

# **Drivers of Compliance and Non-compliance with Competition Law**

**An OFT report**

May 2010

OFT 1227

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# 1 EXECUTIVE SUMMARY

## Introduction

- 1.1 Competition within the economy is good for business and good for consumers. Strong competition regimes encourage open, dynamic markets, and drive productivity, innovation and value for consumers. Competitive and open markets at home increase the global competitiveness of UK firms, raising economic growth and standards of living in the UK, and benefiting consumers by ensuring lower prices and a greater variety of goods and services.
- 1.2 We recognise that the majority of businesses want to comply with competition law. Whilst we will take enforcement action where necessary, we also wish to support businesses seeking to achieve a competition law compliance culture, so that breaches of competition law are avoided in the first place.
- 1.3 We undertook research into the drivers of compliance and non-compliance with competition law in order to gain a better understanding of the practical challenges faced by businesses seeking to achieve a competition law compliance culture.<sup>1</sup> Our aim was to learn what motivated businesses to comply with competition law and what businesses had found worked well in practice to achieve this. We also explored with them competition law compliance challenges that might arise in their businesses despite their compliance<sup>2</sup> efforts.

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<sup>1</sup> In parallel with this research, the OFT has undertaken research into drivers of compliance and non-compliance with consumer law, as well as research into levels of awareness of competition law, see paragraph 2.2. These workstreams aim to assist the OFT in assessing the most effective ways we can use our limited resources to drive compliance with both competition and consumer law.

<sup>2</sup>In this report, references to compliance refer to competition law compliance unless otherwise stated.

- 1.4 Given the objectives of this research, we chose to undertake qualitative research with larger businesses having existing competition law compliance activities to learn from their experiences, and to build a picture of current best practice. We conducted 22 detailed interviews with businesses. We also benefited from a number of group discussions with in-house counsel and private practice lawyers.

### **General Approach to Compliance**

- 1.5 Most of the businesses we interviewed adopted a risk-based approach to competition law compliance, focusing their activities on the areas of greatest risk in their businesses. We support a risk-based approach to competition law compliance to focus activities in the areas they are most needed. We also support a principles-based approach to compliance, rather than a rules-based approach that might result in businesses applying a 'box-ticking' approach and impose unnecessary burdens on business.
- 1.6 We recognise that one size will not fit all in competition law compliance and that the appropriate actions to achieve a compliance culture will vary by size of business and also by the nature of the risks identified. Our research has focused on larger businesses with experience of competition law compliance activities. We will be considering how the findings of this research might be relevant to smaller businesses.

### **Best Practice**

- 1.7 We have included in the report examples of the compliance activities undertaken by these businesses, in order to provide ideas to businesses designing or refreshing their competition law compliance strategy and share best practice. We do not suggest or imply that all or any of these activities are necessary in order to have an effective competition law compliance culture.
- 1.8 We report on practical ways in which some respondents have ensured senior management commitment to competition law compliance and encouraged business units to take ownership of competition law compliance risks. We provide examples of how respondents have

decided upon appropriate compliance activities to address the key competition law risks for their businesses, including legal advice, training activities, policies and procedures. We include practical suggestions from respondents on how to focus these activities and to ensure that there are sufficient internal incentives for employees to comply with competition law.

### **Drivers of Compliance and Non-compliance**

- 1.9 A number of the businesses we interviewed emphasised that, whilst important for their organisation, competition law compliance was part of a **broader compliance agenda**. Competition law compliance often stands alongside other compliance requirements in areas such as health and safety, environmental protection or anti-bribery and corruption. Some businesses sought to emphasise their commitment to competition law compliance through including it in their business's overall corporate responsibility or ethical trading statement.
- 1.10 The key drivers for competition law compliance mentioned by respondents were the fear of **reputational damage** and **financial penalties**. A number of respondents mentioned the importance of **individual sanctions**, such as the risk of criminal proceedings, director disqualification, personal reputational damage or internal disciplinary sanctions, in encouraging individuals to focus on competition law compliance. A **commitment** to competition law compliance from the top of the organisation down was a key driver of compliance in the organisation as a whole. Certain respondents specifically mentioned that they viewed competition law compliance as helping them to win business through being able to position themselves as **ethical** businesses. One respondent thought that competition law compliance activities resulted in **confident employees** who knew the rules of the game and who could compete for business without fear of breaching competition law.
- 1.11 We explored with respondents the competition law challenges that might arise despite their compliance efforts. Any apparent **ambiguity or lack of management commitment** to competition law compliance was mentioned

by the majority of respondents as creating the risk of non-compliance. Other possible reasons for non-compliance mentioned include **rogue employees**, confusion or **uncertainty** about the law, **employee error** or naivety, **loss of trust** in legal advice, a '**box-ticking**' approach to compliance and competition law compliance having to compete for attention with other compliance activities.

### **How the OFT could drive compliance**

- 1.12 We are keen to understand how we can best use our limited resources to support businesses wishing to comply with competition law – both in conducting a competition law risk assessment and in identifying appropriate activities and actions to mitigate those risks. A number of suggestions were made in the interviews and group discussions, which we have considered.

#### **Financial Penalties**

- 1.13 A number of respondents suggested that the OFT should change its policy in relation to the setting of financial penalties for breaches of the competition law so as to allow increased discounts from the penalty where the infringing party had undertaken appropriate competition law compliance activities prior to the infringement. These respondents considered this would help to drive compliance since the potential benefit of competition law compliance activities would become more clearly visible, and measurable, to businesses. Concerns were also expressed about whether the OFT would regard a pre-existing compliance programme that had failed to prevent a breach occurring as an aggravating factor, justifying an increase in the financial penalty. Respondents expressing this view were concerned that such an approach would discourage businesses from investing in competition law compliance activities.
- 1.14 After thorough consideration, we have decided not to change our penalties policy in relation to compliance activities. We will continue with our current **neutral starting position** with regard to competition law compliance activities when setting financial penalties. The key reward of

an effective competition law compliance programme is the avoidance of an infringement decision in the first place. Where, in an individual case, we consider that the existence or adoption of a compliance programme should be regarded as a **mitigating factor**, we will generally reduce the financial penalty by up to 10 per cent. Save for exceptional cases, we will not treat the existence of a compliance programme as an aggravating factor justifying an increase in the financial penalty, since we recognise that such an approach might create disincentives for engaging in competition law compliance activities.

### **Other Suggestions**

- 1.15 We already have plans to implement a number of other suggestions made by respondents. In particular, we intend:
- to update our current guidance on competition law compliance to reflect current best practice
  - to issue guidance for directors on what they need to do to comply with competition law, following on from our proposed changes to our policy on director disqualification orders
  - to provide more guidance to businesses on novel or unresolved questions of competition law through our new short-form opinion tool, and
  - to consider how the findings of this research might be relevant to smaller businesses.

### **Proposed Four Step Approach to Compliance**

- 1.16 Our proposed updated guidance on an effective competition law compliance culture is summarised in Figure 1.1 and the paragraphs below.<sup>3</sup> We suggest a four step approach to an effective competition law

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<sup>3</sup> We intend to publish for consultation a revised draft version of our quick guide OFT 424, *How Your Business Can Achieve Compliance* later this year, based upon the approach below.

compliance culture and intend to publish a draft guidance document for consultation, with more detail on each of the steps, later this year.

**Figure 1.1: Effective Competition Law Compliance Culture: Virtuous Circle**



**Core: Commitment to Compliance**

1.17 The core of an effective compliance culture is to have an unambiguous commitment to competition law compliance from the top down. Our current guidance already recognises the need for senior management commitment as an essential ingredient for an effective compliance culture. However, the findings from this report have emphasised that this commitment needs to be unambiguous and that the commitment needs to be at all levels of the management chain. We have therefore included this at the centre of the virtuous circle of an effective competition law compliance culture. Without unambiguous commitment, the remaining steps are unlikely to be effective.

### **Step 1: Risk Identification**

- 1.18 The first step is for the business to identify the key competition law compliance risks it faces. The findings in this report highlight some examples of the way in which businesses approach this exercise. For some businesses the key risks relate to the risk of cartel activities, for some abuse of dominance might be more of a concern, others face a broader range of risks. Some businesses might have known risk areas based on previous enforcement action. Businesses might seek to identify the key areas of the business in which risks might arise, for example the sales and marketing departments, staff who attend trade association meetings or otherwise have contact with competitors, and new staff joining the business. Businesses might also identify specific risks when engaging in mergers and acquisitions activity or entering a new product or geographic market.

### **Step 2: Risk Assessment**

- 1.19 The second step is for the risks identified to be assessed as high, medium or low risks for the business based on the likelihood of the risks occurring. The findings in this research provide some examples of how businesses might assess the risks facing them. For example, the risks arising from the arrival of new staff might be assessed as high if the new member of staff is joining from a competitor, is joining the sales and marketing department or will be undertaking a role requiring contact with competitors. Conversely the risk might be assessed as low if the new member of staff will have a back-room function with no contact with competitors or customers.

### **Step 3: Risk Mitigation**

- 1.20 The third step is for appropriate risk-mitigation activities. These would generally include appropriate policies and procedures, and appropriate training activities. The business should also consider how best to achieve behaviour change within the organisation to achieve an effective competition law compliance culture.

- 1.21 The identification of appropriate policies and procedures and appropriate training activities will depend on the risks identified and the assessment of those risks. This reports sets out some examples of risk-mitigation activities that have been undertaken by businesses. For example, if the business has identified a risk arising from new staff joining the sales and marketing department and assessed the likelihood of the risk occurring as high, the business might establish procedures to ensure that such new staff are given competition law compliance training as part of their induction programme. Businesses might also establish procedures for obtaining advice on possible competition law issues and internal disciplinary procedures for staff involved in breaches of competition law.
- 1.22 Appropriate training in competition law compliance should be targeted at the risk areas identified. This might include online training, face-to-face training or a combination of the two. It might be supported by other activity such as testing of employees' knowledge and understanding and/or written materials summarising competition law. Businesses should consider how best to focus their training activities to mitigate the risks identified. For businesses with large numbers of staff in low risk areas, it might be appropriate to concentrate training activities on staff in high risk areas.

#### **Step 4: Review**

- 1.23 The fourth step is the review stage. It is important that businesses regularly review all stages of the process to ensure that there is unambiguous commitment to compliance from the top down, that the risks identified or the assessment of them have not changed and that the risk mitigation activities are appropriate and effective. The key competition law compliance risks faced by a business might change over time. For example, a business's market share might grow over time so that the risk of breaching the abuse of dominance rules becomes high risk. Some businesses find that audits can be a helpful way to review the effectiveness of their internal policies and procedures and/or training. Some test their employees at regular intervals to review the success of their training activities.

## **Structure of this Report**

1.24 This report is structured as follows:

- Chapter 1 – Executive Summary
- Chapter 2 – Introduction and Background
- Chapter 3 – Methodology
- Chapter 4 – Findings
- Chapter 5 – Respondent Suggestions on what more the OFT could do to drive compliance
- Chapter 6 - OFT Response to Respondent Suggestions on what more the OFT could do to drive compliance
- Chapter 7 – Conclusion

## 2 INTRODUCTION AND BACKGROUND

2.1 This report presents the findings of an Office of Fair Trading (OFT) research project exploring the drivers of compliance and non-compliance with competition law.<sup>4</sup> We conducted this research in order to gain a better understanding of the practical challenges faced by businesses seeking to achieve a competition law compliance culture. The OFT was keen to learn what businesses have found works well in practice, to explore with them the key reasons for competition law compliance issues arising in their businesses and, in turn, to share through this report these examples of best practices with other businesses. The OFT's overall aim in this research has been to find out how we might support UK businesses in achieving an internal competition law compliance culture, so that breaches of competition law are avoided in the first place.

### Other OFT compliance workstreams

2.2 In parallel with this research into the drivers of compliance and non-compliance with competition law, the OFT has undertaken research into the drivers of compliance and non-compliance with consumer law,<sup>5</sup> as well as research into levels of awareness of competition law among businesses.<sup>6</sup> The OFT is committed to helping businesses comply with the laws we enforce in order to avoid breaches of law occurring in the

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<sup>4</sup> The OFT carried out this research pursuant to section 5 of the Enterprise Act 2002 (EA02). Under section 5(1) of EA02 the OFT has the function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions. In carrying out that function the OFT may carry out, commission or support (financially or otherwise) research (section 5(3) EA02). Information relating to the business of an undertaking that has been collected in this research is therefore specified information to which section 237 of EA02 applies and has been disclosed in accordance with the provisions of Part 9 of EA02.

<sup>5</sup> See OFT 1225 *Drivers of Compliance and Non-Compliance With Consumer Law* (to be published) and OFT 1228 *Factors Affecting Compliance with Consumer Law and the Deterrent Effect of Consumer Enforcement* (to be published).

<sup>6</sup> See *OFT Competition Law Awareness Business Survey* (to be published).

first place. These workstreams have been designed to assist the OFT in assessing the most effective ways we can use our limited resources to drive compliance with both competition and consumer law.

## **Background on the OFT**

- 2.3 The OFT is the UK's consumer and competition authority. Our mission is to make markets work well for consumers. Our vision is for competitive, efficient, innovative markets where standards of consumer care are high, consumers have choice and are empowered and confident about making choices, and where businesses comply with consumer and competition laws but are not disproportionately burdened by Government regulations. Competition within the economy is good for business and good for consumers. Strong competition regimes encourage open, dynamic markets, and drive productivity, innovation and value for consumers. Competitive and open markets at home increase the global competitiveness of UK firms, raising economic growth and standards of living in the UK, and benefiting consumers by ensuring lower prices and a greater variety of goods and services.
- 2.4 The UK's competition regime is built on the prohibitions set out in the Competition Act 1998 (CA98), which prohibits anti-competitive agreements and abuses of dominance, and provisions in the Enterprise Act 2002 (EA02), which made it a criminal offence for individuals to engage in cartel activity in the UK and empower the OFT to apply to the court for a Competition Disqualification Order (CDO) against directors whose businesses have infringed competition law in certain circumstances. In addition, Council Regulation 1/2003 empowers the OFT to enforce the prohibitions under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) of anti-competitive agreements and abuses of dominance, where the agreement or conduct in question has the potential to affect trade between EU Member States. The EA02 also gives the OFT powers and duties in relation to mergers and market investigations.
- 2.5 Accordingly, the UK competition regime comprises both sanctions against businesses and sanctions against individuals. The competition

law prohibitions under the CA98 and Articles 101 and 102 of the TFEU are civil, or administrative, in their nature and exclusively relate to the conduct of undertakings. The criminal cartel offence and CDO powers introduced by the EA02 are sanctions against individuals.

## **Existing OFT research**

### **Deloitte research**

- 2.6 The OFT in 2007 published a research report prepared for it by Deloitte<sup>7</sup> (the Deloitte Report) which addressed a number of questions about the deterrent effect of its enforcement activities in the areas of merger control and competition law, from the viewpoint of businesses and their legal advisors. The businesses surveyed highlighted the importance of individual sanctions in driving compliance with competition law, in addition to concerns about adverse publicity, financial penalties and private damages actions.

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<sup>7</sup> OFT 962, *The Deterrent Effect of Competition Enforcement by the OFT*, November 2007, available at [www.of.gov.uk](http://www.of.gov.uk).

**Perceived Importance of Sanctions in Deterring Infringements of Competition Law<sup>8</sup>**

<b>Ranking by Businesses</b>	<b>Ranking by Lawyers</b>
1. Criminal Penalties	1. Criminal Penalties
2. Disqualification of Directors	2. Fines
3. Adverse publicity	3. Disqualification of Directors
4. Fines	4. Adverse publicity
5. Private damages actions	5. Private damages actions

2.7 According to the Deloitte Report, the most common compliance measure was taking external legal advice (40 per cent of businesses). Other relatively common compliance measures were:

- having a policy code (34 per cent)
- providing seminars on competition law (26 per cent)
- employing a dedicated competition compliance officer (20 per cent)
- taking economic advice (16 per cent), and
- requiring employees to take an online training programme (nine per cent).

2.8 Whether a business undertakes compliance activities was found to be strongly related to the size of the business.<sup>9</sup>

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<sup>8</sup> OFT 962, at footnote 7 above, at paragraphs 5.55 to 5.59.

<sup>9</sup> Ibid. at paragraphs 5.98 to 5.99.

## London Economics research

- 2.9 In 2009 the OFT published research<sup>10</sup> by London Economics (the London Economics Report) assessing the penalty regime, and how the UK penalty regime compared to an 'optimal' regime. This involved a comparison of the UK regime with international peers in relation to the tools used and the level of financial penalty imposed.
- 2.10 The London Economics Report suggested that, if anything, OFT financial penalties were relatively low by international standards. OFT financial penalties were found to be around 65 to 75 per cent lower than financial penalties imposed by the other competition authorities considered in the report.
- 2.11 The London Economics Report emphasised that financial penalties were not the sole way of achieving deterrence. Other policies, such as leniency, individual sanctions and settlements, are important ingredients in an optimal enforcement regime. The London Economics Report concluded that the overall UK enforcement regime was good, with recourse to financial penalties and individual sanctions backed by a strong leniency policy.

## Existing OFT publication on compliance

- 2.12 The quick guide OFT 424, *How Your Business Can Achieve Compliance* was published by the OFT in 2005. This offers general advice to businesses on what they can do to encourage competition law compliance. The guide recognises that the steps that need to be taken in order to ensure compliance will vary from business to business and will depend on a range of factors, including the size and nature of the business. It suggests that as a starting point it is helpful to assess the extent to which competition law impacts upon the business and the risk of the business committing an infringement. The guide advocates a risk-

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<sup>10</sup> OFT 1132, *An Assessment of Discretionary Penalties Regimes*, October 2009, available at [www.of.gov.uk](http://www.of.gov.uk).

based approach to compliance, noting that the higher the risk of infringement, the more comprehensive measures that are likely to be required in order to ensure compliance.

- 2.13 In order to assist this risk assessment, the quick guide sets out a short series of questions in order to help the reader assess their business's position in the market as well the degree to which directors and employees of the business might have contact with competitors. The guide also sets out the need for businesses to raise competition law awareness among employees.
- 2.14 The quick guide aims to encourage businesses to consider whether they ought to implement a competition law compliance programme. It notes that in some cases, where the risk of infringing competition law might be high and/or where the business is so large and diverse it is simply too difficult to monitor the activities of individual employees, there is a strong likelihood that a formal mechanism – a compliance programme – will be needed to ensure that all employees, including management, conduct their business dealings in compliance with competition law. While acknowledging that the content of a compliance programme must be tailored to the business's particular requirements and that there is no standard compliance programme that can apply in all cases, the guide nevertheless sets out certain general features that must be included as a minimum in any compliance programme if it is to work effectively. These are:
- support of senior management
  - appropriate policy and procedures
  - training, and
  - regular evaluation.
- 2.15 In addition, the guide states that the existence of a compliance programme in an infringing business might be taken into account as a

mitigating factor when the OFT calculates the level of a financial penalty.<sup>11</sup> It states that the OFT will give careful consideration to the precise circumstances of the infringement and the efforts made by management to ensure that the programme has been properly implemented. It notes that the OFT will take into account the seniority of the persons involved in the infringement and that the OFT will view very seriously the involvement of directors or senior management in any infringement.

- 2.16 In practice the OFT has, in some cases, taken the adoption of a compliance programme into account as a mitigating factor to reduce the amount of the financial penalty imposed for infringements of the Chapter I prohibition, by up to 10 per cent.<sup>12</sup>

### **Policies/publications of other competition authorities on compliance**

- 2.17 We have reviewed the practice of other competition authorities in relation to competition law compliance and, where applicable, their published guidance. We have summarised these below.

#### **European Commission**

- 2.18 The European Commission (the Commission) has not published any guidance on competition law compliance programmes. Whilst in some decisions the Commission has noted the adoption of a competition law compliance programme by an infringing undertaking, the Commission has not tended to treat such a programme as a factor to reduce the amount of the fine.<sup>13</sup> The legality of this approach by the Commission has been upheld by the General Court, which has held that the Commission is not

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<sup>11</sup> As noted in OFT 423, *OFT's Guidance as to the Appropriate Amount of a Penalty* at paragraph 2.16.

<sup>12</sup> See, for example, the OFT decision of 21 September 2009 *Bid-Rigging in the Construction Industry in England* (Case CE/4327-04) at paragraphs VI.316 to 319.

<sup>13</sup> See, for example, *Graphite Electrodes* (2002/271/EC) OJ 2002 L100/1 at 193.

required to take the adoption of a competition law compliance programme into account as an mitigating circumstance when setting the amount of the fine, especially when the infringement in question amounts to a manifest infringement of Article 101 TFEU.<sup>14</sup>

### **US Federal Sentencing Guidelines**

- 2.19 The US Federal Sentencing Guidelines (the Sentencing Guidelines) are generally used by the US Federal Courts when imposing sentences, including for criminal violations of section 1 of the Sherman Act, the main US antitrust statute. The Sentencing Guidelines indicate that an 'effective compliance and ethics programme' might reduce the fine that will be imposed.
- 2.20 According to the Sentencing Guidelines, in order to be considered as having an 'effective compliance and ethics programme', an organisation must:
- exercise due diligence to prevent and detect criminal conduct and
  - otherwise promote an organisational culture that encourages ethical conduct and a commitment to compliance with the law.
- 2.21 The Sentencing Guidelines make it clear that the compliance and ethics programme must be reasonably designed, implemented and enforced so that the programme is generally effective in preventing and detecting criminal conduct. They also provide that any failure to prevent or detect the offence before the court 'does not necessarily mean that the programme is not generally effective in detecting and preventing criminal conduct.'<sup>15</sup> A summary of the approach in the Sentencing Guidelines is set out in Annexe 1.

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<sup>14</sup> See *Archer Daniels Midland Co v Commission* (Case T-329/01) [2006] ECR II-3255 at paragraph 299.

<sup>15</sup> The Sentencing Guidelines, §8B2.1.(a)(2).

## **Australian Competition & Consumer Commission (ACCC) guidance and 'three-phases of compliance'**

2.22 The ACCC published 'Corporate Trade Practices Compliance Programs' (the ACCC Guidance) in 2005. This guidance acknowledges that there cannot be a generic compliance programme, as each organisation's circumstances are different, but that whatever the type and style of the compliance programme, it should be well managed, adequately resourced, properly documented and actively supported by the board and senior management. The guidance states that a successful compliance programme is likely to include:

- **Strategic vision** – compliance activities must be linked to the business's strategic goals. Therefore, the method employed by the business to achieve those goals must be communicated, along with the benchmarks for implementation.
- **Risk assessment** – the business must actively identify its compliance risks and reassess them at regular intervals. A business must also do this when it enters into new business activities. The programme must ensure that specific compliance risks that might arise within each business unit or area of operations are considered.
- **Control points** – each of the identified risks are managed at specified control points, which are themselves reinforced by establishing behavioural and procedural controls. Procedural controls address and mitigate high risk areas in a business's operating environment, while the behavioural mechanisms emphasise the business's policies for those risks.
- **Adequate documentation** – the business's compliance efforts are adequately documented to ensure that they can be substantiated in the event of a breach.
- **Identified people** (in appropriate positions of responsibility) that are accountable – these people manage each specific element of the compliance system.

- **Continuous improvement** – the business will evaluate its performance and its approach, to ensure that they are appropriate to its operations.

2.23 The ACCC Guidance also suggests that, based upon its experience, organisations go through three phases when institutionalising a compliance culture:

- **Commitment to comply:** during this phase, the business management develops a willingness or commitment to address compliance issues and allocate the resources to achieve compliance.
- **Compliance know-how:** at this stage, specialist personnel such as a compliance officer or compliance advisor are appointed and are made accountable for compliance programme development. Internal and external expertise will be sought and assimilated. The business's corporate strategy will take into account compliance. Policies and procedures will be developed in order to address compliance issues.
- **Compliance as a business practice:** in this final phase, compliance becomes the way that business is done and is no longer external to it. Compliance policies are now considered integral to the business's objectives. Operational procedures take account of compliance and the performance of work duties in accordance with the law is the norm. Compliant practices are expected and rewarded. Non-compliance is prevented and discouraged.

2.24 According to the ACCC, once the final phase is reached, businesses very rarely revert to the non-compliant state.

2.25 The ACCC Guidance also includes four compliance programme template undertakings<sup>16</sup> to provide an indication of what the ACCC considers advisable in compliance programmes implemented voluntarily by

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<sup>16</sup> The four template trade practice compliance programme undertakings differ in two respects—the number of elements present and the obligations within each of the templates.

businesses, as well as providing an example of what the ACCC is likely to accept by way of formal administrative undertaking.<sup>17</sup>

### **Canadian Competition Bureau – Corporate Compliance Programs Information Bulletin**

- 2.26 In 2008 the Canadian Competition Bureau published the revised Information Bulletin, 'Corporate Compliance Programs' (the Bulletin). This describes the measures that businesses should consider in order to prevent or minimise their risk of contravening the Canadian Competition Act and other legislation that the Competition Bureau enforces. The Bulletin also provides tools that help businesses to develop their own compliance programmes and includes a framework which sets out, in the Competition Bureau's opinion, the essential components of a 'credible and effective' compliance programme.
- 2.27 The Bulletin states that there are five elements fundamental to a credible and effective compliance programme, regardless of the particular model adopted, its level of complexity or the size of the business. These are
- Senior Management Involvement and Support
  - Corporate Compliance Policies and Procedures
  - Training and Education
  - Monitoring, Auditing and Reporting Mechanisms, and
  - Consistent Disciplinary Procedures and Incentives.
- 2.28 According to the Bulletin, while the existence of a compliance programme does not immunise businesses or individuals from enforcement action, when determining the most appropriate means to

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<sup>17</sup> Section 87B of the Australian Trade Practices Act 1974 empowers the ACCC to accept formal administrative undertakings, which may include compliance programme obligations.

resolve cases where due diligence is a factor,<sup>18</sup> the Competition Bureau (and the Director of Public Prosecutions) may give weight to the existence of a credible and effective compliance programme. The Bulletin adds that where a business has a compliance programme in place and a contravention of the Canadian Competition Act or other legislation enforced by the Competition Bureau occurs, then the programme might still be considered credible and effective where it can be demonstrated that it was reasonably designed, implemented and enforced in the circumstances of the case.

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<sup>18</sup> Under certain provisions of the legislation enforced by the Canadian Competition Bureau, it is a defence for a person to establish that they exercised due diligence to prevent the commission of the offence (see, for example, section 52.1(6) of the Competition Act R.S.C. 1985 in respect of deceptive telemarketing). Although an in-house programme is not, in and of itself, a defence, a credible and effective programme may enable a business to demonstrate that it took reasonable steps to avoid contravening the law. In this regard, such a programme may support a claim of due diligence. Documented evidence of corporate compliance will assist a business in advancing a defence of due diligence, where available.

### 3 METHODOLOGY

#### Approach

- 3.1 We undertook research into the drivers of compliance and non-compliance with competition law in order to gain a better understanding of the practical challenges faced by businesses seeking to achieve a competition law compliance culture. We wished to learn what motivated businesses to comply with competition law and what businesses had found works well in practice to achieve this. We also wished to explore with them the competition law compliance challenges that might arise in their businesses despite their compliance efforts.
- 3.2 Given the objectives of this research and pre-existing OFT research into deterrence which was largely quantitative in nature,<sup>19</sup> we decided to undertake qualitative research with larger businesses having existing competition law compliance activities, to learn from their experiences and build a picture of current best practice in competition law compliance.
- 3.3 We considered that we would gain the most valuable insights into the practical challenges of competition law compliance through holding confidential in-depth interviews with in-house staff (typically in-house legal advisers or compliance officers) having direct experience of driving competition law compliance. We saw such interviews as being the best way to gain practical examples of best practice in competition law compliance.
- 3.4 We did not include small and medium-sized enterprises (SMEs) within the sample since this research was targeted at the challenges of driving compliance with competition law within larger businesses. Care should therefore be taken before assuming that the insights provided in this report apply to SMEs. We recognise that some of the challenges in

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<sup>19</sup> For example, the Deloitte Report and the London Economics Report - see footnotes 7 and 10 above.

driving competition law compliance in SMEs might well be different to those in larger businesses. We will be considering how the findings of this research might be relevant to smaller businesses. With this in mind, we have conducted separate research into the levels of awareness of competition law among businesses.<sup>20</sup>

- 3.5 Before embarking on the research, we undertook a literature review into the drivers of compliance and non-compliance in order to inform us of the areas in which we should aim to gain insights. This phase involved the review of the OFT's current guidance on compliance, the Deloitte Report, the London Economics Report and the practice of other competition authorities in relation to competition law compliance including, where applicable, their published guidance<sup>21</sup> and research.<sup>22</sup> In addition, we reviewed literature on the drivers of compliance and non-compliance with various areas of law, including food standards, health and safety and environmental requirements.

### **Sampling and Recruitment**

- 3.6 While not a fully representative sample, we sampled a mix of businesses facing the range of competition law compliance issues, in order to maximise the insights likely to be generated. We therefore contacted some businesses which had been involved in competition law investigations and some which had not, some who might have

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<sup>20</sup> See OFT Competition Law Awareness Business Survey, at footnote 6, above.

<sup>21</sup> This review is summarised at paragraphs 2.6 and following, above.

<sup>22</sup> See, for example, the ACCC's Enforcement and Compliance Project at [www.cartel.law.unimelb.edu.au/go/related-projects/the-australian-competition-and-consumer-commission-enforcement-and-compliance-project](http://www.cartel.law.unimelb.edu.au/go/related-projects/the-australian-competition-and-consumer-commission-enforcement-and-compliance-project). The ACCC's Enforcement and Compliance Project's purpose is to test on an empirical basis the major theories of how businesses respond to regulatory enforcement and why they do or do not comply with the law. The project tests these theories using data collected in the ACCC Enforcement Compliance Survey involving 1000 larger businesses in Australia, as well as in quantitative interviews with ACCC staff, trade practices lawyers and business people. The project has produced a wealth of reports and working papers, accessible at the link above. The project issued a preliminary research report in 2003 and is scheduled to continue until 2011.



















































































































































