

Competition Law – how aware are you?

On 27 June 2011, the OFT published guidance for businesses and company directors on competition law compliance. It also published a film of a staged dawn raid, with commentary to help businesses to identify risks and comply with competition law. Both the guidance and the film can be found on the compliance project page of the OFT's website (<http://www.of.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance>).

The new guidance is intended to help businesses create a “compliance culture” and to enable them and their employees avoid the risks of infringing competition law. The consequences of infringement are serious: businesses that breach competition law risk fines of up to 10 per cent of the worldwide turnover of their corporate group and actions for damages. Company directors face disqualification of up to fifteen years. All employees (not just directors) who are or have been involved in cartels face prosecution for the cartel offence, imprisonment for up to five years and/or financial penalties.

Guidance for businesses

There are three main guidance documents for businesses. The principal document, How your business can achieve compliance with competition law, sets out detailed guidance on the OFT's recommended approach to competition law compliance. Two further documents, a quick reference guide and a diagram, identify the main points of the detailed guidance.

The OFT recommends a four-step approach to ensuring compliance:

- **Step 1: risk identification:** The nature and size of the business in question are key factors in evaluating exposure to competition law risk. Risks may also arise from engaging in mergers and acquisitions or entering new product or geographic markets. To help identify potential risk areas, the OFT provides businesses with a non-exhaustive list of considerations which, while not inherently constituting infringing activities, may give rise to an increased risk or warrant detailed assessment.

The questions businesses need to ask include:

- Do employees have contact with competitors, for example, in the context of a trade association or partnership?
 - Does the business share information with competitors?
 - Are there any long-term exclusivity provisions in contracts?
 - Does the business enter into agreements that restrict the prices or terms on which goods or services may be resold?
 - Does the business have a strong market position?
- **Step 2: risk assessment:** Once a business has identified potential risks the OFT recommends conducting an assessment of the level of those risks and for example, categorising the risk as low, medium or high. Employees likely to have contact with competitors or in sales and marketing roles engage in high risk activities; those performing back-office functions are more likely to be low risk.
 - **Step 3: risk mitigation:** Risk mitigation includes introducing compliance training, policies and procedures. However, there is no one-size-fits-all solution – this will depend on the nature of the risks identified.
 - **Step 4: review:** Competition law compliance is an evolving process and businesses are expected to review their procedures regularly. They should ensure that there is a clear ongoing commitment to compliance from the top down.

Guidance for company directors

The OFT's guidance Company directors and competition law, explains the crucial role directors play in promoting a culture of compliance within a company, the knowledge they are expected to have of competition law and the steps they should take to prevent, detect

and terminate infringements of competition law. The exact level of expectation depends on the role and involvement of the director concerned: executive directors are expected to take active compliance steps; non-executive directors are expected to be vigilant and ask questions about competition law compliance.

Film

The OFT's film, which provides commentary on competition law and compliance in the context of a staged dawn raid, is a useful illustration of the OFT guidance.

Next Steps

The OFT's guidance highlights the need for businesses and their staff to be aware of the need to comply with competition law. Different businesses face different risks, which makes it important for each business to adopt a compliance programme that is tailored to the specific risks it faces in the markets in which it operates.

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