

Compliance: a key role for Trade Associations in helping business understand and meet their legal obligations

A speech given to the Trade Association Forum annual conference

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Introduction

Thank you for inviting me here today. It is my great pleasure to be back, having spoken at your conference two years ago.

For those of you who were not here then, I would mention that this CBI location – named the Methven Room – is a reminder of the links between OFT and business as it is named after the first Director-General of Fair Trading, John Methven, who went on to become Director-General of the CBI.

As I prepared to speak to you today, I glanced at the definition of 'compliance' in my Collins (no relation, I should add) Dictionary.

One of the definitions of 'compliance' given there is 'the property of a material undergoing elastic deformation or (of a gas) change in volume when subjected to an applied force. It is equal to the reciprocal of stiffness.'

While I appreciate that I have the honour of speaking to the Trade Association Forum today, and not to a conference of physicists, nevertheless I think that the physics definition offered by Collins (the Dictionary) perfectly illustrates the proposition that the term 'compliance' can have different meanings depending on the context.

So what do we mean by compliance? To this Collins, compliance is about creating a positive, ethical and knowledgeable culture within a business that empowers and drives the business, and the people who work in it, to act with integrity and to compete vigorously and effectively within the law.

And what do we not mean by compliance? It does not mean a form-based, tick-box compliance process or involve a compliance manual that sits on a dusty shelf somewhere and which is periodically referred to sometimes, perhaps often, with disdain on the basis that 'the lawyers say we have to look at this'.

What it does mean in practice will be different for different businesses, which is why the OFT has looked in detail at what drives compliance, and how we can help businesses comply with the law.

This morning I would like to touch on why compliance is good for business, and how the OFT can help. I will then share some early findings of our most recent research in this area, and then look at what the OFT plans to do next and how you, as trade associations, can help your members.

Why instilling a culture of compliance is good for business

The original title for my speech today was about why instilling a culture of compliance is good for business. As the results came in from our most recent research on compliance it became increasingly clear that trade associations already play a key role in helping business understand and meet their legal obligations.

Given this, I am not sure that you need to be told why compliance matters. You already know. But I would just like to stress that, as businesses have been focussing on keeping their heads above water during such difficult

economic times, it is important that compliance is not put to one side. Not only would doing so put companies at risk of enforcement action by bodies such as the OFT, but it could also mean that they are basing their business models on conduct which may not be sustainable or effective in the long term – business models that are in effect, not just built on sand, but on dirty and highly unstable sand.

Our recent research also showed us that companies feel that a strong, effective compliance culture can be commercially liberating. Managers and other staff have a clear idea of what they can and cannot do and what they should do if they are not sure. They have the confidence to take informed decisions, rather than acting over cautiously. They are confident in standing up to parties, especially competitors, who seek to draw them into anti-competitive conduct with a response such as 'this is not the way we do business here' – a response based on ethics and on integrity – rather than 'our lawyers tell us we cannot do this'.

How the OFT encourages compliance

At the OFT, we start from the point of view that the vast majority of businesses wish to comply, and try to comply, with the law. Given the vast array of laws and regulations that businesses face, we see our role as helping businesses understand what is required of them under competition and consumer law and how they can achieve compliance.

Starting with the basics, the OFT has published a number of guides and documents designed to help businesses understand which rules they have to comply with and how they might go about doing so. These are all available on our website. Whenever there is a change in the rules or the guidance that we provide, then we consult widely, including with business organisations and trade associations, to ensure that what we provide to businesses is information that can really help them.

We also hope that the publicity surrounding the taking of enforcement action can help encourage compliance. I do not only mean this because companies will be scared that enforcement action might be taken against them - although this does of course help. Enforcement action can also highlight how

the law applies in various situations, including to new business models, new practices and arrangements and in the context of evolution in markets. It can also show relevant is compliance with competition and consumer law to almost every business.

Where possible, we also work in partnership with industry to raise the level of compliance: a recent example is the campaign to develop an enhanced understanding of consumer rights amongst customer-facing retail staff.

We are aware, however, that we can do more.

Concerns have been expressed that uncertainty about how competition law in particular might be applied has led to some forms of potentially beneficial collaborative work between businesses not going ahead. In some cases, it may not be clear how the competition rules may be applied to collaborative conduct, for example with regard to some government-led initiatives.

As a result, we are proposing to trial a 'short-form' opinion procedure. This would allow us, in a limited number of cases, to provide prompt guidance where there is a novel or unresolved issue of wider interest arising in the context of a specific prospective collaborative initiative. We would like to hear from you and your members about issues that you or they think would benefit from clarification through means of such a 'short-form' opinion.

In order to help us engage more closely with industry and gain insight from business organisations we have recently started a Competition Compliance Working Group. This allows the OFT to work directly with business groups, including the Trade Association Forum, so we can best shape our compliance messages and tools to make them more effective.

I would like to thank the Trade Association Forum for participating in this group. Following the first meeting of the Working Group, we are undertaking survey research into the awareness of competition law by businesses of all sizes across a range of sectors which will be published soon.

Drivers of compliance

In late 2009, we embarked upon an internally-run research project entitled 'Drivers of Compliance with Competition and Consumer Law'. This examines what actions are most likely to assist business to achieve compliance, current best practice and what further steps the OFT could take to encourage it. Whilst compliance can never take a 'one size fits all' approach, some interesting common factors are emerging from our research.

The research also highlighted that a barrier to business compliance can be a lack of understanding of what legislation means or what exactly are the legal obligations. Some businesses reported that the volume of regulatory requirements on business meant that it was difficult for business to comply with everything. Competition and consumer law is effectively jostling for attention with other important statutory requirements such as health and safety legislation.

There was also concern about the lack of clarity in particular pieces of legislation. Again this is an area where trade associations can play a vital role for their members in engaging with government and taking part in consultations to ensure outcomes support businesses across the UK and do not confuse, or overly complicate, regulatory frameworks. First-hand experience from business is crucial to getting the balance right.

As I mentioned earlier, the OFT believes that the vast majority of businesses want to comply with the law. This is strongly supported by our research. Businesses want to do the right thing, to act in a 'fair' and ethical manner to ensure customers and others are satisfied. Protecting business reputation emerged as a key driver, with the fear of adverse publicity from getting something wrong, whether for the smallest firms in their local newspaper, or for multinationals in the global media.

We are aiming to publish reports into the drivers for consumer and competition compliance in the next few months and I will touch on some of the emerging themes here before considering the important role that you play in helping businesses comply.

Drivers of competition compliance – emerging themes

Our competition research focussed on medium to large companies, most of whom tend to consider competition compliance alongside health and safety, financial reporting and other key compliance agendas.

Very few of our interviewees said that competition law compliance occupies a unique, distinct or for that matter, sacrosanct, place within their organisations. This tends to put the lie to the claims of some critics that competition law compliance is somehow special or is uniquely and unduly burdensome or expensive.

Perhaps unsurprisingly, our interviewees also told us that for the compliance message to be effective, it must be articulated in practical business-like terms and avoid being overly risk-averse. Our research also confirmed our existing understanding that the commitment of senior management was crucial to creating a culture of competition compliance and that there should be no ambiguity within a business and its management as to the unacceptable nature of any breaches.

We will take these findings and consider how we can adjust what we are doing to reflect them. In particular, we will:

- review the guidance we give to businesses about achieving compliance,
- produce specific guidance on the role of company directors, and
- consider specific tools to help SMEs comply with competition law, including whether we can make better use of on-line tools.

We will develop these ideas in collaboration with industry groups, including the Trade Association Forum, and through that forum and through our website, e-newsletter and publications, we will keep you informed.

Drivers of consumer law compliance – emerging themes

As highlighted earlier, maintaining a good reputation is seen by business as crucial and cited as a main reason for acting in a fair and ethical manner with consumers.

Some trade associations and business groups can help to enhance business reputation by having easily recognisable logos which aim to provide assurance to consumers that the business processes are fair and have been independently checked. At the OFT we are supportive of this approach, as you know, through our endorsement and promotion of trade association consumer codes of practice under our Consumer Codes Approval Scheme.

One of the main barriers to businesses fully complying is a lack of understanding of the full details of legal obligations, especially amongst SMEs. Compared to most larger businesses, our research showed a low awareness of consumer law, guidance and enforcement among SMEs.

The desire to win and retain customers means that most firms are naturally focussed on protecting their reputation for quality of product and service, which can often mean that they meet or exceed the requirements of consumer law, even where they do not know the detail. Sometimes, however, a pressure to keep up with 'offers' by competitors can encourage breaches of consumer law, particularly if there is no perceived adverse consequence.

An interesting, if not surprising, finding is that one of the main drivers of compliance, according to companies, is informed consumers who assert their rights, and thus become de facto enforcers of consumer law. Whereas consumers will rarely be aware of breaches of competition law, like cartel activity, they are directly on the receiving end of good or bad customer service, are increasingly aware of and will to enforce their rights and expect businesses to know and comply with their obligations.

This suggests that the OFT's efforts to reach consumers with straightforward messages about how the law applies to their purchases are efforts well spent, helping to inform not just them but businesses too. But it also creates a responsibility on us to ensure businesses also have easy access to information about consumer rights. Business people are, of course, consumers too, so general efforts to increase consumer awareness can reap a double dividend.

The exception to the general rule that smaller firms have low awareness of the detail of consumer law was businesses who were members of trade associations. In these cases the respondents to our research emphasised the important role their trade associations play in disseminating information about existing and new laws. The use of model terms for members reduced burdens, especially on SMEs, and freed up valuable resources for them to continue to focus on their core activities.

Where businesses are not members of a trade association they turn to other information sources including BusinessLink, although they often rely on internet searches and Google to find information, leaving us with a big challenge to ensure the information we produce is easily found when they search.

There are some clear lessons for us to learn from this research and as we go forward we will look at how we can improve understanding of rights and duties for both business and consumers.

The role of trade associations in encouraging compliance

Our research has highlighted the vital role that trade associations play in encouraging business compliance with consumer and competition law. From providing advice and information to interacting with government on the development of the law, trade associations support their members' activities and promote compliance.

It is, however, worth highlighting an interesting outcome from our research. Many businesses raised concerns that their employees' involvement in trade associations can create competition law risks. These fears are readily understandable: they are concerned that their employees will become involved in trade associations that do not have adequate competition law safeguards in place (such as policies making it clear not to discuss pricing or other commercially sensitive issues) and the companies will become implicated in a competition law infringement through their participation in trade association activities.

Some of our interviewees have said that they will treat it as a potential disciplinary offence if an employee attends a trade association function that has not been formally approved in advance by the company, so that the trade association's competition compliance policy can be checked. Similarly, the same interviewees say that their companies require that employees submit for review the competition compliance policies of trade associations that they wish to join, before they are allowed to join them.

To be sure, not every interviewee company has such protocols in place, but this is a sign that trade associations that do not take competition law compliance seriously may find that their membership numbers may be affected.

Moreover, all of our interviewees have said that they have specific expectations in place as to how their employees will conduct themselves at trade association events and how they must react if those events raise competition law risk. As a result of the research, we are currently considering what more we could do to help trade associations and their members ensure that discussions do not stray into problematic areas.

Many interviewees have commented very positively upon the importance of trade associations in helping to instil a culture of competition compliance among their members. This is particularly the case among SMEs, many of whom regard trade associations as the first port of call for assistance with compliance matters. The OFT shares this view that trade associations can empower their members to create a culture of compliance.

There are some excellent examples of the positive role trade associations can play in helping drive compliance by members. Since I spoke to you last, the UK Contractors Group and National Federation of Builders in August 2009 jointly launched a competition law code of conduct. Directly inspired by the *Construction* investigation then underway the code was the result of ongoing discussions between the OFT and the industry groups in question, who were rightly keen to see how they could best represent their members.

In our work looking at the ticket pricing of airlines ABTA's assistance was instrumental in helping us to address issues in the market. This was an

excellent example of a compliance partnership in action which has led to real changes in the clarity of pricing messages. ABTA and the OFT's coordinated warnings to members and non members respectively allowed ABTA to exert more pressure as its members could see there would be no competitive disadvantage to complying.

These examples show how trade associations can take a leading role in working with the OFT to help to instil a culture of compliance among their members. For that matter, trade associations can and do take the initiative in developing compliance initiatives for their members, even without an OFT investigation: prevention is better than a cure.

Conclusion

I started this talk by noting that compliance has different meanings, depending on the context. It can have some meanings that we might not expect. Perhaps the most important things about compliance are creating a positive, ethical and informed culture within a business, in which employees know of and understand their obligations and how to conduct business in manner that does not infringe competition and consumer law.

Such a culture can protect companies from reputational and financial sanctions as well as personal sanctions on its employees. Moreover, it is commercially liberating: it helps to remove the fear of falling foul of the law and can allow the company to embrace new business opportunities.

The OFT is examining what more it can do to help drive competition and consumer law compliance. Trade associations have an important role to play in this area. As the examples I've talked about today show, the OFT wants to help you to help your members comply.

We are very pleased, but not at all surprised, that our most recent research has backed up our existing view that the support you give your members through training courses, briefings and advice on legal duties is vital in increasing understanding and ultimately compliance.