awareness of the importance of fighting cartels. Most of the agencies surveyed take a multi-pronged approach to cartel awareness efforts, reaching out to the public at large as well as designing programs to target specific groups. Further, agencies use many different channels to maximize the reach of the cartel awareness efforts, creating campaigns, materials and maximizing publicity avenues. Some agencies also developed various multi-media activities to increase awareness.

Although all competition agencies recognize the importance of increasing cartel awareness, they face several challenges, including limited resources, resistance from certain sectors and groups which may have competing commercial interests, and the difficulties of outreach to small and medium enterprises.

In promoting cartel awareness, several competition agencies have found it useful to adopt a strategy of employing awareness and outreach activities conjunctively thus enabling them to promote competition to all sectors of society.

3. OUTREACH

3.1. What is outreach?

As discussed above, competition agencies frequently engage in cartel awareness efforts. Outreach refers to a specific type of awareness activity in which the agency takes an active role, such as providing training to specific groups (e.g. procurement agencies or government institutions). Outreach efforts are designed for specific purposes, and often involve an ongoing and active role by competition agencies, and they entail participation in the design, support or assessment of target groups' strategies to fight or deter cartels.

For most competition agencies, the main goals when undertaking outreach activities with respect to cartel conduct are to enhance detection and increase deterrence. Even though deterrence and prevention both aim to avoid cartel conduct, the former uses negative incentives and the latter uses but positive incentives. For example, educating companies and their employees on the existence of fines or criminal penalties would be aiming to increase deterrence while teaching them that abidance with competition laws can improve the company's value and image would be aiming for prevention.

3.2. Outreach priorities

Competition agencies often focus their outreach efforts on specific objectives aimed at improving prevention, enhancing detection, or increasing deterrence of cartel behaviour. Agencies that focus their outreach activities on prevention generally promote tools for consumers to identify and report cartel conduct. Some agencies engage in outreach to support their investigations, by building relationships with other agencies, regulators and other law enforcers. Many competition agencies reach out to the private sector, promoting private detection and prevention programs among possible wrongdoers and sending clear and strong enforcement messages.

One agency indicated that it publishes an agenda identifying the industries/sectors that the agency has prioritized, including outreach efforts in specific sectors.

3.2.1. Targeted outreach

Outreach activities are generally focused on certain target groups or industries. In order to properly identify target groups, competition agencies use a variety of methods.

3.2.1.1. Agency goals

Some target groups are chosen based on the agency's overall goals and priorities. For example, some agencies have named the construction industry as a priority sector, and therefore focus their outreach efforts on construction industry participants and regulators.

3.2.1.2. Risk

Some industries have a higher risk of cartel conduct than others, and therefore may be targeted for outreach activities. Agencies surveyed indicated the following possible industry risk factors:¹⁴

- History of cartel conduct,
- Homogeneous products,
- Few substitutes,
- High barriers to entry,

¹⁴ This list is not exhaustive and may vary across jurisdictions.

- Few competitors,
- Probability of affecting a large volume of commerce, or
- Active trade association.

This risk-based approach to outreach may require research by the competition agency. Some agencies have used independent contractors to conduct this research, which can be very expensive. Partnerships with other regulators may help with resources, by pursuing research jointly. This joint research could also lead to future outreach activities.

3.2.2. Relationship building

The success of outreach efforts is often tied to the strength of the relationship built between the competition agency and outreach recipient. Some agencies reach out to target groups informally, in order to build a good relationship, before proposing a formal outreach strategy. For instance, some agencies surveyed stated that if they would like to provide training on the detection of bid-rigging to public procurement officials from a certain group, it is more effective to have informal meetings and phone conversations with the group before discussing any official proposals. This approach builds a good relationship, which is the foundation for future joint initiatives, including outreach.

3.2.2.3. Maintaining relationships

Once the first contact is established, it is essential to maintain a good working relationship with target groups. As resources are limited, many agencies do not have staff dedicated to outreach. As such, it is very common for case handlers, staff attorneys and investigators to engage in outreach efforts, while maintaining their enforcement work.

One agency's recommendation is to assure that the staff dedicated to outreach in each of its country's different regions will have the set of skills to engage "effectively" with relevant stakeholders, for example, sending experienced members of said staff. Surveyed agencies indicated that having investigators and case handlers directly involved in outreach activities, such as providing training sessions about anti-cartel enforcement, is very effective. Their investigative experience makes them well placed to provide practical answers to any questions and to give anecdotes from their own enforcement experiences.

One agency surveyed indicated that their junior officials work as tutors on an "e-learning program", answering students' questions and reviewing submissions, while more senior officials generally give outreach presentations and provide related training activities. Other competition agencies also follow this approach.

The CBC recently underwent an evaluation of their anti bid-rigging program, in order to assess the effectiveness of the program and to provide recommendations on how to improve it.¹⁵ Among other things, the evaluation recommended that the CBC ensure resources dedicated to outreach have or develop the skills necessary to engage effectively with stakeholders, while balancing enforcement as an important pillar of anti bid-rigging activities.

3.2.2.4. Duration and timing

In creating an effective outreach strategy, agencies should consider the optimal duration for the outreach efforts. Some of the agencies surveyed consider many of their outreach efforts to be permanent, with activities like workshops and training seminars occurring on an ongoing basis. However, some outreach activities are finite, for example, training the public procurement officers involved in a certain project (for instance, training before and during the procurement processes for an Olympic Games or other similar event). In such cases it is very important to anticipate events that may present the opportunity

¹⁵ The findings, conclusions and recommendations of the evaluation were included in a report, which is available online at: http://dsp-psd.pwgsc.gc.ca/collection_2009/ic/lu4-140-1-2008E.pdf

for effective outreach efforts. These events may include: the allocation of governmental funds to certain industries as a stimulus to the economy or the hosting of large sporting or cultural events.

The ACCC and the US DOJ each prepared outreach activities in response to announcements regarding large governmental expenditures aimed at stimulating their countries' economies.

In 2009, the US DOJ developed a specific outreach initiative in response to the \$500 billion stimulus fund package known as the American Recovery and Reinvestment Act. The US DOJ launched an initiative to help government agencies insulate procurement, grant and program funding processes from collusion and fraud, as well as to ensure that those who abuse those processes are prosecuted. Through the outreach program the US DOJ trained thousand of law enforcement agents, auditors, and procurement and grant officials in the detection and reporting of collusion and fraud in the award of the stimulus funds.¹⁶

In Australia, a stimulus program called "Building the Education Revolution" (BER) project was implemented by the Australian Government in 2008/2009. Since BER entailed spending billions of Australian dollars in the construction industry, the ACCC conducted parallel processes of random sampling and targeted sampling of BER construction processes and participants. The ACCC took action by: writing to local agencies requesting details of managing contractors and construction firms involved, distributing copies of ACCC publications about cartel conduct, meeting with auditing task forces and local authorities; and obtaining complaint data on the BER project. Additionally, the ACCC provided information about immunity programs and contact information to 330 managing contractors across Australia.

3.2.3. Format of Outreach

3.2.3.5. Educational goals

All of the competition agencies that responded to the survey reported that they have developed and used tools to assist public procurement authorities to understand and recognise:

- i) which types of conduct are prohibited by competition law,
- ii) indicators that such conduct may be present in public procurement activities,
- iii) the circumstances that are likely to give rise to such conduct, and
- iv) the detrimental effects from the conduct.

These tools aim to train public procurement authorities to detect collusion in procurement activities.

3.2.3.6. Written guidance

Many agencies distribute written guidance to public procurement authorities, such as checklists, pamphlets, or booklets. One agency created a textbook to complement its training program focused to public procurement officials. More comprehensive written guidance, such as manuals can also be created to enhance training activities. It is generally recommended to support the distribution of such materials with an information campaign. To reduce costs, the guidance material may also be distributed by e-mail. All of the survey respondents indicated that their guidance material is available electronically

¹⁶ Electronic material including "Red Flags of Collusion", information about antitrust laws, training on detection and tips for reporting collusions is available at: <http://www.justice.gov/atr/public/criminal/economic-recovery.html>.

on their agency websites.¹⁷ The content of these guidance documents is typically drafted by agency staff, but some agencies have sought input from their private stakeholders as well as private bar, business community, academics, and politicians).

Several agencies surveyed stated that they maintain a good working relationship with public procurement officials, even after the distribution of guidance documents. This is essential to assessing the documents' impact and effectiveness. One agency indicated that it has designed specific feedback mechanisms, such as electronic questionnaires, to assess the effectiveness of their outreach documents.

3.2.3.7. In-person meetings

In addition to providing written guidance to public procurement authorities, competition agencies often hold in-person meetings with procurement officers. During these meetings, agency officials provide procurement officers with training on how to prevent, detect and report cartel conduct. During in-person meetings, agencies often provide an overview of the agency's written guidance documents and provide procurement officers with agency contact information. Sharing contact information, such as direct telephone numbers and e-mail addresses, encourages procurement officers to report any suspicious behavior and helps establish a good working relationship between the competition agency and public procurement authority. As mentioned above, a good working relationship is critical to obtaining feedback regarding the effectiveness of outreach.

In the event that other government agencies organize seminars and meetings with public procurement authorities, competition agencies may consider attending to help bolster anti-cartel enforcement messages. In some cases, agencies may consider holding joint workshops or seminars with other government agencies.

The content of the outreach sessions should vary depending on the objectives sought, but many competition agencies recommend a case study approach. Outreach activities should also be tailor-made for particular situations and audiences.

3.2.3.8. Formal agreements

Some agencies have prepared an agreement or Memorandum of Understanding (MOU) between the competition agency and procurement authority, in order to formalize the way the agencies work together to combat bid-rigging. An MOU may be useful in jurisdictions where the majority of government purchases are made by a few procurement authorities. In countries where there are many procurement authorities, preparing an MOU may be less practical.

An MOU can include the obligation to educate procurement officers on the detection and prevention of bid rigging. This training may be provided in-house by the procurement authority or via sessions or workshops provided by the competition agency. Some agencies include the obligation of bidders to state that they have not engaged in cartel activities, to disclose all information regarding any previous contact with any competitors, and to disclose any previous sanctions imposed for anti-competitive conduct.

Mexico's Comision Federal de Competencia (CFC) has signed a three-party MOU with the National Institute for Social Security (Institute) and the Organization for Economic Co-operation and Development (OECD), in order to enhance public procurement. The agreement was signed after cooperation between

¹⁷ A pamphlet about the Swedish Competition Authority's checklist is available at: <http://www.kkv.se/upload/Filer/ENG/Publications/Checklist.pdf>, the checklist itself can be found at: http://www.konkurrensverket.se/upload/Filer/ENG/Publications/Honesty_pays.pdf; a presentation made for ICN can be found at: <http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/awareness/cartelaware-sweden.pdf>.

France's Autorité de la Concurrence's report designed for citizens is available at: http://www.autoritedelaconcurrence.fr/doc/annualreportsummary_en_2010.pdf.

Australia's ACCC checklist for government procurement officers is available at: <http://www.accc.gov.au/content/index.phtml/itemId/869010>, <http://www.accc.gov.au/content/item.phtml?itemId=869010&nodeId=356d0c783f21942eb7a558e5fc058201&fn=Cartels%20Deterrence%20and%20detection%20Checklist.pdf> and <http://www.accc.gov.au/content/item.phtml?itemId=869010&nodeId=d7eb3f938ff68cda8c722e0f7465d710&fn=Cartels%20Deterrence%20and%20detection.pdf>.

Canada's Competition Bureau pamphlet on bid-rigging is available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03152.html>.

the two national organizations led to the identification of a major cartel in the supply of medicine for the Institute. The MOU contains specific obligations for each party: the Institute is required to design an internal program to detect bid-rigging; the CFC and the OECD are required to provide training to the Institute's directors and to advance the implementation of the OECD Guidelines for Fighting Bid-Rigging in Public Procurement.¹⁸

Other competition agencies have signed similar agreements with ministerial departments in their countries.

3.3. Target groups

Agencies may wish to engage in targeted outreach strategies with respect to specific groups and organizations. The target groups should be selected carefully and may vary across jurisdictions.

3.3.1. Legislature

Many competition agencies have an ongoing working relationship with their Parliament or Congress. In order to promote support for strong anti-cartel enforcement, competition agencies often engage with their legislatures through outreach efforts that highlight, for example, the importance of effective enforcement resources or needed legislative changes.

One agency indicated that, when proposing legislative reform, it has received the most positive reaction in response to justifications that are centered on the benefits to consumers and/or when they highlight well-established international standards. In this agency's experience, providing arguments based on the efficiencies that would be created has not been as successful. A number of agencies surveyed indicated that building relationships with competition interest groups, including organized consumers, is an effective way to help support legislative reform.

3.3.2. Other Law Enforcement and regulatory authorities¹⁹

Prosecutorial and regulatory authorities may have or be able to obtain information that could be used in anti-cartel investigations. As such, many competition agencies have regular meetings with other regulators, in order to describe common warning signs of cartels and to promote cartel awareness. Communication with different regulators is often tailored towards the sector that the authority regulates.

The majority of competition agencies surveyed participate in roundtable discussions with executive authorities, such as ministerial departments or secretariats in charge of economic affairs. The purpose of these roundtable discussions is to educate executive authorities about anti-cartel enforcement. This promotes a consistent approach to anti-cartel policies and enforcement, and may help increase detection, as some agencies may observe anti-competitive behaviour and be unaware of the gravity of the offence. For example, one agency indicated that it has started a "road show" to increase awareness on bid-rigging, first, concentrating its presentations to government procurement officials; on a second stage it will complement its efforts by focusing on the private sector.

Some competition agencies conduct outreach activities regarding specialized issues in which they have gathered experience. One agency, for example, has conducted outreach activities with competition agencies on different countries across the globe, sharing its expertise on the subject of digital investigation of cartels.

¹⁸ Available online at: http://www.oecd.org/document/29/0,3746,en_2649_40381615_42230813_1_1_1_1,00.html

¹⁹ This sub-section refers to law enforcement officials, competition agencies and other regulatory authorities. 'Executive authorities' refers to authorities that are part of the Government's public administration entities (in some jurisdictions, they are considered to be part of the country's Executive Power, or under its command). Depending on the jurisdiction, these authorities can be called "secretariats", "ministries" or "state departments". 'Regulatory authorities' refers to independent or semi-independent public entities in charge of regulating a given market or industry.

Also, other “white collar” offenses, such as fraud, money laundering, tax evasion and corruption, often include an element of cartel conduct. As such, many agencies recommend maintaining a good working relationship with the agencies responsible for investigating and prosecuting other white collar crime.

Many competition agencies hold presentations and seminars for public prosecutors, often on a regular basis. Some jurisdictions have specialized prosecutors devoted to the prosecution of cartel offenses. In these jurisdictions, exchanges of views between agencies and prosecutors are particularly valuable.

Reaching out to public prosecutors should improve overall antitrust enforcement. For example, one agency has developed a training program that is tailored specifically to prosecutors. This training program consists of online courses, which have been attended by more than 1000 law officers. This strategy of using e-learning provides daily support to public prosecutors and police.

Some jurisdictions face deep-rooted practices of regulation that is not conducive to competition. One agency identified the existence of several local regulators that allow or even promote anticompetitive practices in specific sectors. This agency drafted specialized guidelines for the regulators and businesses involved in the relevant markets, in order to help avoid collusion. The guidelines were designed to raise executives’ and local regulators’ cartel awareness. In addition to creating the specialized guidelines, case handlers and senior officials from the agency, held several roundtable discussions and gave many presentations to promote the guidelines.

Some agencies have the power to overrule regulators’ decisions when they are contrary to competition legislation. They combine this power with periodic meetings and other outreach efforts, in order to avoid anti-competitive conduct.

3.3.3. Public procurement authorities

Many agencies have made providing outreach to authorities that have public procurement responsibilities a top priority. Authorities that have public procurement responsibilities are often well placed to detect and report potentially anti-competitive conduct, given their knowledge of the relevant industry sectors and opportunities to observe patterns in bidding processes.

Therefore, there is a larger set of techniques and formats used to reach out public procurement authorities than to reach out other more specific authorities or targets. The following formats, although they are based on outreach activities to public procurement authorities, can be used to design similar techniques to reach out different targets.

3.3.4. Courts

Some agencies hold presentations, seminars and joint workshops with judges. Other agencies have designed special training programs for members of the judiciary.

One agency is planning to offer seminars focused on the members of the judiciary, in order to improve their understanding of competition policy. Another agency has conducted programs and seminars about recent amendments in competition law and important international cases with the participation of recognized foreign judges. Those strategies are intended to enhance the communication between the agency and the judiciary.

It may be particularly useful to engage in outreach to the judiciary shortly after competition law amendments have been passed. Sometimes legislative reform “imports” institutions or practices (e.g. new investigative tools or leniency programs) from other jurisdictions. In this case, it is important to include any relevant experience gathered in the originating country in the outreach presentations.

3.3.5. Consumers

Consumers are an important target group for competition agencies' outreach efforts. Generating consumers' awareness of competition laws will promote compliance and enhance deterrence. Many agencies have created online tools to enhance bid-rigging awareness among consumers.²⁰

Many competition agencies promote consultations with consumer groups and receive information requests from consumers. In this regard, one agency has developed guiding principles such as "maximum predictability" and "transparency" in its dealings with consumers and other interest groups. These principles seek to promote the diffusion of the agency's enforcement standards, its procedures, and encourage possible victims to report any relevant information to the agency.

The JFTC has an outreach program for consumers called "Consumer Seminar" aimed to explain Japan's Antimonopoly Act and its activities to the general public. The JFTC explains the interaction between consumer's daily activities and the Antimonopoly Act through simulation games. JFTC also holds events named "JFTC for One Day" which include: classes about Japan's Antimonopoly Act, round-table discussions with media and consultation tables.

3.3.6. Business and trade associations

Industry and trade associations are important targets for outreach activities, as they often provide a forum for competitors to communicate, meet and socialize. Such regular meetings may increase the risk of association members becoming involved in anti-competitive practices. For many competition agencies, the main goal of providing outreach to businesses and trade associations is to promote the creation of corporate governance practices that avoid and punish anti-competitive conduct from the inside. The majority of agencies reach out to industries rather than specific companies, but depending on a company's size and background, sometimes special tailored approaches are appropriate. For example, several agencies extend their procurement outreach efforts to private companies. Many agencies surveyed indicated that is important to contact both in-house counsel and corporate firms, as it is important for organizations to implement and regularly review its compliance program.

Some agencies hold meetings with businesses or consumer associations to discuss expertise with industry professionals and market insiders. Holding regular advisory meetings with such association representatives may be helpful to gain information about specific sectors.

In addition to in person meetings, agencies often send letters, pamphlets or brochures to executives in various sectors, industry associations and trade unions. The content of such written material may vary based on the anticipated outcome. For example, mid-level executives can be addressed on issues regarding their possible responsibility for executing or promoting cartel activity and techniques to detect cartel activity, while in house counsel and high-level executives can be informed, in addition, of the leniency program process.

Public consultations are also focused to businesses. One agency noted that it has made public consultations to obtain input when drafting guidelines regarding: notice on fines, compliance programs and settlement procedure. The agency sees added value in promoting this consultations because of its preventive and educational role for companies' executives and employees.

²⁰ The Competition Bureau of Canada's Bid-Rigging Awareness and Prevention presentation is available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02601.html>.

The US's Department of Justice has electronic content drafted for consumers available online at: http://www.justice.gov/atr/public/div_stats/276198.pdf.

3.3.7. Other private organizations

3.3.7.1. Communication with journalists and media

Reaching consumers through the media can be an important communication strategy. Competition agencies should always remember that journalists' understanding of competition cases may not be complete, and their media articles or publications may reflect this. Ongoing cartel investigations require especially cautious treatment, since a lot of the relevant information may be confidential. Often, members of a specialized media-relationship staff are the only members of an agency to communicate with the media.

Nevertheless, the media can be an important ally when detecting risk sectors or industries. For example, the DG COMP provides briefings to journalists before major press conferences. The DG COMP also organizes an annual general press conference with specialists to explain the most relevant cases finalised or investigated during the year.

3.4. Conclusion

Outreach activities are important to the improvement of cartel enforcement as they are directly focused on the prevention, detection and deterrence of cartel activity. Outreach activities may be targeted at public or private stakeholders and may be based on agency research, for example, the identification of industries with risks of fostering collusive activities. Effective outreach can establish and improve relations between the competition agency and key stakeholders who can influence anti-cartel enforcement.

Outreach activities can educate stakeholders about the various types of cartel conduct and the ways in which they may be detected and eliminated. It is important to remember that most outreach activities are complementary and their effectiveness is often improved by conducting them simultaneously. The combined use of human, printed and technological resources can assist competition agencies to establish and maintain an on-going outreach program.

Competition agencies should be attuned to opportunities that commonly call for an outreach activity, such as: legislative amendments, the need of regulatory reform, pervasive cartels in an industry, large governmental expenses, or lack of familiarity with anti-cartel laws and enforcement among businesses and consumers or other government agencies. Of course, outreach efforts should be tailored to agencies' objectives and priorities. Some agencies may require enhancing its prevention mechanisms and outreach activities would respond to that aim; others may need to promote the collaboration from the private sector when reporting cartel activity or abiding to competition legislation.

4. COMPLIANCE

4.1. What is compliance?

“Compliance” refers to the efforts businesses make to prevent infringements of competition laws. A compliance program is a formal tool or tools that businesses employ to achieve compliance. Compliance culture refers to the general attitude of a business towards compliance and competition laws, and can be improved through compliance efforts, including compliance programs.

Promoting compliance is also an important tool for competition agencies in preventing cartels, together with effective enforcement of competition law through investigations, sanctions and leniency. Establishing and maintaining a culture or program of compliance within a company can reduce the incidence of cartel conduct. The purpose of this section is to consider how competition agencies can promote effective compliance programs and to set out the key elements necessary for effective compliance cultures and programs.

The ideas of how compliance should be practiced seem to have shifted over the years from a so called “check box” approach to a more risk-based approach. This means that it is no longer considered sufficient for businesses to create a static compliance program which describes in general the overall risks of breaching competition law. “Risk-based” means that the approach is tailored to the specific risks faced by the business. The risks identified will necessarily vary, and each business must take appropriate actions according to the specific risks which that particular business faces.

Jurisdictions have varying experiences with regard to the level of compliance culture within businesses. This may be related to the diverse societies and regulations amongst jurisdictions, and it may therefore be difficult to give recommended good practices for competition agencies. Therefore, this section will refrain from making such recommendations.

The responsibility for taking the necessary steps to ensure compliance with competition law, including the establishment of an effective compliance program, lies with the business itself. However competition agencies may encourage more businesses to learn about the benefits of investing resources to achieve a culture of compliance, and provide useful resources.

Some competition agencies have, as an extension of this, developed some form of formal guidance or guidelines. Such guidance or guidelines provide information on compliance, including how compliance programs may be designed. Guidelines may also include practical electronic guidance, with questions and answers, a list of acceptable and suspicious practices (“Do and Don’ts”), or an index of acceptable behavior between the business association and its members. Some agencies have found it useful to carry out broad surveys of the status of businesses’ compliance programs before the preparation of such statements or guidance.

Guidance regarding compliance may contain information about the law, the importance of compliance (the costs of non-compliance, benefits of compliance), and that compliance programs should consider a risk-based approach and be subject to top management commitment reflected in the entire organization (top down commitment).

Established guidance and resources on compliance can be communicated clearly and unambiguously. When businesses contact competition agencies to discuss compliance, the agencies have a clear base from which to provide information.

Many agencies also have compliance-related resources or information. One agency has prepared a film and a DVD containing material on compliance efforts by businesses. Another agency indicated that it has given compliance speeches and has spoken on compliance teleconferences to business groups and private attorneys who represent business clients. Another has made a “road safety brochure” which can help businesses to comply with its competition rules.

4.2. Individual counselling vs. general guidance

Most competition agencies will not consider individual compliance programs, provide concrete advice related to individual compliance programs, or provide any form of approval of individual programs. Businesses are best placed to assess what is required for their own compliance program and they have the necessary in-depth knowledge of their own structure and requirements. Competition agencies may also want to avoid the contradictory situation where they have to establish infringements concerning a business that has based its compliance program on previous concrete advice from the agency.

However, there are examples of agencies that go further in guiding and evaluating specific compliance measures. One agency, for example, has as part of their efforts to make businesses implement compliance programs, invited businesses to submit their compliance programs to the competition agency for evaluation. If the compliance program meets a certain minimum standard, the business will obtain a certificate from the agency. Such a certificate does not give the business the right to a reduction of potential fines or other benefits.²¹

Another agency has conducted extensive surveys of corporate compliance activities, and subsequently provided concrete and practical feedback from the survey to the businesses. This agency has also conducted relevant surveys related to lawyers working with compliance programs, in addition to holding seminars on compliance for businesses and industry organizations.

4.3. Importance of compliance

The detection, investigation and prosecution of cartel behaviour is a priority for every competition agency. Cartels are typically shrouded in secrecy and, in addition to effective enforcement, it is important to work actively to prevent cartel behaviour. Promoting compliance is therefore an important tool for competition agencies in the fight against cartels.

Businesses and their senior management generally wish to comply with the law. Still, by creating awareness about the benefits of compliance and the costs of non-compliance, agencies can further promote compliance.

Businesses and the relevant employees should be aware of the following consequences of competition law infringement:²²

- Financial penalties,
- Possible criminal convictions,
- Loss of reputation,
- “Business Ban” for prominent members of the management,
- Diversion of management time,
- Legal costs,
- Partial annulment of agreements that infringe the law, and
- Lawsuits from third parties.

A business with an effective compliance culture, may not only prevent the above mentioned consequences, but may also achieve the following outcomes (which are not exhaustive and may vary between jurisdictions):

- Early detection and termination of infringements, which can result in a leniency application and immunity,

²¹ An evaluation of this system commenced in December 2011.

²² This list is not exhaustive and may vary across jurisdictions.

- Recognition as an “ethical business”, and
- Awareness among employees about suppliers or competitors infringing the law and perhaps causing damages to the business.

While achieving an effective compliance culture may require an investment by the business, the general benefits of this investment can far exceed the cost.

Promoting the legal, economic and reputational benefits of a compliance culture to businesses can aide competition agencies working to prevent cartels and/or detect cartel behaviour as early as possible.

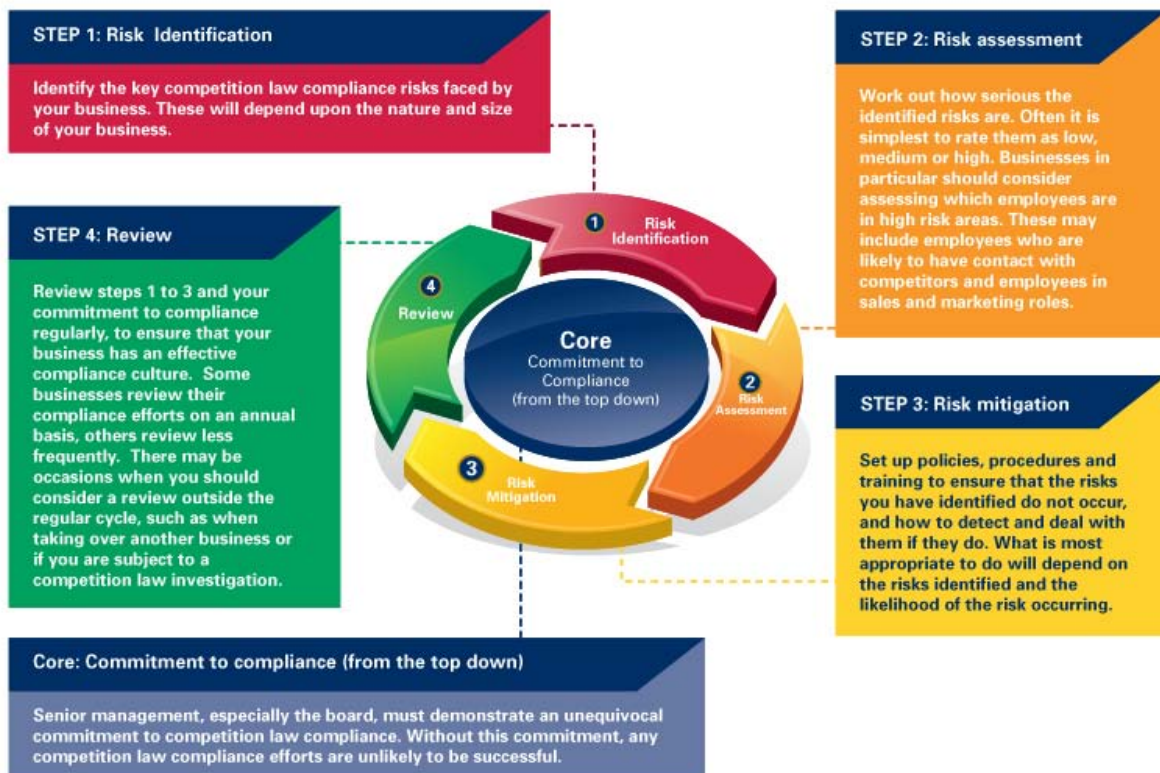
4.4. Elements of compliance culture (program)

Some competition agencies emphasize that compliance efforts should be tailored to the specific risks faced by the businesses. However, the views of competition agencies may differ when it comes to giving concrete advice or recommend specific “safeguard-systems”. One possible recommendation is to draw the business’ attention to assessing risks, dealing with them and evaluating their efforts. The United Kingdom Office of Fair Trading (UK OFT) has developed a “compliance wheel” which demonstrates a risk-based approach in a straightforward and easy to understand diagram:

Competition agencies that have done research and work in the compliance area mention the importance of businesses developing a tailor-made approach which suits their particular situation. There are many ways to achieve a risk-based approach for compliance programs, the essence being that businesses are aware of specific risks and understand how to take appropriate action to mitigate them. It is also essential for businesses to show a clear and strong commitment from the top down.

Four-step competition law compliance process

OFFICE OF FAIR TRADING



4.4.1. Identification of individual risks

In order to pinpoint the specific risks a business is facing it is important that senior management and employees understand the basic elements of a cartel. In general, cartels are agreements where two or more businesses agree not to compete with each other. Such agreements may include:

- Price fixing,
- Bid rigging,
- Limiting production, and
- Market sharing.

A successful business compliance strategy can be based on a comprehensive analysis of the areas in which a business is most likely to violate competition law. The risk analysis will depend on the nature and size of the business in question. It will also depend on factors like:

- Business sector: Some sectors have a history of previous infringements which may indicate a need for particular attention.
- Level and frequency of interaction with competitors: Many businesses attend meetings with competitors within trade associations or even on a more day to day basis. In these settings businesses should be aware of the dangers connected with exchange of information.
- The characteristics of the market: Some market structures can make cartelization more likely.

The above list of factors is neither definitive nor exhaustive. The exposure to the risk of infringing competition rules may vary greatly between businesses and also between employees. In particular, employees who attend trade association functions or have other contact with competitors and at the same time possess sensitive information or deal with pricing are exposed. On the other end, employees who work “in-house” are less exposed. Some businesses may choose to use external consultants to assess the risk. These should have the full support of the management in order to achieve the best results.

4.4.2. Assessment of identified risks

To increase the effectiveness of the compliance efforts, a business may want to assess the level of risks identified. One way of doing this involves considering each risk as high, medium or low. This exercise might help businesses to tailor appropriate risk mitigation actions.

4.4.3. Eliminating or reducing the risks

The next step for a business is to mitigate its identified risks in a manner appropriate to the level of exposure. This generally includes implementing suitable training activities, policies and procedures.

It is important that businesses do not take a “one size fits all” approach, but tailor its mitigation steps according to the actual risks the businesses face.

For the sake of internal clarity, policies and procedures should also preferably be laid down in writing. It could for example take the form of a manual. Such internal guidance should be understood by everyone, i.e. plainly worded and in all the working languages of the company.

Even though the same principles of a risk-based approach apply regardless of the size of a business, the necessary compliance efforts might be less formalized and structured in small businesses compared to such efforts which might be necessary in larger businesses.

It might not be considered necessary or desirable for all businesses to engage in training activities or develop written policies and procedures. This all depends on the risks identified. The most important goal in any case is to achieve an effective culture of compliance within the business. For some businesses

this may mean a change of behaviour within the organization. Suitable training activities, policies and procedures can help businesses to achieve the behaviour change considered to be necessary.

4.4.4. Training

It is important that suitable training activities reach out to the employees who are exposed to the highest risks of infringing competition law. These employees are typically sales staff and other employees who have sporadic or frequent contact with competitors. Training should also focus on the most exposed activities. However, this does not mean that other employees should not be aware of the principles of competition law compliance.

Competition law training can be delivered online, face to face or even through testing of employees. A business can use small group seminars, online training or workshops. The intensity, level of detail and form will depend on the level of competition law risk to which the employee is exposed.

Training should demonstrate to staff, in a practical way, how competition law affects their daily activities. In addition to explaining typical cartel behaviour, it is important to relate this to the actual activities of the business. The key word is awareness—not only of the general principles, but also of the specifics for employees who deal with situations that could raise issues under competition law.

Training may be delivered by experts (legal counsel or a compliance officer), or by senior management who themselves have undertaken the necessary compliance training.

4.4.5. Compliance policies and procedures

Training measures may not be enough to achieve an effective culture of compliance for the businesses. It is also important to have appropriate documented policies and procedures in place to minimize the risk of competition law infringements occurring.

This documentation should be widely available to all employees in a readily accessible form.

As with training measures, policies and procedures are best tailored to the specific risk levels of the business in order to be effective. Below are some examples of policy and procedural measures:²³

- Design policies and procedures for different business units based on the competition risks that may arise.
- Make a list of “DOs” and “DON`Ts” or “RED FLAGS”.
- Make it clear that involvement in competition law infringement will result in a breach of code of conduct for employees.
- Make it clear that involvement in competition law infringement can be subject to disciplinary consequences.
- Ensure that legal division or external lawyers have the opportunity to review significant and/or standard contracts for compliance with competition law.
- Require employees to alert their managers before attending trade association meetings and /or certain contact with competitors.
- Ensure that employees who attend trade association meetings are properly trained in handling situations related to competition law compliance.
- Ensure that employees have a culture of confidentiality in the sense that commercially sensitive business information stays in-house.

²³ This list is not exhaustive, nor will all examples be appropriate for all businesses.

- Make it clear that all employees have an obligation to report competition law concerns to senior staff or an appointed “compliance officer”.
- Request that employees sign a certification letter stating that they have read and understand the business compliance strategy.

4.4.6. Effective control, audit or review

Businesses should regularly review all the steps in the risk-based approach. Key competition law compliance risks faced by a business might change over time.

A review can be based on:

- Changes in the industry/market,
- The entrance into a new or different business area or the acquisition of another business,
- Lessons learned,
- Investigations by competition agencies, and
- Complaints.

Even without any significant changes, it may be helpful for businesses to review the effectiveness of their internal training, policies and procedures.

4.4.7. Commitment

In order to achieve compliance, an internal commitment to compliance with competition law at all levels within a business is essential. Commitment is an important ingredient in an effective compliance culture but, at the same time, the most challenging.

Commitment must come from the top down. Senior management and the executive board are ultimately accountable for ensuring compliance with competition law. They need to demonstrate their commitment clearly and unambiguously. Senior management must foster a culture of compliance within the business organization by playing an active and visible role in promoting compliance. By demonstrating its commitment to compliance, senior management is sending a clear message of what is acceptable. To ensure an effective compliance culture this message should be communicated periodically. This applies for all levels of the management chain.

The commitment must be communicated and demonstrated within the business. Below are some examples of measures that could be taken:²⁴

- Clearly promote compliance with competition law as a fundamental part of the business policy.
- Senior management should expressly commit to compliance. This should be done on a regular basis.
- Senior management should take compliance training and ensure that all employees do as well.
- Implementing business policies where all managers at all levels demonstrate their commitment to competition law compliance.
- A member of senior management or the board can be made the official “compliance officer”. This person should have the role of driving compliance within the business, and report to the board or senior management on compliance issues.
- Establish a system where employees can anonymously and confidentially alert the compliance officer within the business about any competition law compliance concerns. This system must be clearly endorsed by the board and/or senior management.

²⁴ This list is not exhaustive, nor will all examples be appropriate for all businesses.

4.5. Conclusion

The incidence of cartel conduct can be reduced where businesses establish and maintain a tailored internal compliance program and compliance culture.

A clear commitment from the top management is the core of successful compliance. To achieve compliance, businesses should undertake a risk-based assessment and then tailor appropriate measures to mitigate the identified risks.

The benefits (and risks of not having an effective compliance culture) are evident and should be understood by businesses and companies: Avoid costly and time consuming cases with competition agencies, avoid questionable reputation among professionals and consumers, and preserve a reputation as a well-functioning company focused on real competition.

Businesses are responsible for complying with competition law and implementing effective measures to achieve it. Competition agencies should strongly promote compliance with anti-cartel laws and should consider making compliance resources and information available.

5. CASE STUDIES

5.1. AWARENESS CASE STUDIES

Case Study: Competition Commission Singapore (CCS)

Instrument:

Comic Books/ Mangas “FIXED”, “FREED” and “FOILED”: “FIXED” focuses on price-fixing, “FREED” highlights CCS’ Leniency Programme and “FOILED” talks about abuse of dominance.

Target Audience:

The Mangas were distributed to the general public, tertiary schools and businesses in general. The Mangas were distributed during Outreach activities (such as road shows, flagship events and tertiary school outreach), through the website, agency visits or courtesy calls, overseas conferences or events and/or specific requests from stakeholders.

Incentive to use this tool:

The objective is to raise awareness on the key prohibitions in the Singaporean Competition Act and CCS’ leniency programme. However, the challenge is to convey the messages in an entertaining and simple way, in order to overcome the problem that the subject matter can be arid and technically complex.

After brainstorming, the CCS found that comics, in manga style and layman language, were the solution to overcome the challenge. The mangas conveyed the messages in an interesting way, and the layman language used makes reading easy. This was attested by many of the stakeholders when the first manga was launched (“FIXED”). Building on the success of the first manga, the CCS produced other mangas with different themes and key messages intended, with the aim of reaching out to people who find competition law difficult to understand or who do not have much time for text-heavy collaterals.

Year of publication:

2010/2011

Publication reference:

http://app.ccs.gov.sg/cms/user_documents/main/pdf/FixedManga.pdf

http://app.ccs.gov.sg/cms/user_documents/main/pdf/Freed.pdf

http://app.ccs.gov.sg/cms/user_documents/main/pdf/Foiled%20Manga%20in%20pdf.pdf

Case Study: Nederlandse Mededingingsautoriteit (NMa)**Instrument:**

Video “Leniency in Cartel Cases”

Target Audience:

The Video was intended to address not only the General Public. Furthermore, also specific outreach targets were foreseen. The video may also serve individual undertakings during their internal compliance trainings as a useful tool.

Incentive to use this tool:

The NMa used this tool as it explains, potentially to the public at large, what a cartel is and what the leniency programme is about. In addition, it enables us to use it in the NMa’s outreach efforts, e.g. if it gives presentations to other national enforcement agencies, at conferences vis-à-vis undertakings, or during lectures at universities etc. Finally, the NMa considered that the video was likely to be used by in-house and outside competition lawyers during compliance trainings, and to date it is understood that it is indeed used in that context.

Year of publication:

2008

Publication reference:

<http://www.youtube.com/watch?v=5diFAaJdwel&lr=1>

Case Study: Bundeskartellamt**Instrument:**

Exhibition booth at a public fair “Deutschlandfest”

Target Audience:

The booth was aimed at communicating the work of the Bundeskartellamt to the general public. The passing citizens could obtain information on the work of the Bundeskartellamt through wall charts and displayed brochures. Furthermore, it was possible to discuss and interact with some of the Bundeskartellamt’s staff members, who were present at the booth.

Incentive to use this tool:

The Bundeskartellamt was approached by the city of Bonn, whether it would like to take part in the festivities for the German Day of Reunification on October 3, 2011. The German Federal Government, authorities assigned to the Federal Ministries, the local government of the Land Nordrhein-Westfalen and other public authorities participated in the festivities. It was perceived to be a good opportunity to explain to the interested citizens, what the Bundeskartellamt does and how it works.

Year of publication:

2011

Publication reference:

n/a

5.2. OUTREACH CASE STUDIES

Case Study: Brazilian Ministry of Justice

Instrument:

Comic Book “Cartel da Limonada”

Target Audience:

The Comic book was primarily targeted at children, teenagers and their parents.

Free copies of the comic book were distributed at main Brazilian airports during the Anti-Cartel National Week in October 2009 and also sent to randomly selected public elementary schools throughout Brazil. Altogether 300,000 (three hundred thousand) comic books were issued.

Incentive to use this tool:

The tool of a comic book was chosen to raise the concept of cartel awareness already in younger years of the citizens. The idea was also to initiate a discussion between adults and children because children often ask their parents about words they do not know the meaning of. Thus they would ask for the meaning of the word “cartel”. Therefore, when adults subsequently read or listen to news regarding cartels they would remember the lemonade cartel story because it was prior discussed with their children.

Year of publication:

2009

Publication reference:

http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/awareness/cartel_da_limonada.pdf

Case Study: Konkurransetilsynet (Norwegian Competition Authority)**Instrument:**

This campaign involved showing an information film about illegal cooperation and leniency in the Airport Express Train.

Target Audience:

The film was shown on the Oslo Airport Express Train between downtown Oslo and the main airport during the period 2 February–1 March 2009.

The Norwegian Competition Authority considered it was necessary to try out new ways to reach the target group. The primary target group for the film was managers of small and medium-sized companies. During the screening period, 430,000 people travelled on the Airport Express Train. Around half of these—215,000—could be defined as business travellers. Hence, it was expected to reach a fare share of the target group via this channel of communication.

Compared to other alternative channels of communication, the campaign on the Airport train was actually relatively reasonable priced. Potentially there could be great value for money. Following the campaign the movie was posted on the Norwegian Competition Authority's website.

Incentive to use this tool:

In 2008, the Norwegian Competition Authority carried out a survey to explore the knowledge of the competition agency, the competition rules and the leniency program. The survey revealed surprisingly little knowledge of the leniency programme, particularly among small and medium sized enterprises.

In 2008/2009 the Government issued a crisis package to increase the activity in building and construction and other sectors, to dam up for the financial crisis. When such a large number of public tenders for building and construction work were issued over the course of a relatively short period of time, it was considered particularly important to be aware of the risk of illegal price-fixing and bid-rigging.

So in sum – there was a need to increase the knowledge about the leniency program, especially among leaders of small and medium sized enterprises. The primary aim of this campaign was to increase awareness of the leniency program among company managers and trade organizations and to encourage more people to report illegal activities.

Year of publication:

2009

Publication reference:

http://www.konkurransetilsynet.no/ImageVault/Images/id_1775/ImageVaultHandler.aspx

Case Study: Konkurrensverket (Swedish Competition Authority) (SCA)**Instrument:**

Roadshow and Checklist “Twelve ways to detect bid-rigging cartels”

Target Audience:

From 2007–2011 the SCA did a road show all around Sweden promoting its Checklist. During the road show, it held meetings with public procurers in over 10 cities, educating them about bid rigging cartels and informing them about the checklist. During these meetings the SCA sent around a list where the procurers could provide their contact information. Following-up, the SCA sent the checklist to them personally after the road show.

The black and yellow pamphlet also includes a list of points on how to avoid encouraging cartels. Because the SCA wanted the procurers to remember this checklist and put it on their bulletin board, it decided to print it on “hard paper”. The SCA also included some bright yellow paperclips, encouraging them to call the SCA if they have suspicions of possibly anti-competitive conduct.

A few months after giving the presentation to public procurers, the SCA sent them a simple questionnaire via e-mail (interactive link), asking them if they believed they had ever been exposed to cartels, if they were evaluating the bids differently after having heard the presentation and also if they designed the specifications in the tender differently, to avoid encouraging cartels.

Incentive to use this tool:

Within the framework of a bid-rigging related project, the SCA has put a lot of time and effort into talking to public procurers and putting together a checklist. The origin of these efforts was a big asphalt case that the SCA investigated in the beginning of 2000. It realized that there was a lack of knowledge among the public procurers about bid-rigging cartels and that there was a need for education on this topic and a need for information or even for a checklist for detecting bid-rigging cartels. The checklist was developed with inspiration from the OECD’s checklist. It works on bid-rigging cartels in general, which means that it can be of value for both public and private procurers.

Year of publication:

2010

Publication reference:

<http://www.kkv.se/upload/Filer/ENG/Publications/Checklist.pdf>