

# How your business can achieve compliance

A guide to achieving compliance with competition law



Competition  
law 2005

## Understanding competition law

*How your business can achieve compliance* is one of several quick guides designed to inform businesses about how the Office of Fair Trading (OFT) applies competition law in the UK. You may wish to read this together with *Competing fairly* which provides an overview of all the quick guides in the series. More comprehensive information is available in a number of detailed competition law guidelines published by the OFT in conjunction with the sector regulators. Turn to the back of this guide to find out how to obtain copies of other OFT publications.

Competition law is enforced in the UK principally by the OFT. However, in certain industries, such as gas and electricity, the sector regulators have been given 'concurrent powers' to apply and enforce competition law. Although this guide is based on OFT experience and practice, it should also be of assistance if you are dealing with one of the sector regulators. You will find a list of these sector regulators and their contact details at the back of this guide.

This quick guide provides an introduction to competition law only and should not be relied on as a substitute for the law itself. If you have any doubts about your position under the law, you should seek legal advice.

# Introduction

In the UK, anti-competitive behaviour is prohibited under Chapters I and II of the Competition Act 1998 and may be prohibited under Articles 81 and 82 of the EC Treaty. These laws prohibit anti-competitive agreements between businesses and the abuse of a dominant position by a business. Businesses that infringe competition law may face substantial financial penalties of up to ten per cent of their worldwide turnover.

As the consequences of infringement can be serious, it is in your interests to ensure that your business complies with the law. For some businesses this will mean implementing or updating a compliance programme, while for others less formal action may be required.

This guide offers general advice to businesses on what you can do to encourage compliance with the law within your organisation. In addition, it describes the four basic elements that we believe should be in a compliance programme as a minimum if the compliance programme is to be effective. However, this is only a starting point. If you are thinking about setting up a compliance programme you should consider seeking further advice from a legal adviser or compliance specialist.

You may wish to read this together with the quick guide *Competing fairly* which provides an overview of the law.

## **Definition of 'business'**

Throughout this guide, 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 their legal status, including companies, partnerships, Scottish partnerships and individuals operating as sole traders.

# Why worry about compliance?

All businesses have a duty to act lawfully, but there are more practical reasons why compliance with competition law is particularly important. On a broad level, the main aim of competition law is to ensure that UK and EC markets remain competitive. Compliance ensures that this aim is achieved to the benefit of both business and consumers. At an individual level, businesses that comply with the law will avoid the various consequences of non-compliance. These are potentially very serious and include the following:

- investigation by the OFT, the sector regulator or the European Commission, which may require significant management input
- a financial penalty of up to ten per cent of worldwide turnover
- agreements being void and unenforceable
- adverse publicity, or
- the possibility of being sued for damages by those harmed by the unlawful behaviour.

Furthermore, a business that has taken adequate steps to achieve compliance but has nonetheless committed an infringement may receive a reduction in the amount of financial penalty imposed. What constitutes adequate steps will vary from business to business. Further details are given on pages 5 - 7.

## What about small businesses?

Compliance is important for all businesses, no matter what their size. Although there is limited immunity from financial penalties for 'small agreements' and 'conduct of minor significance', this does not extend to agreements to fix prices, or cover the other consequences of infringement, such as the voidness of agreements or the possibility of being sued for damages. Moreover, we can withdraw the immunity in certain circumstances.

### Further information

For further information, see the more detailed guideline *Enforcement*.

It is therefore vital that small businesses take compliance seriously. We recognise, however, that the way in which businesses choose to ensure compliance may reflect their size, ie: smaller businesses may not need to implement a formal compliance programme of the type described in this guide, but you **will** need to ensure that your employees are aware of and are kept up to date with the implications of and the need to comply with competition law.

## What steps do you need to take?

The steps that need to be taken to ensure compliance with competition law will vary from business to business and will depend on a range of factors including the size and nature of your business. As a starting point it is helpful to assess the extent to which competition law will impact on your business and the risk of committing an infringement. If you think the risk of infringement is high, more elaborate measures are likely to be required to ensure compliance.

The following questions should help you assess the risk:

- What is your position in the market?
  - Are any of your relations with others likely to have an **appreciable** effect on competition in any market in which you operate?

### Definition of 'appreciable effect'

Whether or not an agreement has an **appreciable** effect usually depends on the market shares of the businesses involved. However, where an agreement fixes prices, shares markets or imposes minimum resale prices, it is generally capable of having an appreciable effect whatever the businesses' market shares.

For further information see the guideline *Agreements and concerted practices*.

- Could you be said to have a **dominant** position in any market in which you operate?

### **Definition of a 'dominant position'**

Whether you are in a dominant position will largely depend on your size and strength in relation to others in the market, but as a general rule you are unlikely to be considered dominant if your market share is less than 40 per cent.

For further information see the guideline *Abuse of a dominant position*.

- Is there scope for sales, purchasing or marketing staff to enter into arrangements with other businesses which might infringe competition law without the knowledge of senior employees?
- Do employees or directors of your business have regular contact with competitors on a business or social footing?

This may be particularly likely where you are a member of a trade association or similar body. It is important to note that the law can catch informal understandings and oral agreements as well as formal written agreements.

- Is the sector in question one with a small number of competing businesses who know a lot about each other's commercial activities?

If competition is working well, it would be normal for businesses in such a small sector to be particularly vigilant about disclosing commercially sensitive information.

## **Raising awareness among employees**

Even if you consider the risk of committing an infringement is low, or even negligible, you can and should still take steps to ensure compliance. A vital step towards compliance is to ensure your employees are at least aware of competition law and the implications of infringement. This should help you avoid committing infringements in the first place.

Awareness needs to be spread among **all** employees, not just those in the sales, marketing and purchasing areas for whom the law has the most obvious implications. Those involved in other areas, such as research and development, distribution and after-sales services should also be aware of the implications of the law.

If your employees have an understanding of competition law, they will also be able to recognise when you might be the victim of anti-competitive agreements or conduct and they will be well-placed to protect your interests. Under the law, we have

significant powers to investigate suspected infringements and welcome complaints from those who consider they are suffering from the anti-competitive actions of others.

While you will need to decide for yourself how best to approach the education of your employees, we offer assistance in the form of quick guides, more detailed guidelines and a CD-Rom called *Compliance matters!* explaining the importance of compliance. This material is available free of charge. Details of how to obtain copies are at the back of this guide.

# Compliance programme

## Is it necessary?

Educating employees may not be sufficient on its own to ensure compliance in all cases. In some cases the risk of infringing the law may be high, eg: where a business is in a dominant position or is involved in markets where the opportunities for colluding with competitors are great. In other cases, the business may be so large and diverse that it is simply too difficult to monitor the activities of individual employees. In such circumstances, 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.

A compliance programme provides a formal framework for ensuring that the business as a whole, as well as individual employees and directors, complies with competition law. It can also help you to identify actual or potential infringements at an early stage, enabling you to take appropriate remedial action. In the case of cartel activity, early detection is key if you are to benefit fully from our leniency programme.

## Further information

You can find out more about our leniency programme in the quick guide *Leniency in cartel cases* and the *OFT's guidance as to the appropriate amount of a penalty*.

When considering whether it is necessary to implement a compliance programme, you should bear in mind that if you do commit an infringement, any financial penalty may be reduced where you can show that you have taken adequate steps to achieve compliance. The larger the business and the greater the risk of infringement, the more likely it is that adequate steps will include the introduction of a compliance programme.

## What should the compliance programme contain?

The content of a compliance programme must be tailored to your particular requirements. There is no standard programme that can apply in all cases. However, there are certain general features that must be included as a minimum in any programme if it is to work effectively. We take the view that there are four such features:

- support of senior management
- appropriate policy and procedures
- training, and
- regular evaluation.

These features provide a framework around which you should build the programme. Exactly how you do this will depend on the particular requirements of your business, but the following is general guidance on what you should cover.

## **Support of senior management**

Senior management support for the programme is vital as an indicator of your commitment to complying with competition law. Not only does it act as a signal to the outside world of the importance you attach to compliance, but within the organisation it will also help to encourage more junior employees to sign up to the programme and actively follow its principles. Senior management support must be visible, active and regularly reinforced.

This element can be achieved in a number of ways, including:

- a personal message to staff from the most senior individual in the organisation stating their commitment to the programme
- referring to the policy in the business' mission statement or code of behaviour and ethics
- making adherence to the programme one of the overall objectives of the organisation, or

- designating a particular member of the board or senior management team to take on overall responsibility for ensuring that the programme is functioning correctly and to report at regular intervals on how it has operated.

## Appropriate policy and procedures

A compliance programme goes further than a verbal or written commitment to comply with competition law. It must be actively implemented and promoted through the operation of appropriate policies and procedures. An effective policy would contain at least the following elements:

- an overarching commitment to comply with competition law
- placing a duty on all employees and directors to conduct their business dealings within this overarching policy and seeking a written undertaking from them to this effect, and
- a commitment to take disciplinary action against employees/directors who intentionally or negligently involve the firm in an infringement of competition law – this is essential if the programme is to be taken seriously.

The procedures for implementing the business' policy on compliance will be governed by the policy itself, but a framework should be provided to enable employees to:

- seek advice on whether or not a particular transaction complies with competition law, and
- report activities that they suspect infringe competition law.

It is essential that staff are informed of the business' policy and procedures on compliance in an appropriate way. Many businesses choose to issue a compliance handbook or manual which acts as a useful reference point for staff. A typical manual may include the following:

- a clear statement of the business' policy towards compliance, including the consequences for employees of not upholding that policy
- details of competition law: an explanation of its main provisions and the investigatory powers of competition authorities and the consequences for businesses of infringing the rules
- examples of types of behaviour that are or might be illegal, making reference to the business' particular circumstances, and areas where caution should be exercised, and
- clear details of the business' compliance procedures.

## Training

Training forms a crucial part of an effective compliance programme and is essential for all employees who have dealings that may impinge on competition law. You must give training on the law itself and

on your policy and procedures in relation to compliance. You should offer training on compliance as part of the induction programme for new staff and you should then offer it on a continuing basis in order to reinforce the compliance message and keep staff updated with changes in the law. You can deliver the training in a variety of ways – such as informal seminars, video presentations and role play. Ideally the training should be related in some way to your activities in order to be seen as relevant and to retain the interest of employees. You should keep a record of any training you give.

## **Regular evaluation**

Even if the above three elements are present, a programme is unlikely to be successful unless its effectiveness is regularly evaluated. Evaluation is essential not only as a means of ensuring that the programme is working properly but also to enable areas of risk to be identified and addressed.

The evaluation element should include some or all of the following:

- testing of the individual employee's knowledge of the law, policy and procedures
- the inclusion of adherence to your compliance policy as an objective against which an individual's and a department's performance are appraised

- formal audits of sales and procurement processes, by appointment or unannounced, to check for actual or potential infringements, and
- mechanisms for reporting actual or potential infringements to senior management, and for taking steps to put right the problem and limiting the risk of recurrence.

The evaluation process should be carried out as openly as possible as an indicator to employees that their conduct is constantly subject to review against the terms of the compliance programme.

## **What if the programme fails to prevent an infringement?**

### **Compliance as a mitigating factor**

Occasionally infringements of the law may occur despite the existence of a compliance programme. However, the fact that a compliance programme is in place may be taken into account as a mitigating factor when we calculate the level of a financial penalty. We will give careful consideration to the precise circumstances of the infringement and in particular the efforts made by management to ensure that the programme has been properly implemented. We will also take account of the seniority of the person or persons involved in the infringement. We will view very seriously the involvement of directors or senior management in any infringement and may treat such involvement as an aggravating factor when setting the

level of financial penalty. For example, the mitigation in having a compliance programme in place may be offset where it was blatantly ignored at a very senior level.

### **Further information**

For further information, see the *OFT's guidance as to the appropriate amount of a penalty*.

## **Leniency in cartel cases**

Where the infringement relates to cartel activity, such as price fixing or market sharing, businesses can benefit from our leniency programme.

### **Further information**

For further information, see the quick guide *Leniency in cartel cases* and the *OFT's guidance as to the appropriate amount of a penalty*.

## **Will the OFT endorse a compliance programme?**

We do not endorse individual compliance programmes. A compliance programme must be capable of meeting the changing requirements of your business and you must make efforts as part of the regular evaluation process to ensure that the compliance programme continues to be relevant. In these circumstances endorsement would be inappropriate.

In addition to their powers under the Competition Act 1998, the sector regulators continue to have powers under the legislation specific to the sectors they regulate. In certain circumstances they may use these powers to order a business to submit a compliance programme. This does not, however, mean that they would be willing to endorse individual programmes.

# Where can you get further information?

You can order free copies of our publications by phoning **0800 389 3158** or emailing **oft@ecgroup.uk.com**

You can also download our publications from **www.oft.gov.uk**

## Quick guides

This booklet is one of a series of quick guides designed to inform you about how we apply competition law in the UK. *Competing fairly* gives an overview of the law while the other guides cover specific areas.

*Competing fairly* (OFT447)

*How your business can achieve compliance* (OFT424)

*Under investigation?* (OFT426)

*Cartels and the Competition Act 1998* (OFT435)

*Leniency in cartel cases* (OFT436)

This information is available in other formats and languages on request.

## CD-Rom on compliance

We also provide a CD-Rom called *Compliance matters!* (OFT723) explaining the importance of compliance.

## Competition law guidelines

Detailed information on the Competition Act 1998 and Articles 81 and 82 of the EC Treaty is given in a series of guidelines we have published in conjunction with the sector regulators. The titles shown below are currently available:

*Agreements and concerted practices* (OFT401)

*Abuse of a dominant position* (OFT402)

*Market definition* (OFT403)

*Powers of investigation* (OFT404)

*Concurrent application to regulated industries* (OFT405)

*Enforcement* (OFT407)

*Trade associations, professions and self-regulating bodies* (OFT408)

*Assessment of conduct (draft)* (OFT414a)

*Assessment of market power* (OFT415)

*Vertical agreements* (OFT419)

*Land agreements* (OFT420)

*Services of general economic interest exclusion* (OFT421)

*OFT's guidance as to the appropriate amount of the penalty* (OFT423)

*Modernisation* (OFT442)

## Dealing with the OFT

Individuals, businesses and their advisers are entitled to be treated with courtesy, respect and in a non-discriminatory manner. If you have a concern or complaint about our procedures, you may contact us by phone (phone **OFT Enquiries** on **08457 22 44 99**) or write to us setting out your concerns. Complaints in writing should be sent to us at:

Office of Fair Trading  
Fleetbank House  
2-6 Salisbury Square  
London EC4Y 8JX

## Sector regulators

Office of Communications (OFCOM)  
Riverside House  
2a Southwark Bridge Road  
London SE1 7DB  
Tel: 020 7981 3000  
**[www.ofcom.org.uk](http://www.ofcom.org.uk)**

Gas and Electricity Markets Authority (OFGEM)  
9 Millbank  
London SW1P 3GE  
Tel: 020 7901 7000  
**[www.ofgem.gov.uk](http://www.ofgem.gov.uk)**

Northern Ireland Authority for Energy  
Regulation (OFREG NI)  
Brookmount Buildings  
42 Fountain Street  
Belfast BT1 5EE  
Tel: 028 9031 1575  
**ofreg.nics.gov.uk**

Office of Water Services (OFWAT)  
Centre City Tower  
7 Hill Street  
Birmingham B5 4UA  
Tel: 0121 625 1300  
**www.ofwat.gov.uk**

Office of Rail Regulation (ORR)  
1 Waterhouse Square  
138-142 Holborn  
London EC1N 2TQ  
Tel: 020 7282 2000  
**www.rail-reg.gov.uk**

Civil Aviation Authority (CAA)  
CAA House  
45-59 Kingsway  
London WC2B 6TE  
Tel: 020 7379 7311  
**www.caa.co.uk**

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