OFFICE OF FAIR TRADING

How your business can achieve compliance with competition law

Guidance

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1 INTRODUCTION

What this Guidance is about

1.1 The OFT acknowledges that the majority of businesses wish to comply with competition law. This guidance is intended to help all businesses to comply with competition law, by describing the OFT's suggested four-step process for achieving a competition law compliance culture. This Guidance replaces OFT424 *How Your Business Can Achieve Compliance.*

1.2 This is a suggested, not mandatory, process. The OFT recognises that a 'one size fits all' approach is not appropriate for competition law compliance and that the appropriate actions to achieve a compliance culture will vary, for example depending on the size of business and the nature of the risks identified. None of the illustrative examples provided in this guidance for each step of the recommended four-step process should be regarded as compulsory. They are included to provide ideas to businesses which are designing or refreshing their compliance activities. 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 This document also explains how the OFT will view a business' compliance efforts when setting the level of any penalty for competition law infringements.

1.4 Company directors and their advisers might also wish to consult the guidance OFT1340 *Company Directors and Competition Law.* The OFT has also produced a OFT *Quick Guide to Competition Law Compliance* that incorporates information from this Guidance and *Company Directors and Competition Law*.

The benefits of compliance

1.5 While achieving a culture of competition law compliance requires an investment by the business,[1] including a real commitment of management time, the benefits of this investment far exceed the cost. Having an effective culture of compliance with competition law will help a business to avoid the many adverse potential consequences of competition law infringement including the following:[2]

- financial penalties of up to 10 per cent of group turnover
- adverse reputational impact (business and personal) associated with having committed a competition law infringement
- director disqualification orders for the directors of infringing companies
- criminal convictions for those individuals involved in a cartel
- considerable diversion of management time and the incurring of legal costs in order to deal with investigations by competition authorities

[1] Throughout this Guidance, we refer to a 'business'. This term (also referred to as an 'undertaking' in our more detailed competition law guidelines) means any entity engaged in economic activity, irrespective of its legal status, including companies, partnerships, Scottish partnerships and individuals operating as sole traders.

[2] See, for example OFT407, *Enforcement* and OFT510 *Director Disqualification Orders in Competition Cases*.

- unenforceability of restrictions in agreements that infringe the law, and

- lawsuits from those who have suffered harm as a result of the infringement.

1.6 Effective competition law compliance has greater benefits than just avoiding the adverse consequences mentioned above. Other potential advantages of an effective competition law compliance culture include the following:

- the early detection and termination of any infringements that have been committed by the business allowing, in appropriate cases, immunity or leniency applications[3] to be made, potentially helping to reduce or eliminate financial penalties

- taking appropriate steps to comply with competition law might result in an up to 10 per cent reduction in the amount of the financial penalty imposed by the OFT for a competition law infringement, depending upon the circumstances[4]

- employees being able to recognise the potential signs that another business might be infringing competition law, particularly in situations where their own business might be the victim of such an infringement and might decide to take appropriate action

- employees being confident of 'the rules of the game' and able to compete vigorously for business without fear of infringing competition law, as well as recognising when they should seek legal advice on potential competition law issues, and

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[3] For a discussion of the OFT's immunity and leniency programme, see OFT423 *Guidance as to the Appropriate Amount of a Penalty* at para. 3.1 and following and OFT803 *Leniency and No-action – OFT's guidance note on the handling of applications*.

[4] See Chapter 7 below.

- an effective culture of competition law compliance is an essential part of an ethical business culture, which can provide reputational advantages.

1.7 Competition law compliance can sit comfortably and be addressed in an integrated fashion with other items on a business's governance agenda, such as anti-bribery and corruption, internal anti-fraud controls, health and safety and environmental concerns.

What about small businesses?

1.8 The OFT expects senior management of all businesses, irrespective of their size, to demonstrate a clear and unambiguous commitment to competition law compliance. The risk-based, four-step process described in this guidance is intended to help **all** businesses in the UK to comply with competition law.

1.9 As part of this approach, the OFT recognises that size can be an important factor affecting a business's competition law risk profile and the kind of risk-mitigation measures it ought to take. Smaller businesses must not ignore competition law and should take compliance measures that are proportionate to their degree of risk.[5] For example, **all** businesses, including small ones, should consider and address their potential risk exposure with respect to cartels.

1.10 The OFT recognises that information needs for businesses may vary. Therefore the OFT has produced a *Quick Guide to Competition Law Compliance* that incorporates information from this Guidance and OFT1340 *Company Directors and Competition Law*.

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[5] While smaller businesses may have limited immunity from financial penalties under the Competition Act 1998, this immunity does not apply to agreements to fix prices, nor to director disqualification applications or criminal prosecutions of those involved in a cartel. See para. 5.16 and following of OFT407 *Enforcement*.

Achieving effective competition

1.11 Effective competition between businesses delivers open, dynamic markets and drives productivity, innovation and value for consumers. Moreover, competitive markets at home increase the global competitiveness of UK firms. Competition law helps businesses to provide these benefits by deterring them from engaging in anti-competitive agreements or conduct.

1.12 In the UK, anti-competitive agreements are prohibited under Chapter I of Competition Act 1998 (the CA98). Businesses with a dominant position in a market are prohibited from abusing that dominant position under the Chapter II prohibition of the CA98.[6] Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are the EU law equivalents of these UK prohibitions and apply where the anti-competitive agreement or conduct may have an effect on trade between EU Member States.[7]

Competition law compliance culture

1.13 The OFT suggests a risk-based, four-step approach to achieve an effective culture of compliance with competition law. 'Risk-based' means that the approach is tailored to the specific risks faced by the business.

1.14 That said, the OFT does not wish to mandate any specific compliance measures. The compliance measures that a business ought to take will be a decision for the individual business, having regard to its competition law risk exposure and the business's internal culture. None of the illustrative examples discussed in this guidance in respect of each step of the four-step process should be seen as an absolute requirement. They are included to provide ideas to businesses which are designing or

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[6] See OFT401 *Agreements and Concerted Practices* and OFT402 *Abuse of a Dominant Position*.

[7] See OFT442 *Modernisation*.

refreshing their compliance activities.[8] Businesses may already have in place, or choose to implement, a compliance methodology that differs from the four-step process discussed in this guidance but which is equally effective in delivering an effective compliance culture within the business. 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.

Risk-based, four-step approach

1.15 The OFT's risk-based, four-step approach can be summarised as follows:

[8] Further examples are included in the OFT research report OFT1227 *Drivers of Compliance and Non-Compliance with Competition Law*.

- **Core – Commitment to Compliance (from the top down)**: Senior management, especially the board, must demonstrate a clear and unambiguous commitment to competition law compliance. Without this commitment, any competition law compliance efforts are unlikely to be successful.

- **Step 1 – Risk identification**: identify the key competition law risks faced by your business. These will depend upon the nature and size of your business.

- **Step 2 – Risk assessment:** Work out how serious the identified risks are. Often it is simplest to rate them as low, medium or high. Businesses in particular should consider assessing which employees are in high risk areas. These may include, for example, employees who are likely to have contact with competitors and employees in sales and marketing roles.

- **Step 3 – Risk mitigation:** set up appropriate policies, procedures and training with the aim that the risks you have identified do not occur, whilst ensuring that you detect and deal with them if they do. What is most appropriate to do will depend upon the risks identified and the likelihood of the risk occurring.

- **Step 4 – Review:** review steps 1 to 3 and your commitment to compliance regularly, to ensure that your business has an effective compliance culture. Some businesses review their compliance efforts on an annual basis, others review less frequently. There may be occasions when you should consider a review outside the regular cycle, such as when taking over another business or if you are subject to a competition law investigation.

2 CORE: COMMITMENT TO COMPLIANCE

2.1 The core of an effective compliance culture is a clear and unambiguous commitment to competition law compliance, throughout the organisation. Senior management commitment is the essential ingredient for an effective compliance culture. Indeed, the board and senior management are ultimately accountable for ensuring a business's commitment to compliance. They need to demonstrate this commitment through their actions clearly and unambiguously. As suggested below, a senior officer within the business should have the **role** of driving compliance within the business. However, **overall accountability** within a business for ensuring a commitment to compliance cannot simply be passed on to one person and, ultimately rests with the senior management of the business.

2.2 This clear and unambiguous commitment to compliance does not stop at the senior levels of a business. It should be demonstrated at all levels of the management chain. If there is any ambiguity in management's commitment to compliance, whether at the senior, middle or lower levels, then staff may feel that infringing competition law is 'worth the risk', for example in order to achieve extra sales to meet an internal target. There are many ways by which this commitment at all levels can be communicated and demonstrated within the business. Examples are included below for illustrative purposes to provide businesses with some ideas of the measures that could be taken. There is no suggestion that any or all of these would be appropriate for all businesses:

- ensuring that one board member or other suitably senior officer within the business has the role of driving compliance within the business and that he/she reports regularly to the board (or senior management team if the business is not a company) on compliance efforts:
    - in some larger businesses, the senior officer may be given authority to report any compliance concerns they have direct to the audit committee. The audit committee may be used in such businesses to undertake some of the review functions.

- the remainder of the board of directors (or senior management team if the business is not a company) challenge the effectiveness of compliance measures that have been undertaken, for example by asking questions about what is being done to identify, assess, mitigate and review competition law risk

- regular e-mail and other direct communication by chief executives or other very senior management underlining the importance of competition law compliance, setting out the business's competition law compliance policy and what individuals should do if they have compliance concerns

- senior management showing what they have done to help the business to comply with competition law, such as attending competition law compliance training activities or ensuring that legal advice is sought on proposals that might raise competition law risks

- for businesses with a code of conduct for employees, making it clear that involvement in a competition law infringement will result in a breach of the code of conduct

- making it clear to employees that involvement in a competition law infringement and/or a breach of the business's competition law compliance policy will be viewed as gross misconduct and could be subject to disciplinary consequences, up to and including dismissal

- establishing a system, with senior management endorsement, through which individual employees can confidentially and/or anonymously alert the senior compliance management within the business to any competition law compliance concerns that they may have,[9] and

- implementing business policies under which managers of all levels must demonstrate their commitment to competition law compliance.

[9] Businesses should consider obtaining legal advice on the legal issues and obligations relating to the operation – both inside and outside of the UK – of such reporting systems.

2.3 How a middle or junior manager can demonstrate their commitment to compliance may depend upon the industry and the business, but middle and junior management in some businesses have done so using the following means:

- taking compliance training and ensuring that their staff do so as well, and
- appointing 'compliance champions' within their teams, whose role it is to ensure that all those in the team comply with relevant laws and regulations, including competition law.

Case Study – Commitment to Compliance[10]

The managing director of a large business had concerns about certain practices that were common in the sector. He mentioned to a number of the business's senior employees that they should discontinue the practice and asked them to mention this to others within the business. There was never any written communication more widely within the business about the managing director's concerns. Nor was there any wider commentary about the importance of competition law compliance. Subordinates within the business were subsequently found to have caused the business to enter into anti-competitive agreements.

Analysis

The managing director and the other senior managers failed to demonstrate a clear and unambiguous commitment to competition law compliance. Merely drawing attention to concerns about a certain practice within the industry was in no way sufficient to show that competition law compliance was important.

Senior management could instead have used some of the measures discussed above to show that the business was now taking competition law compliance very seriously.

[10] All of the case studies in this Guidance are hypothetical examples.

3 STEP 1: RISK IDENTIFICATION

3.1 The first step is for a business to identify its key competition law compliance risks. The risks will often depend upon the nature and size of the business in question. Businesses might also identify new risks when engaging in mergers and acquisitions activity or entering a new product or geographic market. This chapter highlights some of the more common potential competition law risks that should be considered by a business in order to identify the ones relevant to their business. It is not a comprehensive guide to competition law and when identifying their potential competition law risks, particularly those relating to more complex areas such as abuse of a dominant position, businesses may wish to consult with specialist legal and other advisers.

Types of competition law risk

Cartels

3.2 One of the competition law risks with the most serious consequences (both for businesses and individuals) is cartels. Cartels are agreements where two more businesses agree (whether in writing or otherwise) not to compete with each other. Cartels include agreements to:

- fix prices
- engage in bid rigging (for example, cover pricing)
- limit production
- share customers or markets.

Cartels can also involve sharing or exchanging commercially sensitive information with competitors directly, or indirectly through a third party (for example, competitors using a mutual supplier as a conduit to exchange pricing information).

3.3 In order to help identify potential risk areas, you should consider whether:

- your customers are also your competitors
- your staff attend trade or professional association functions with your competitors
- staff, particularly those in managerial or sales roles, often join your business from your competitors
- your employees seem to have commercially sensitive information about your competitor's pricing, cost structures or business plans
- you trade in a market in which people move among a comparatively small circle of businesses on a fairly regular basis, never staying with one business for very long
- you trade in a market in which 'everyone seems to know everyone else' in competing businesses
- you work in partnership with your competitors, for example, in joint ventures
- you have staff who have contact with staff from your competitors, whether frequent or not, and/or
- you trade in a market which has been subject to cartel investigations or lawsuits alleging cartels, either in the UK or elsewhere.

3.4 This list of considerations is illustrative only and is neither definitive nor exhaustive. None of the above in and of themselves constitute cartel activity. However, they can give rise to an increased risk, or be indicative, of such activity and may warrant assessment.

Other potentially anti-competitive agreements

3.5 Cartel activities are not the only agreements that might infringe competition law, leading to the consequences mentioned in para 1.5 above, including unenforceability of the infringing agreement. When

identifying any potential competition law risk arising from agreements your business enters into, you should consider whether:

- you enter into contracts with exclusivity provisions of long-duration (five years or more)
- you enter into contracts with your customers about the terms on which they can resell your goods or services, for example with respect to prices[11]
- you enter into intellectual property licensing agreements containing exclusivity provisions, particularly with businesses that are also your competitors
- you enter into agreements involving standardisation
- your agreements involve joint selling or purchasing
- your agreements involve provisions on collaboration with your competitors.

3.6 This list of considerations is illustrative only and is neither definitive nor exhaustive. Agreements containing such provisions will not necessarily infringe competition law. However, such provisions can give rise to increased risk, or be indicative, of an anti-competitive agreement and may warrant assessment.

Abuse of a dominant position

3.7 A business that enjoys substantial market power over a period of time might be in a dominant position. The assessment of a dominant position is not based solely on the size of the business and/or its market position. Whilst market share is important (a business is unlikely to be dominant if its market share is less than 40 per cent) it does not determine on its

[11] In particular, where a supplier imposes fixed or minimum resale prices on a party which is reselling its goods and services this may constitute a serious infringement of competition law.

own whether a business is dominant. It will typically depend upon a range of factors and may require a detailed legal and economic assessment. However, low market shares are generally a good proxy for the absence of substantial market power.[12]

3.8 A business is only likely to occupy a dominant position if it is able to behave independently of the normal constraints imposed by competitors, suppliers and consumers.

3.9 When considering whether your business may occupy a dominant position, you should consider some of the factors below.

- What is/are the relevant markets in which your business is operating?[13]
- Does your business have persistently large market shares, in excess, for example, of 40 per cent, in the relevant market? Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position?[14]
- Are there barriers to entry or expansion that may prevent your potential competitors from entering or expanding in the market?[15]

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[12] See the European Commission's *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (OJ 2009 C45/2) at para. 14-15.

[13] For a discussion of the concept of 'relevant market' and market definition, see OFT403 *Market Definition*.

[14] See *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, above, at para. 15.
[15] See *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, above, at para. 16-17.

- Do your customers have any degree of buying power that they can exert on you?[16]

3.10 Anti-competitive conduct by a dominant business, exploiting consumers or tending to have an exclusionary effect on competitors is likely to constitute an abuse. If your business is dominant, when identifying whether it might be at risk of abusing a dominant position, you should consider whether:

- your business is refusing to supply an existing customer without objective justification
- your business is offering different prices or terms to similar customers without objective justification
- your business is granting non-cost justified rebates or discounts to customers that reward them for a particular form of purchasing behaviour, or imposing exclusivity provisions
- your business is requiring customers purchasing one product to purchase a different one in addition (tying or bundling)
- your business is charging prices so low that they do not cover the costs of the product or service sold
- your business is refusing to grant access to facilities that a business owns which may be essential for other competitors to operate in a market.

3.11 This list of considerations is illustrative only and is neither definitive nor exhaustive. None of the above activities carried out by a dominant business will necessarily constitute abuse. However, they can give rise to increased risk, or be indicative, of abuse and may warrant assessment.

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[16] See *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, above, at para. 18.

4 STEP 2: RISK ASSESSMENT

4.1 Having identified the potential competition law risks within an organisation, the next step for a business is to assess the level of those risks. This can involve considering each risk identified at Step 1 and assessing it as high, medium or low (or using some other scale).

4.2 A business might decide, for example, that its risk of cartel activity is high due to its sales staff having frequent contact with competitors at trade association meetings or through involvement in other industry bodies. A business with a high market share in a market characterised by high barriers to entry and low levels of countervailing buyer power might decide that the risk of abuse of a dominant position is high.

4.3 Some businesses also find it helpful to perform a risk assessment exercise that revolves around the degree of staff exposure to competition law risk,[17] since this may help the business to tailor appropriate risk mitigation activities at Step 3 (see below). The objective is to identify their employees' degree of exposure to the identified risks – for example, high, medium or low. We show below how such a categorisation might work in practice in relation to the risk of cartel activity.

High-risk staff

4.4 For example, where the business has identified a risk of cartel activity, the following staff may be identified as being at high risk:

- senior managerial roles
- staff in the sales and marketing departments
- staff in purchasing or procurement roles

[17] And note para. 3.3 above involving risk identification considerations, many of which relate to staff.

- staff attending trade association meetings
- staff dealing with competitors
- staff responsible for price setting, and
- new members of staff joining the business from competitors and who are involved in any of the above functions or activities.

Medium risk

4.5 For example, where the business has identified a risk of cartel activity, the following staff may be identified as being medium risk:

- management roles that do not involve regular contact with competitors or trading partners
- staff in other departments (such as finance, communications, operations) whose activities may be used to support cartel activity, and
- new members of staff joining the business from competitors, but who are not identified as being at high risk (for high risk, see para. 4.4 above).

Low risk

4.6 For example, where the business has identified a risk of cartel activity, the following staff may be identified as being low risk:

- manual labour staff
- back-office staff
- HR staff that do not have contact with their HR counterparts in other businesses
- persons involved in clerical or administrative roles, and

- front-line retail sales staff.

4.7 There will be many other roles in a business not named above which are likely to be at low risk of competition law infringement.

5 STEP 3: RISK MITIGATION

5.1 The third step for a business is to mitigate its identified risks in a manner appropriate to the level of exposure. This generally includes implementing suitable training activities and policies and procedures. The business should also at this stage consider how best to achieve the behaviour change within the organisation that might be necessary to achieve an effective culture of compliance with competition law. As noted above, the OFT recognises that a one size fits all approach is not appropriate to 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. The examples given in this chapter are given for illustrative purposes to provide ideas for businesses designing or refreshing their compliance activities. There is no assumption that all or any of the activities listed would be appropriate for all businesses.

5.2 For example, if the business has identified a high risk of cartel activity resulting from staff frequently joining the sales and marketing department from competitors, the business might establish procedures to ensure that such new staff are given competition law compliance training as part of their induction programme, before they have any opportunity for contact with customers or competitors. Businesses might also establish procedures for obtaining advice on possible competition law issues as well, and develop express internal disciplinary sanctions for staff involved in infringements of competition law.

Training

5.3 If competition law training is considered necessary or desirable, it might be delivered online, face-to-face or through a combination of the two. It might be supported by other activity such as testing of employees' knowledge and understanding of competition law and/or written materials summarising competition law. As noted above, businesses should consider how best to focus their training activities in order to mitigate the level of identified risk, for example by concentrating training on those activities and individuals that are considered to be of higher

risk. The intensity, level of detail and form of training required will depend upon the level of competition law risk to which the employee is exposed. For example, higher risk employees will likely require more in-depth training than medium risk employees. For low risk employees, some businesses may decide that no competition law compliance training is required, or perhaps just very basic awareness training as part of a general induction process or a component of a wider compliance training agenda.

5.4 Employees who are not necessarily at risk as a result of their roles, but who are in a position to identify potential competition law infringements are also likely to benefit from competition law training. This might include staff who are involved in internal audit or other aspects of corporate governance, for example.

5.5 Many businesses find that competition law compliance training can be most effective if it focuses on training staff how to recognise potential competition law risks likely to be relevant to the business and prevent competition infringements from occurring in the first place. To do so, many businesses choose to tailor the training as appropriate to their industry and their employees' roles within the business, making it clear which activities they should avoid, how to report competition law concerns and risks as they arise and who to contact for further advice. Training might also be used to help employees identify situations in which their business might be the victim of anti-competitive activity and what action they should take when they think that this is the case.

5.6 As part of this training, particularly with respect to potential cartel risks, businesses might wish to mention the potential benefits of immunity and leniency programmes, such as the one operated by the OFT. This can have the benefit of illustrating to employees that disclosing the existence of a cartel is in the business's best interests. Doing so can also convey the message that owing to the benefits conferred by immunity and leniency programmes, the existence of a cartel may well come to the attention of competition authorities such as the OFT and the personal and business consequences of not being covered by an immunity or leniency agreement in such a situation are very significant. Businesses

might also wish to include discussion of the OFT's Informant Reward programme in respect of cartels.

5.7 Some businesses might focus their training solely on competition law compliance, while others may wish to have competition law training as a component of a wider compliance training programme. The business should decide which would be most appropriate, given the competition law risks it is facing and the nature and size of the business, in order to achieve an effective competition law compliance culture.

Small businesses

5.8 Given their size and structure, the practical means by which small businesses achieve competition law compliance are likely to be different from those of larger businesses. In particular, the necessary compliance efforts might be less formalised and structured than that which might be necessary in a larger business.

5.9 For example, smaller business can alert their employees to the existence of competition law and ensure, for example, that relevant employees are aware that discussing pricing intentions, output levels and commercial territories with competitors (even in a social context) might create significant risks for both the business and the individuals involved (see para 1.5 above). Managers of smaller businesses might find the OFT *Quick Guide to Competition Law Compliance* and other OFT publications available on the OFT website helpful in this respect.

Case study – risk mitigation[18]

A business that was involved in a market in which employees moved between competitors relatively frequently became concerned about competition law risk. It therefore decided that **all** employees, irrespective of rank or role were required to attend a one-day lecture on competition law held in a theatre rented for the purpose. The lectures involved high-level discussion of Article 101 and 102 TFEU by leading competition lawyers, making frequent reference to the leading cases. All employees had to sign the register that they had attended and understood the training. Employees who had done so did not need to receive further training.

Some employees were later found to have caused the business to engage in a cartel. The employees claimed that they did not realise that their activities could have amounted to a competition law infringement, as the activities in which they had been engaged had not been covered in the training and for that matter, they did not remember the training.

Analysis

The business could have ensured that the competition law training related to the risks actually faced by the business, and targeted the training at employees in relation to their level of risk exposure. The business could have targeted practical training at those employees who are at risk, using examples from the market in question, in a manner which would enable them to recognise and address risky activity. It may be that more detailed training could have been given to high risk employees, familiarisation training to medium risk employees and either no or very basic training to low risk employees. There could also have been regular follow-up and refreshers to the training to ensure that the employees understood the training and were committed to compliance. The approach taken in this case is an example of a 'box-ticking', 'one size fits all' approach to compliance, one that may well be counterproductive to instilling a compliance culture.

[18] Please see footnote 10 above.

Reinforcing a culture of compliance through policies and procedures

5.10 Training measures by themselves are unlikely to achieve a culture of compliance for the business. It is essential for there to be a commitment to competition law compliance integrated into the day to day activities of the business. It is also therefore necessary to have appropriate documented policies and procedures in place to minimise the risk of competition law infringements occurring. These will need to be tailored to the structure of the business in question, its internal sign-off procedures and the nature and level of risk faced. The appropriate policies and procedures are likely to cover a range of activities and risk areas, with a view to competition law concerns being addressed at an early stage. These should be accessible and readily understandable to any staff who may need to consult them. A business is likely to benefit if it links its scheme of incentives and disincentives to its compliance objectives.

5.11 Below are some examples of the procedural measures that a business might consider taking with a view to helping create an effective compliance culture within the business. The examples will not be necessary or appropriate for all businesses. As with appropriate training measures, they must be tailored to the specific risk levels of the business in order to be effective.

5.12 Some illustrative examples of the measures a business could take include:

- for businesses with a code of conduct for employees, making it clear that involvement in a competition law infringement will result in a breach of the code of conduct

- making it clear to employees that involvement in a competition law infringement and/or a breach of the business's competition law compliance policy will be viewed as gross misconduct and could be subject to disciplinary consequences, up to and including dismissal

- ensuring the business's lawyers have the opportunity to review significant proposed contracts for compliance with competition law

- ensuring the business's lawyers review standard form commercial contracts for compliance with competition law and are asked to advise on any significant variations made to these before they are signed

- ensuring that there are procedures in place to allow for competition law advice to be obtained where any competition law questions arise

- ensuring that there are effective competition law sign-off procedures relating to legitimate business dealings with competitors

- requiring employees to obtain approval before joining trade associations (or other industry body), so that the trade association's code of conduct/compliance policy on competition law can be reviewed

- requiring employees to alert their managers before attending trade association events and to provide the agenda or other materials for the event to ensure that they do not raise competition law risks

- ensuring that employees who do attend trade association events or who otherwise have contact with competitors have been properly trained in how to behave in such situations in terms of competition law compliance, as well as what to do if competition law risks (such as any form of discussion of prices or other commercially sensitive matters) arise

- a system under which employees must report the nature of certain contact with competitors

- instilling a culture of confidentiality among employees, to ensure that they do not discuss commercially sensitive business matters outside of the office environment

- appointing 'compliance champions' within business units who take responsibility for promoting competition law compliance within the relevant unit

- rewarding employees who proactively take appropriate steps to raise competition law compliance concerns

- requirements that all employees have an obligation to report competition law concerns, as appropriate, to suitably senior staff within the business and/or to the senior officer responsible for competition law compliance

- anonymous and/or confidential telephone lines, perhaps run by independent contractors, through which serious concerns are reported directly to senior compliance management (such as the senior officer responsible for driving competition law compliance), allowing for competition law concerns to be shared outside of the usual chain of command within the business[19]

- having clear procedures in place so that staff know what to do if they receive commercially sensitive information regarding a competitor

- ensuring that staff have regard to competition law risk when discussing and recording market intelligence, which can include reporting the source of the market intelligence

- requiring staff each year (or on some regular basis) to sign an undertaking confirming that they have complied with competition law, and

- active review by managers of business travel as well as expenses incurred by employees in respect of meetings or other business contacts, to the extent that they might indicate meetings that could raise competition law concerns.

[19] Though please see footnote 9 above.

Case study – risk mitigation[20]

An employee become concerned about email exchanges involving her immediate manager, which suggested that the manager was involved in cartel activity. She telephoned her business's confidential hotline about her concerns, which were referred to the Company Secretary, who was responsible for driving competition law compliance within the business. The Company Secretary engaged external lawyers to investigate the matter, who confirmed that there was cause for concern. With the assistance of the external lawyers, the business concluded a leniency agreement with the relevant competition authorities and received immunity from fines in the case that followed.

The manager refused to co-operate with the internal investigation (even after being offered independent legal advice), claiming that he/she had done nothing wrong, and was subsequently dismissed. The company subsequently rewarded the employee with a promotion within her department.

Analysis

The business had an effective procedure for raising competition law concerns and effectively linked internal incentives/disincentives to competition law compliance.

[20] Please see footnote 10 above.

6 STEP 4: REVIEW

6.1 The fourth step is the review stage. It is important that businesses regularly review all stages of the process to ensure that there is a clear and 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 remain appropriate and effective. The compliance activities being undertaken by the business should then be adjusted if necessary.

6.2 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 infringing the abuse of dominance rules becomes higher.

6.3 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. There is no standard review period – it is for the business to decide how frequently reviews should be carried out. Some businesses review their compliance efforts on an annual basis, others carry out reviews less frequently. Reviews may also be appropriate outside the regular review cycle, such as in the following circumstances:

- where the business detects evidence that its employees might have been exposed to, or involved in, a competition law infringement
- where the business comes under investigation for a competition law infringement
- when it enters into a new or different business area, or
- following the acquisition of another business.

7 IMPACT ON THE AMOUNT OF A PENALTY

7.1 The key benefit of compliance activities for a business is through avoiding any infringements of competition law in the first place. Accordingly, the OFT's starting point in relation to penalty setting for businesses that have undertaken compliance activities is neutral: there are no automatic discounts or increases in the level of financial penalty if the business has undertaken compliance activities.

7.2 However, the amount of a financial penalty imposed for a competition law infringement may be reduced where adequate steps have been taken with a view to ensuring compliance with the Chapter I and Chapter II prohibitions and Article 101 and 102 TFEU.[21] Taking 'adequate steps' for these purposes may include having implemented the four-step process described in this guidance or, in the OFT's view, reasonably equivalent measures.[22] This can apply where these steps pre-date the infringement or where they were implemented quickly following the business first becoming aware of the potential competition infringement.

7.3 Each case will be assessed on its own merits. A business seeking a reduction in the amount of the penalty on these grounds would be expected to adduce evidence of adequate steps having been taken in relation to:

- achieving a clear and unambiguous commitment to competition law throughout the organisation
- risk identification
- risk assessment
- risk mitigation, and

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[21] See OFT423 OFT's *Guidance as to the Appropriate Amount of the Penalty* at para. 2.16.

[22] This could include a risk-based competition law compliance programme.

- review.

7.3 The OFT will expect the business to demonstrate that the steps taken were appropriate to the size of the business concerned and its overall level of competition law risk.

7.4 Where the OFT considers that adequate steps have been taken and that a discount from the financial penalty is justified, the OFT will consider reducing the amount of the financial penalty by up to 10 per cent. Whether such a reduction will be granted and, if so, its exact amount, will turn upon the OFT's analysis of the facts of each case. One relevant factor for these purposes will be the steps taken by the business following discovery of the infringement.

7.5 The OFT will not, subject to some exceptions, ordinarily regard the existence of a competition law compliance programme as a factor to warrant an increase in the amount of the fine to be imposed against that undertaking for a competition law infringement. The exceptions include situations where the purported compliance programme had been used to facilitate the infringement, to mislead the OFT as to the existence or nature of the infringement, or had been used in an attempt to conceal the infringement.