The detection and prosecution of cartel offences is one of the Irish Competition Authority’s main priorities. Companies which engage in cartel behaviour, such as price-fixing, bid-rigging or market sharing can be investigated by the Competition Authority and prosecuted by the Director of Public Prosecutions. The penalties are significant. Irish criminal courts can impose fines of up to 10% of worldwide turnover or €4 million on companies and individuals. Executive and non-executive directors can face up to five years in prison as well as fines set at the same level as corporate fines. Directors who are convicted of cartel offences can also face disqualification from acting as a director.

The UK’s Office of Fair Trading has recently (June 2011) published guidance of how directors can minimise the risk of disqualification in the UK, the imposition of fines, and to promote competition law compliance within business.

Directors, irrespective of whether they are executive or non-executive, or have a responsibility for compliance, should take note. Publication of the guidance is a timely reminder of the importance of developing a compliance culture within an organisation. Compliance with competition law can be positioned and addressed within a broader compliance agenda which would include anti-bribery and corruption, and internal anti-fraud controls.

The OFT publications contain guidance which is also useful in an Irish context.

**Compliance Culture**

Directors are encouraged to cultivate a competition law compliance culture within business as this will help reduce the risk of fines being imposed, of prison terms being imposed or disqualification orders being made on directors. The fact that one director has a compliance function does not absolve other directors from their overall responsibilities for compliance with competition law.
A compliance culture may be promoted by following the OFT's four-step risk based process, at the centre of which is a clear and unambiguous commitment to competition law compliance. Within this framework, it is up to each individual business to consider its competition law exposure and how best to mitigate any risks identified. Large or small, however, the OFT expects directors and senior management of all businesses to demonstrate commitment to competition law compliance and to communicate that to all levels within an organisation.

Mitigation activities might be supported by ensuring that there are clear rewards for staff who are pro-active in promoting competition law and deterrents for staff who fail to abide by competition law.

**Review**

Finally, risk analysis should be reviewed on a regular basis to ensure that the correct risks have been identified and assessed, as these can change over time. Compliance activities should be reviewed for their effectiveness.

**Role of Directors**

Directors play a key role in ensuring that compliance is at the heart of business. The OFT considers that a director cannot rely on a failure to keep himself informed or a turning of a blind eye to suspicious activities. Directors are encouraged to engage with the four step risk-based approach to minimise the potential for exposure.

The OFT acknowledges that directors may have different levels of knowledge of the day-to-day activities of the business, however, each have a role to play in promoting compliance.

**Executive directors**

Directors with direct management responsibility are expected to have the greatest awareness of anti-competitive behaviour in those particular areas and will be expected to ensure that appropriate mitigation activities are put in place in those areas. Directors with overall responsibility for an area (but not direct management) will be expected to make reasonable enquiries of staff.

**Compliance directors**

Designation of a compliance director does not absolve other directors of their responsibility or potential liability for competition law infringements. Compliance directors will be expected to introduce and maintain appropriate compliance measures but will not be expected to have any greater awareness of specific infringements than any other director.

**Non-executive directors**

Non-executive directors are expected to make reasonable enquiries of the company's executive directors that competition law compliance is at the heart of business and that appropriate steps are being taken to identify, assess, mitigate risk and to review and assess the effectiveness of a compliance programme.

**Conclusion**

Competition law enforcement, and cartel detection in particular remains a priority for enforcers. Irish companies and the directors who lead them, can minimise corporate and personal exposure by adopting some of the measures recommended by the OFT.
Contact

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