

Competition compliance – what are the obligations on businesses and directors?

On 19 October, the UK Office of Fair Trading (“OFT”) published for consultation two draft guidance documents intended to help businesses and company directors comply with competition law. Both documents provide a useful steer to businesses and their senior management grappling with this important issue.

‘How Your Business Can Achieve Compliance’

The first document, entitled ‘How Your Business Can Achieve Compliance’, has been prepared following the OFT’s May 2010 report, ‘Drivers of Compliance and Non-Compliance with Competition Law’ and is divided into three parts.

The first part provides guidance on how a business can communicate and demonstrate a commitment to compliance throughout the organisation, which the OFT describes as the ‘core’ of an effective compliance culture. Suggestions include:

- Expressly including competition compliance in the business’ code of conduct and making clear that activity that risks causing a competition law breach will attract disciplinary sanctions;
- Ensuring that one board member or other suitably senior manager has the role of driving compliance within the business and that they report regularly to the board on compliance efforts;
- Regular communications by chief executives or other very senior management underlining the importance of competition law compliance, setting out the business’ competition law compliance policy and what individuals should do if they have compliance concerns;
- Establishing a confidential system, with senior management endorsement, which individual employees can use anonymously to alert the business to their competition law compliance concerns; and

- Implementing business policies under which managers of all levels must demonstrate their commitment to competition law compliance, such as linking bonuses to compliance activities.

The second part of the document describes a four-step process for achieving a competition law compliance culture:

Step 1 – risk identification: identify the key competition law compliance risks faced by the business;

Step 2 – risk assessment: assess the level of risk identified;

Step 3 – risk mitigation: develop suitable training, policies and procedures to create any behavioural change within the business necessary to achieve compliance;

Step 4 – review: regularly review all stages of the process.

Useful guidance is provided in this section on some key factors which will increase a business’ competition law risk; how to identify which staff may be particularly high-risk; and the different types of training that might be appropriate and the policies and procedures that are likely to help to reinforce a compliance culture.

In the third part of the document, the OFT reiterates its existing policy on how the existence of a compliance programme will impact on the calculation of a penalty for competition law infringement: there are no automatic discounts or increases in the level of penalty if the business has undertaken compliance activities but where the business concerned has taken ‘adequate steps’ to ensure compliance with competition law, this may result in a reduction in the fine by up to 10%.

Finally, the Annex to the first document contains a quick guide to competition law tailored to small to medium sized enterprises.

‘Company Directors and Competition Law’

The second document, ‘Company Directors and Competition Law’ is intended to explain the legal responsibilities imposed on company directors under competition law and the potential consequences if they fail to fulfil them. This follows the OFT’s publication, in June of this year, of revised guidance on director disqualification orders in competition law cases (competition disqualification orders or “CDOs”).

Pursuant to s9A of the Company Directors Disqualification Act 1986, the OFT and certain sectoral regulators have the power to apply to the court for a CDO. A CDO will disqualify a director from being involved in the management of a company for a maximum of 15 years.

The court must award a CDO if it is satisfied that:

- a company of which the individual was a director has been involved in a breach of UK or EU competition law; and
- the director’s behaviour in connection with that breach makes him unfit to be concerned in the management of a company.

In assessing whether a director satisfies the second of these two criteria, the court will take into account whether the director was personally involved in the breach, but also whether he took reasonable steps to prevent, uncover and bring to an end any infringement by his company more generally. The guidance aims to assist directors in understanding what steps the CDO provisions require directors to take in practice and the factors that the OFT will take into account when deciding whether to apply for a CDO.

Key elements of the guidance are as follows:

1. Where a director’s conduct contributed directly to a breach of competition law, the OFT is likely to apply for a CDO against that director regardless of his or her role in the company.
2. In all other cases, the OFT will assess the level of understanding of competition law it is reasonable to expect of the director, and the steps it is reasonable to expect him or her to take to prevent or detect infringements of competition law.
3. In such an assessment, the OFT will take into account the director’s role in the company and, in particular:

- whether the director has an executive or non-executive role;
- his or her specific responsibilities within the company; and
- the size of the company and wider corporate group.

4. In assessing whether a director should have known that the activity in question suggested a competition law breach, the OFT does not expect all directors to have specific competition law expertise. However it does expect all directors to understand the most serious forms of infringement, namely: price-fixing, bid-rigging, market-sharing, agreements between competitors to limit production, information sharing between competitors and resale price maintenance.
5. In relation to other forms of infringement, the OFT believes that directors ought to have sufficient understanding of the principles of competition law to be able to recognise risks, and to realise when to make further enquiries or seek legal advice.
6. The steps it is reasonable for a director to take to prevent or detect a competition law infringement will depend on various factors relating to the director’s role within the business and the size of the organisation.

Next steps

The two consultation documents can be found on the OFT’s website [here](#).

Responses to the consultations are due by 21 January 2011 and once the OFT has considered the responses received, it will publish final versions of both documents on its website.

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