



John Pheasant

Striking a balance

After a decade of changes, now is the time for businesses to focus on sustaining effective compliance and developing a managed risk-taking culture

Many in UK business may feel they have spent too long focusing on compliance, rather than the business of doing business. It certainly seems that over the past few years with the criminalisation of cartels, the increasing level of fines imposed by the antitrust authorities and now the steady increase in private damages actions, there has been an increased emphasis on compliance and control.

However, in turbulent markets where budgets are coming under increasing pressure, the question to ask is how best to achieve the right balance between maintaining effective compliance and also delivering growth through encouraging a business to develop a culture of managed risk-taking.

How businesses have perceived antitrust compliance and risk management in theory and in practice has undoubtedly changed in the last 10 years. Regulation has been crucial in providing the initial impetus for antitrust compliance but, increasingly, the risk management function is now being recognised as a tool that can contribute to value creation and business success – and a logical home for the coordination between risk, internal controls and commercial activities.

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The following principles can help antitrust risk management become an embedded aspect of the way in which the business functions, providing increased insight into business performance and the threats to ongoing success, without becoming overly bureaucratic.

- Seek clear sponsorship of the programme from the board. Senior management sets the tone and culture of the organisation, and what they say and do can be expected to filter down

in a 'cascade effect'.

- Develop a clear strategy for the management of risk and do not ignore the positive aspects (i.e. where a business can compete without infringing and where it may use competition law defensively).

It would be wrong to imagine that antitrust law is a straitjacket always limiting and controlling the activities of business. It may also act as a lifejacket to rescue the victim of anti-competitive behaviour and provide opportunities for all businesses to take on more powerful competitors.

- Antitrust issues rarely exist in silos and, on any given fact scenario, antitrust may go hand in hand with bribery, corruption and other threats to corporate health. The opportunity is now to ensure that there is a transparent linkage between the key risks and the effectiveness of the key controls over these risks. This will require greater coordination between management and the different risk functions than may have existed previously.

- Avoid re-inventing the wheel and build on existing formal and informal risk management mechanisms to improve overall coordination of procedures across the business. The same controls, document retention and management systems that have been needed to satisfy the requirements of, for example, Sarbanes-Oxley, may well be relevant to identifying and managing antitrust risk.

- Ensure that organisational roles are clearly defined and communicated. As a basic step, consider making it a requirement of each employee's annual appraisal that they have completed the organisation's antitrust training and that complying with the firm's policies and procedures in the area of antitrust is a requirement of their contract of employment.

- Keep the approach simple, easy to understand and above all engaging. Training tends to be more effective if it is tailored to real

life and allows the learner to test their learning.

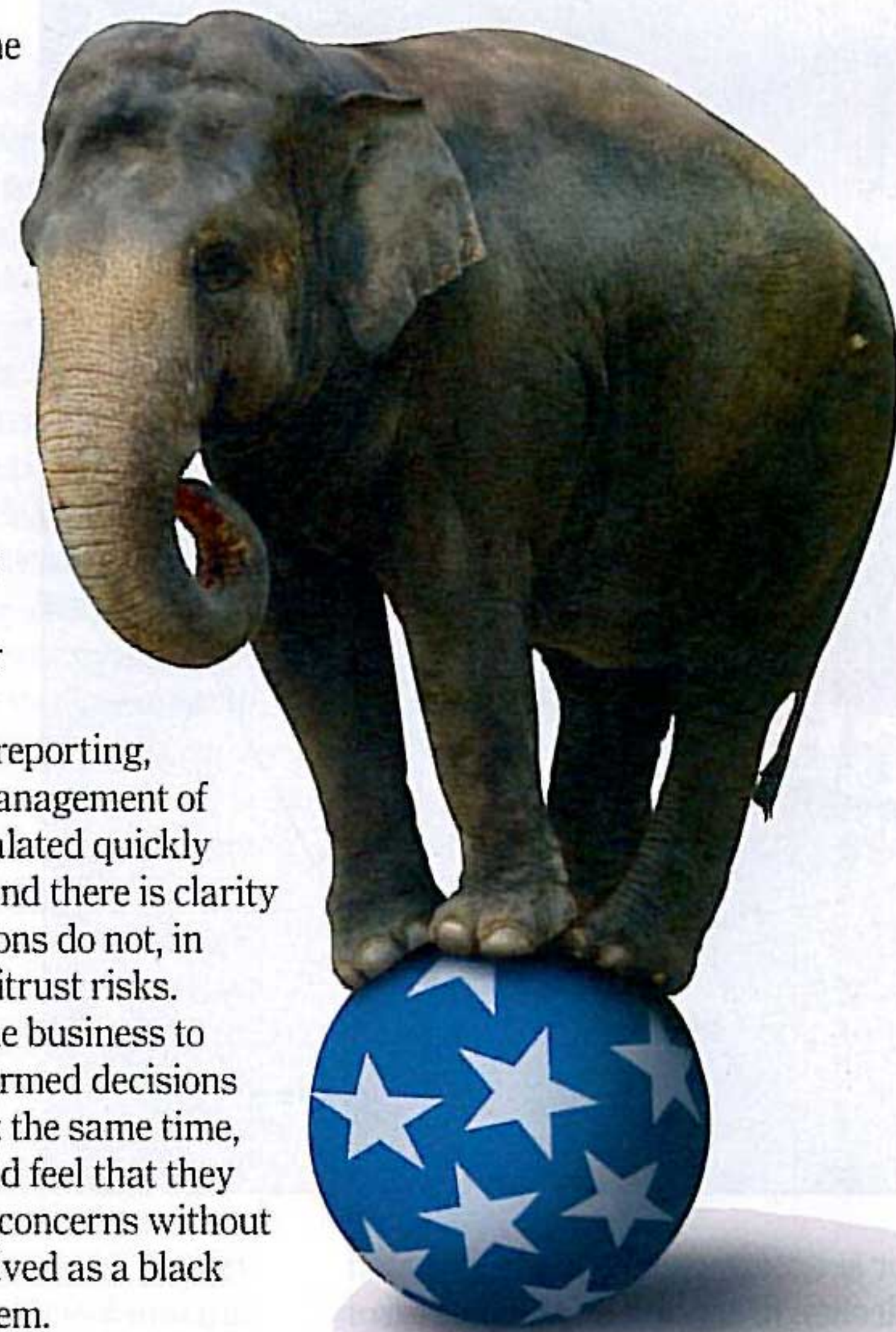
Electronic learning or workshop simulations can come close to simulating real business interactions raising antitrust issues.

- Establish clear mechanisms for monitoring and reporting, ensuring that management of new risks is escalated quickly and effectively and there is clarity on which situations do not, in fact, present antitrust risks. This will help the business to make better-informed decisions more quickly. At the same time, employees should feel that they are able to raise concerns without this being perceived as a black mark against them.

- Be demanding that management uses more real-time information on which to base its operational decisions. This may include information on evolving market shares of a company signalling a heightened antitrust risk and data on regulatory investigations. Much of the information of this nature is either historic by the time it reaches management or is received too late. The frequency of review will differ depending on the needs of the organisation.

- Remain flexible to the evolving needs, culture and market position of the organisation. An approach which assumes that a company has no duty to supply because it is not dominant in any of its relevant markets may well be appropriate for today.

- There is no 'one size fits all'. The upfront costs of an 'off the shelf' compliance programme may be less than a more bespoke programme tailored to the specific risks that the business faces. In the long run, however, an approach that maximises relevance and has



the flexibility to tailor the content and the communication media to the industry challenges and culture of an individual company is likely to be more effective.

Organisations that benefit from a more coordinated approach between risk (antitrust and other), compliance and commercial decision-making will achieve a further simplification of their processes and enable better informed management decisions. The best outcome for business would be that the investment in risk management actually becomes a value, creating activity in itself. The discipline of identifying the business's key antitrust risks and the process of systematically engaging employees recognises that for a business's own complaints to the authorities to be taken seriously, its own record on compliance must be defensible.

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