



Compliance Training
24 September 2012



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ADVOCATEN

Today's topics

- Compliance. Why bother?
- The rules
- The authorities
- Corporate sanctions
- Personal sanctions
- Do's & Don'ts

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Recent developments

- The German competition authority has extended its in-depth review of construction materials acquisition (Xella's / H+H International).
- OFT uncovers antitrust conduct on aggregates market, including concrete.
- OFT has extended its in-depth review of in construction materials Joint Venture Anglo American and Lafarge.
- European Commission opens antitrust proceedings against a number of cement manufacturers.

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Compliance. Why bother?



What are CRH's principal aims?

- To recognize and prevent possible infringements
- To act in accordance with:
 - European and national competition legislation
 - CRH Code of Business Conduct
 - CRH Code of Conduct - Competition

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Compliance. Why bother?

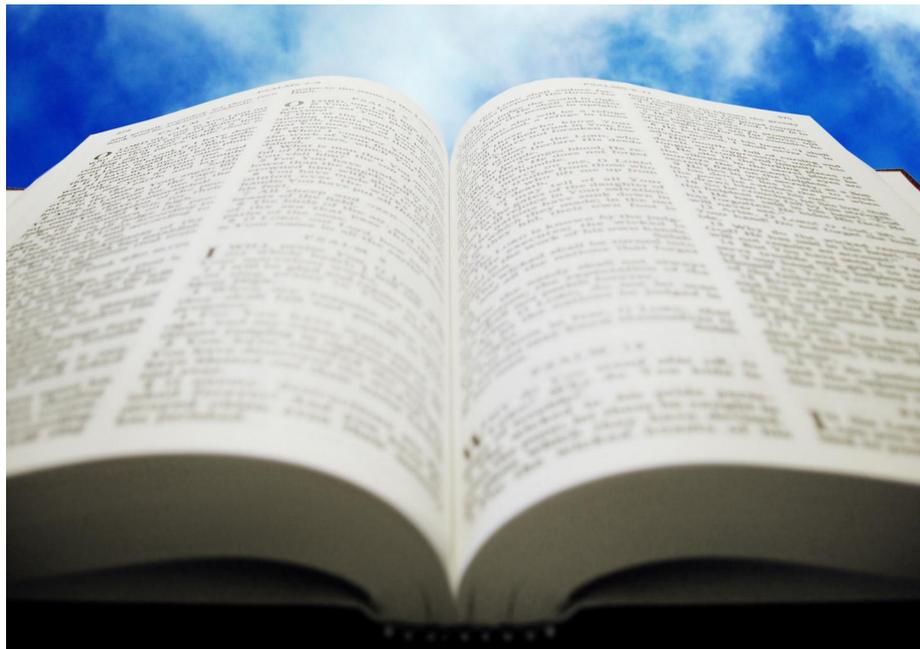
Compliance

- Manual contains general rules
- Not exhaustive
- No concrete advice

In case of doubt: always consult the CRH legal service

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The rules



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The rules: key legislation

Treaty on the functioning of the European Union

- Article 101 TFEU
- Article 102 TFEU

Law of 15 September 2006 to protect the economic competition

- Article 2 Law
- Article 3 Law

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The rules: key principles

What kind of conduct infringes competition law?

- Cartels (and other covert conduct): any improper agreement or coordination, primarily between ‘undertakings’ (competitors, distributors, traders, suppliers, purchasers => public and private parties in your own country and abroad)
- Dominant position: abuse

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The rules: categorizing conduct

Restriction of competition

Agreement or coordination
between undertakings

Unilateral conduct

Horizontal

Vertical

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The rules: cartels



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The rules: cartels

Article 101 TFEU and Article 2 Law prohibit:

- agreements between undertakings,
- which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

Additional element of Article 101 TFEU:

- trade between Member States must be affected

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The rules: horizontal agreements

- Prices / discounts / margins
- Information exchange
- Market-sharing and customer allocation
- Restriction of production, markets, developments and investments
- Boycotts and refusal to supply
- Tying

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Example 1 / 8

Two managers work for competing construction firms.
They meet and agree to offer customers the same discount.

- (a) One month later, they both act as agreed upon.
- (b) They ignore the agreement and never execute it.

Same case, but this time, instead of a discount, they both agree to demand a higher price (surplus).

Example 2 / 8

- A number of your customers is always postponing payment. Their behaviour is getting worse. Both you and your competitors suffer from this behaviour.
- One day, you meet a number of competitors at a business association. Complaining about payments, you all decide to draft a 'black list', naming and shaming these customers.
- Is this allowed?

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Example 3 / 8

A producer of construction materials decides from now on, it will distribute its products exclusively through specialised shops (excluding and bypassing large D.I.Y. chains).

Is this allowed?

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Example 4/8

- Recently, you offered to supply a customer with construction materials. The customer by way of accident sends you your competitor's offer back. You now know your competitor's pricing.
- What do you do?

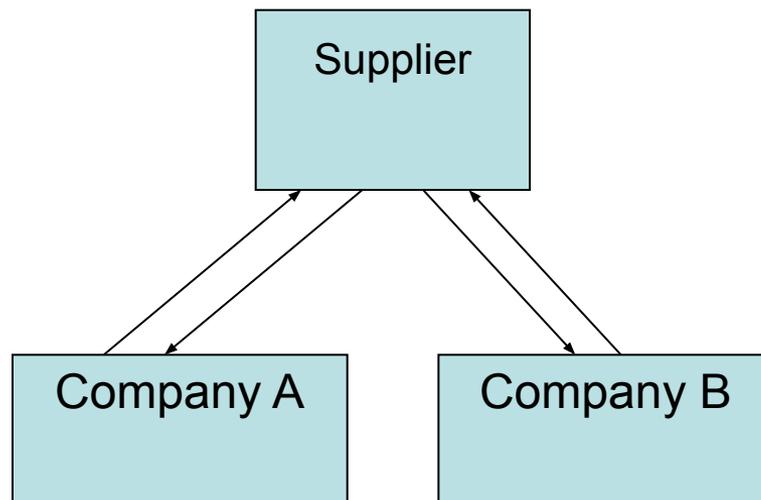
Exchange of information

- Publicly available information
- Aggregated information
- Historical company data without bearing on future market behaviour
- Exchange of information of a competitive nature
- Structural exchange of information (e.g. cost, quantity, price, discount, customer portfolio, capacity)

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“Hub and Spoke” cartel

Competitors exchange company-sensitive information through a third party e.g. a business association or a mutual supplier.



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Example 5/8

- Your competitor sends you an e-mail, which contains its future price list.
- How do you respond?

Example 6/8

A number of independent franchise parties belong to the same chain of D.I.Y. Stores. They agree none of them will buy products from supplier X anymore.

Is this allowed?

Example 7/8

At a meeting organised by a trade organisation, two managers of competing D.I.Y. chains meet. They discuss their respective chains' intention to expand / shut down both their shops.

In the end, the two managers agree it would be best if their chains did not expand / shut down their shops.

- Is this allowed?
- Would your answer be different if it concerns two local D.I.Y. Chains (as opposed to the national policy of both chains).

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Example 8/8

Two managers of competing chains discuss the local government's intention to change the municipal development plan. This would mean a third party could establish itself in their area. The two managers agree they will both appeal their local government.

- Are the two managers allowed to discuss this?
- Would your answer be any different in case the two chains appeal (1) together, or (2) separately.

The rules: vertical agreements

- Vertical price-fixing
- Agreement aimed exclusively at restricting parallel import
- Market-sharing and customer allocation, unless...

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The rules: vertical price-fixing

Broad interpretation:

- Minimum price, fixed price, discounts
- Price-related bonus terms or promotion
- Price-related suspension, delay, sanctions

Allowed in principle:

- List of recommended prices
- Maximum resale prices

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Example 1 / 2

CRH agrees with a customer that in Belgium that customer will:

- sell stones for a fixed price
- provide a certain discount to its customers
- receive a bonus if it respects CRH advisory prices
- receive a bonus depending on how much it orders

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Example 2/2

- CRH has a new line of products and developed a promotion campaign. A large D.I.Y. chain is interested, if it's the only one amongst its competitors allowed to participate in the campaign.
- CRH is willing to give the D.I.Y. chain exclusivity.
- Is this allowed?

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The authorities

Two principal authorities:

- European Commission (DG COMP)
- Belgian Competition Authority
 - General Competition Directorate
 - Competition Council



Regulators, investigators, enforcers



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The authorities: investigative powers

Far-reaching powers of investigation:

- Information requests and hearings (orally, in writing)
- Inspection business premises (dawn raid)
- Inspection non-business premises (e.g. private homes)
- Confiscate or copy documents, files and computer data
- Telephone tap / tape recordings

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The authorities

Domestic courts

- Judicial review
- No power to impose fines
- May however award damages
- Additional PR and reputation risk
- Potential multiplier in terms of corporate damage (7,5x fine)

Corporate sanctions

Main corporate sanctions:

- Agreement is null (no conversion possible)
- Fine up to 10% of annual group (!) turnover
- Civil claims from third parties
- Loss of reputation (naming and shaming)

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Corporate sanctions

- Heat equipment: EUR 3,5 million (Competition Council)
- Washing powder: EUR 315 million (EC)
- Prestressing steel products: EUR 269 million (EC)
- LCD-panels: EUR 648 million (EC)

Corporate sanctions

Little room for justification:

- *I didn't know this was not allowed!*
- *I'm doing this for years!*
- *Other undertakings act the same way as we do!*
- *Otherwise I couldn't go through with the deal!*
- *But this was our largest purchaser!*
- *It was just a one-off exception!*

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Personal sanctions

Fines can be imposed on 'directors' who:

- Instruct employees re improper conduct
- Manage improper conduct

First fines already imposed on CFO's and CEO's

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Personal sanctions

Instructions regarding certain conduct:

- Doesn't need to be a formal director
- Power to dispose of
- Active / passive ('see all, hear all, say nothing')

Managed certain conduct:

- Implies a close connection with the infringement
- The principal should have given an explicit mandate
- Narrower than actual leadership

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Do's and don'ts

Prices. Don't talk to competitors about:

- Prices, rebates or costs
- Future pricing
- In case of a pricelist, note the name of the client
- Price negotiation and/or agreements with third parties
- Don't participate in meetings with competitors

One exchange, e-mail or meeting can be enough!

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Do's and don'ts

Market-sharing. Don't talk to competitors about:

- Allocation of sale territories
- Allocation of customers
- Market shares
- Don't participate in meetings with competitors

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Do's and don'ts

So what should you do?

- Please understand that meetings with competitors are dangerous. Watch what you say.
- Clearly distance yourself when a competitor suggests e.g. to fix prices or share the market. Don't remain silent; denounce. Get up, get out and confirm your response in writing.
- Be careful with agreements of an exclusive nature.
- In case of doubt: always consult the CRH legal service.

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Questions



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