

How Your Business Can Achieve Compliance

Summary of responses to the OFT's consultation and
OFT's conclusions and decision document

June 2011

OFT1278resp

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1 INTRODUCTION

- 1.1 The Office of Fair Trading (OFT) acknowledges that the majority of businesses wish to comply with competition law. In order to help them do so, the OFT intends to replace OFT424 *How Your Business Can Achieve Compliance* with a new version that describes the OFT's suggested four-step process for achieving a competition law compliance culture, as well as how the OFT will view a business' compliance efforts when setting the level of any penalty for competition law infringements.
- 1.2 The four-step process is a suggested, not mandatory, process. The key point is that businesses should find an effective means of identifying, assessing, mitigating and reviewing their competition law risks in order to create and maintain a culture of compliance with competition law that works for their organisations. Some businesses will find it beneficial to take legal or other professional advice in order to guide their compliance activities.
- 1.3 The OFT issued a consultation draft of the new version of *How Your Business Can Achieve Compliance* in October 2010, which in addition included a draft Quick Guide for small business on competition law compliance. Specifically, the OFT asked for views on the following:
- whether the Guidance adequately describe an effective means of achieving a culture of competition law compliance and if not, how it could be improved
 - whether the Guidance adequately described each step of the OFT's recommended four-step process and if not, how it could be improved, especially if there were any considerations in respect of business size
 - whether respondents had comments on any other aspect of the draft guidance that they felt were appropriate, and
 - whether the quick guide adequately reflected the informational needs of business, if its format was appropriate and if not, how it could be improved.

- 1.4 As part of this consultation, the OFT Competition Policy team gave presentations to, and held discussions with, a number of external stakeholders on the content of the consultation.
- 1.5 The OFT received a total of 22 written responses to the consultation.¹ Broadly speaking, several themes emerged, along the following lines:
- welcoming the recommended four-step process, while asking for clarification or suggesting further examples
 - calling for greater clarification of the competition law compliance responsibilities for small businesses, and
 - questioning the OFT's statement that it will consider, on a case by case basis, reducing the amount of a financial penalty imposed for a competition law infringement by up to 10 per cent, where adequate steps have been taken with a view to securing compliance and whether this amount should be increased.
- 1.6 This document sets out a summary of responses to the consultation, and the OFT's decision on its proposals. It should be read in conjunction with the consultation document.

¹ The respondents to the consultation are listed at Annex A.

2 ACHIEVING A CULTURE OF COMPETITION LAW COMPLIANCE

- 2.1 In the Consultation, the OFT asked for views about the Guidance as a whole and whether it described an effective means of achieving a culture of competition law compliance. Since many of the themes raised by respondents were relevant to questions 1, 2 and 3, the responses received to these questions are summarised together.

Question 1: Does the Guidance adequately describe an effective means of achieving a culture of competition law compliance? If not, please explain how it could be improved.

Question 2: Does the Guidance adequately describe each step of the OFT's recommended four-step process? If not, please explain how it could be improved.

When answering questions 1 and 2, please identify any considerations that are relevant specifically to businesses of different sizes, from the largest to the smallest.

Question 3: Please provide comments on any other aspect of the draft guidance you feel appropriate.

Four-step process

- 2.2 Most respondents were supportive of the proposed four-step process and considered that the Guidance adequately described an effective means of achieving a culture of competition law compliance. Some noted that the approach to a large extent the approach reflected their existing competition law compliance practice. However, some respondents made suggestions for improvements to various areas, which are discussed below.
- 2.3 One respondent questioned whether the OFT's recommended four-step process set out in the guideline was helpful and suggested that too much of the process was given over to consideration of risk

identification and risk assessment. The same respondent suggested that it was not necessary for the OFT to reinvent processes that were already well recognised by other competition authorities.

- 2.4 Some other respondents said that while they considered the four-step process to be helpful, they nevertheless were concerned that businesses would not be able to implement all of the suggestions that were made in each step of the process, particularly under step 3 - Risk Mitigation.

OFT's view

- 2.5 In view of the fact that the majority of respondents supported the four-step process and the overall approach in the draft guidance to achieving an effective competition law compliance culture, the OFT has decided to adopt this approach in the final guidance. The OFT recognises that other competition authorities have valuable model compliance programmes and processes and that there may be other methods to achieve an effective competition law compliance culture. The OFT has therefore noted in the final guidance that the four-step process is not compulsory: businesses may choose to implement a different approach which is equally effective in delivering an effective compliance culture within the business.

- 2.6 With respect to the concern that businesses needed to implement all of the suggestions made for each step, the OFT has further clarified in the final guidance that this is not the case. The OFT recognises that 'one-size does not fit all' in terms of compliance activities. The fact that a business cannot or chooses not to implement any of the examples described in the guidance at each step of the process will not mean, by itself, that it lacks an effective competition law compliance culture. The business is free to choose what measures it should take to address the competition law risks it faces.

Benefits of compliance/consequences of non-compliance

- 2.7 Several respondents suggested that the OFT could discuss additional consequences of non-compliance, including incurring legal expenses and diversion of management time.

2.8 Some respondents also suggested that the OFT should also mention that agreements that infringe the Chapter I prohibition/Article 101 Treaty on the Functioning of the European Union could be exempted.

OFT's view

2.9 The OFT has included in the final guidance a reference to additional consequences of infringement, as suggested by various respondents. It is keen to ensure that readers are familiar with as many consequences of infringement as possible.

2.10 The OFT does not consider that it is desirable expressly to refer to exemptions in a document aimed towards driving compliance, as exemption is a potentially complex area of substantive law. However, the final guidance makes it clear that the list of examples of potential competition law risks is neither definitive nor exhaustive and that agreements containing such provisions will not necessarily infringe competition law. The guidance notes that such provisions can give rise to increased risk, or be indicative, of an anti-competitive agreement and may warrant assessment.

Wider compliance culture

2.11 Many respondents welcomed the OFT's observation that competition law compliance can sit comfortably with other key items on a business's compliance and governance agenda, including anti-bribery and corruption and internal fraud controls. Some suggested that this point could be made even more explicit and that competition law compliance be integrated into these other areas.

OFT's view

2.12 The OFT agrees with these suggestions and has clarified this in the final guidance.

Appointment of a chief compliance officer

- 2.13 One respondent suggested that central to the positioning and empowerment of an ethics and compliance programme is the appointment of a Chief Ethics and Compliance Officer. The same respondent called upon the OFT to amend the guidance to recognise this as a core principle and to focus attention on this central element. The respondent drew attention to the guidance offered by the OECD Working Group on Bribery's Good Practice Guidance as well as to recent amendments to the US Sentencing Guidelines, which among other things call upon the compliance officer to have direct reporting obligations to the governing authority of the business or an appropriate subgroup thereof.
- 2.14 The same respondent observed that the OFT's suggestion that a senior manager may take responsibility for driving compliance within the business was ambiguous and could risk an unempowered subordinate manager being appointed for that purpose. That respondent suggested rewording the sentence to make it clear that one senior officer of a company should have the role of driving compliance within the business.

OFT's view

- 2.15 The OFT agrees for many businesses it may be appropriate that one suitably senior person is given responsibility for driving competition law compliance within the business and this has been included as an illustrative example in the final guidance. However, the OFT does not wish to be seen as mandating the appointment of a Compliance Officer for all businesses. It is concerned, among other things, that such a recommendation could be seen as creating the impression that effective competition law compliance efforts necessarily require the creation of *new* senior management positions, and are therefore expensive and overly complicated.

Internal rewards for competition law compliance

- 2.16 A number of respondents suggested amending the OFT's existing wording in the guidance on how employees can be rewarded for

compliance activities. The nub of the various comments was that this could be seen as encouraging rewards simply for having completed compliance training, which would be an undesirable situation.

OFT's view

- 2.17 The OFT has taken these comments into account and amended the guidance to avoid creating any unintended impressions in this respect.

Internal reporting systems

- 2.18 Some respondents queried the OFT's example of confidential and/or anonymous internal reporting systems as an effective risk mitigation measure as they were concerned that it could become subject to abuse, especially if that could lead to unfounded allegations of competition law infringement.
- 2.19 Some other respondents also suggested that privacy laws in some non-UK jurisdictions could impact on the operation of such systems.
- 2.20 Another respondent suggested that the OFT should point out that depending upon the circumstances, such a reporting system could incur reporting obligations under proceeds of crime legislation.

OFT's view

- 2.21 The OFT considers that internal reporting systems can be a highly effective means for a business to become aware of potential competition law compliance concerns. Such systems are widely regarded as an effective tool for dealing with governance concerns in other areas, including internal anti-fraud and other financial controls. They can only be effective if persons using it have the assurance that their concerns will be given appropriate consideration.
- 2.22 While the OFT will be retaining discussion of this tool in the guidance, it is also grateful for respondent comments on possible legal issues relating to the operation of such reporting systems. The OFT does not consider it appropriate for it to offer warnings on specific legal issues relating to the

operation of such systems. That is a matter for the businesses involved. But the final guidance flags that it is prudent for businesses operating such reporting systems to consider obtaining legal advice on the issues and obligations that might arise, both inside and outside of the UK.

Small businesses

- 2.23 A number of respondents expressed concern over the wording in the draft guidance referring to competition law compliance and small businesses. They were concerned that the OFT might unintentionally convey a message that small businesses were immune from the need to ensure competition law compliance.
- 2.24 Several respondents suggested that the OFT instead clarify that all businesses, including small ones, must comply with competition law. They suggested further clarifying that the compliance measures that a small business should take will be proportionate to their degree of risk. One respondent observed with respect to competition law compliance that it was not a question of whether small businesses had to do anything to comply with competition law, but 'how much'.

OFT's views

- 2.25 The OFT is grateful for these comments and will clarify the guidance with respect to compliance and small business.

Drafting comments

- 2.26 A number of respondents made drafting suggestions on the guidance, some of them very specific. Several of these comments related to simplifying the use of language in some parts of the guidance and in particular those parts referring to steps 2 and 3 of the recommended four-step process.

OFT's view

- 2.27 The OFT is grateful for these comments as it wishes to ensure that the guidance is as clear as possible. It has therefore taken on board many of

suggested drafting changes to make the drafting clearer, particularly with respect to steps 2 and 3 of the four-step process.

Step 4 – review

2.28 A number of respondents called on the OFT to elaborate upon the measures that businesses ought to take under step 4, review of the compliance measures in place. Some also suggested additional circumstances in which a review might be warranted, such as when a new business was acquired.

OFT's view

2.29 The OFT is anxious not to be overly prescriptive in any part of its guidance and is especially wary of creating a tick-box approach to competition law compliance. Accordingly, it had not recommended any specific review periods in the draft guidance.

2.30 Nevertheless, the OFT appreciates that readers of the guidance will benefit from elaboration of the review stage, including examples of frequency of review and other circumstances in which a review may be warranted. It has clarified that some businesses conduct reviews on an annual basis, whilst others review on a less frequent basis. It also highlights that there may be circumstances in which a review outside the regular review cycle is likely to be appropriate and cites examples where this might arise.

Impact on the amount of the penalty

2.31 A number of respondents called on the OFT to increase the amount by which it was prepared to reduce the amount of a financial penalty for adequate steps having been taken to comply with competition law – in the draft guidance, the OFT said that this would be a case by case assessment but that it would grant up to 10 per cent discounts on the amount of the financial penalty in these circumstances. Some respondents suggested that the 10 per cent figure was arbitrary and others said that businesses that took adequate steps were deserving of more than 10 per cent. Other respondents suggested that the 10 per

cent reduction would not be an adequate incentive for firms to make the necessary investment to comply with competition law.

- 2.32 One respondent went further and suggested that the OFT should decline to take action entirely against businesses involved in an infringement that had taken adequate steps in this respect.
- 2.33 Several respondents asked for the OFT to expand upon the approach that it would take when considering whether to reduce a financial penalty by up to 10 per cent as a result of taking adequate steps to ensure compliance.
- 2.34 Some respondents also expressed concern that the OFT might consider increasing the amount of the penalty in exceptional situations, such as where the purported compliance programme had been used to facilitate the infringement, to mislead the OFT as to the nature of the infringement or had been used in an attempt to conceal the infringement. They suggested that if the OFT were to retain such discussion in the guidance document, it should provide greater detail as to what would constitute such exceptional situations.

OFT's view

- 2.35 The OFT remains of the view that a generally neutral approach to compliance activities is appropriate. The OFT notes that the key benefit of an effective competition law compliance culture is that it can help to prevent infringements being committed in the first place. The OFT is, however, willing to consider, on a case by case basis, a reduction in the amount of the financial penalty of up to 10 per cent where appropriate. Financial penalties are a key means of deterring businesses from engaging in competition law infringements and the OFT is concerned that granting higher discounts from financial penalties could undermine deterrence. In the event, the OFT observes that an effective compliance culture can help to facilitate early detection of any infringements that do occur, potentially allowing the business to make a leniency application and/or to co-operate with a competition investigation, which might lead to reduced financial penalties.

- 2.36 The OFT further notes that in its judgments in the Construction case, the Competition Appeal Tribunal endorsed the OFT's approach of granting modest reductions to the amount of the financial penalty in response to compliance efforts.
- 2.37 With respect to the suggestion that the OFT could commit not to bring infringement proceedings against businesses that have taken adequate steps to comply, the OFT is again concerned that this could undermine the deterrent effect of the competition law regime, both with respect to the businesses involved in an infringement and businesses more generally.
- 2.38 As to concerns with the OFT saying that there might be exceptional situations in which a purported compliance programme might be a factor warranting an increase in the amount of the financial penalty, the OFT first notes that it has also made a very clear statement in the guidance that subject to some exceptions, it will not ordinarily regard the existence of a competition law compliance programme as warranting an increase in the amount of the financial penalty. The OFT observes that this statement has been widely welcomed by commentators. The OFT has carefully considered the comments made, but does not consider that it would be appropriate to provide further detail on the type of exceptional situations anticipated, especially since doing so could actually create more uncertainty as to whether in practice a case fit within that exception.

Reductions/no financial penalties for infringements committed by rogue employees

- 2.39 Some respondents observed that the consultation document did not refer to infringements committed by 'rogue employees', defined as being those employees who violate company control and policy and cause their businesses to engage in an infringement, without the knowledge or approval of others within the business. Such respondents noted that the OFT had discussed and acknowledged the concept of the rogue employee in its report *Drivers of Compliance and Non-Compliance with Competition Law*. Some of these respondents called for similar

recognition of the rogue employee in the final version of the guidance and some also called for discounts, or even for no penalties to be imposed, where a business with an otherwise effective compliance culture engaged in an infringement owing to the actions of rogue employee.

OFT's view

- 2.40 The OFT takes the view that an effective competition law compliance culture will tend to deter 'rogue employees' by increasing the perception that their activities will be detected and unacceptable, with serious consequences for the employee involved. Furthermore the OFT is concerned to avoid creating any incentives for businesses to identify an employee responsible for the breach, since the employee concerned may be a 'scapegoat' rather than a rogue employee. It therefore does not consider that it is appropriate to address the rogue employee issue in a publication intended to help businesses to take practical steps to comply with competition law. Far from encouraging compliance, doing so could create the impression that businesses did not necessarily need to take responsibility for the actions of their employees.
- 2.41 For similar reasons, the OFT does not consider that it is appropriate to grant penalty discounts or immunity for infringements allegedly committed by a 'rogue employee'. Doing so may create incentives for businesses to identify a scapegoat and would also tend to undermine the deterrent effect of financial penalties and the need for effective internal controls to prevent and detect anti-competitive activities, including controls to seek not to employ 'rogue employees' in the first place and/or to have sufficient internal controls so that they could not operate on their own in a way that exposes the business to competition law risks. Under the CA98 scheme, it is the business which is liable for the infringement and its financial penalties regime reflects this.

3 QUICK GUIDE

Question 4: Does the quick guide adequately reflect the informational needs of business? Is the format appropriate? If not, please explain how it could be improved.

- 3.1 The consultation document included a Quick Guide for small businesses on competition law compliance. The OFT asked for views on whether the Quick Guide adequately reflected the informational needs of business.
- 3.2 All respondents welcomed the Quick Guide, considering it to be easy to read and practical. Some respondents made some drafting comments to enhance the clarity of the Quick Guide.

OFT's view

- 3.3 The OFT is pleased that respondents in general welcomed the Quick Guide as being easy to read and practical. The OFT has made some amendments to the wording of the Quick Guide to accommodate the majority of drafting suggestions received.

A LIST OF RESPONDENTS TO THE CONSULTATION

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Baker & McKenzie

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