

# **Drivers of Compliance and Non-compliance with Competition Law**

**An OFT report**

May 2010

OFT 1227

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# 1 EXECUTIVE SUMMARY

## Introduction

- 1.1 Competition within the economy is good for business and good for consumers. Strong competition regimes encourage open, dynamic markets, and drive productivity, innovation and value for consumers. Competitive and open markets at home increase the global competitiveness of UK firms, raising economic growth and standards of living in the UK, and benefiting consumers by ensuring lower prices and a greater variety of goods and services.
- 1.2 We recognise that the majority of businesses want to comply with competition law. Whilst we will take enforcement action where necessary, we also wish to support businesses seeking to achieve a competition law compliance culture, so that breaches of competition law are avoided in the first place.
- 1.3 We undertook research into the drivers of compliance and non-compliance with competition law in order to gain a better understanding of the practical challenges faced by businesses seeking to achieve a competition law compliance culture.<sup>1</sup> Our aim was to learn what motivated businesses to comply with competition law and what businesses had found worked well in practice to achieve this. We also explored with them competition law compliance challenges that might arise in their businesses despite their compliance<sup>2</sup> efforts.

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<sup>1</sup> In parallel with this research, the OFT has undertaken research into drivers of compliance and non-compliance with consumer law, as well as research into levels of awareness of competition law, see paragraph 2.2. These workstreams aim to assist the OFT in assessing the most effective ways we can use our limited resources to drive compliance with both competition and consumer law.

<sup>2</sup>In this report, references to compliance refer to competition law compliance unless otherwise stated.

- 1.4 Given the objectives of this research, we chose to undertake qualitative research with larger businesses having existing competition law compliance activities to learn from their experiences, and to build a picture of current best practice. We conducted 22 detailed interviews with businesses. We also benefited from a number of group discussions with in-house counsel and private practice lawyers.

### **General Approach to Compliance**

- 1.5 Most of the businesses we interviewed adopted a risk-based approach to competition law compliance, focusing their activities on the areas of greatest risk in their businesses. We support a risk-based approach to competition law compliance to focus activities in the areas they are most needed. We also support a principles-based approach to compliance, rather than a rules-based approach that might result in businesses applying a 'box-ticking' approach and impose unnecessary burdens on business.
- 1.6 We recognise that one size will not fit all in 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. Our research has focused on larger businesses with experience of competition law compliance activities. We will be considering how the findings of this research might be relevant to smaller businesses.

### **Best Practice**

- 1.7 We have included in the report examples of the compliance activities undertaken by these businesses, in order to provide ideas to businesses designing or refreshing their competition law compliance strategy and share best practice. We do not suggest or imply that all or any of these activities are necessary in order to have an effective competition law compliance culture.
- 1.8 We report on practical ways in which some respondents have ensured senior management commitment to competition law compliance and encouraged business units to take ownership of competition law compliance risks. We provide examples of how respondents have

decided upon appropriate compliance activities to address the key competition law risks for their businesses, including legal advice, training activities, policies and procedures. We include practical suggestions from respondents on how to focus these activities and to ensure that there are sufficient internal incentives for employees to comply with competition law.

### **Drivers of Compliance and Non-compliance**

- 1.9 A number of the businesses we interviewed emphasised that, whilst important for their organisation, competition law compliance was part of a **broader compliance agenda**. Competition law compliance often stands alongside other compliance requirements in areas such as health and safety, environmental protection or anti-bribery and corruption. Some businesses sought to emphasise their commitment to competition law compliance through including it in their business's overall corporate responsibility or ethical trading statement.
- 1.10 The key drivers for competition law compliance mentioned by respondents were the fear of **reputational damage** and **financial penalties**. A number of respondents mentioned the importance of **individual sanctions**, such as the risk of criminal proceedings, director disqualification, personal reputational damage or internal disciplinary sanctions, in encouraging individuals to focus on competition law compliance. A **commitment** to competition law compliance from the top of the organisation down was a key driver of compliance in the organisation as a whole. Certain respondents specifically mentioned that they viewed competition law compliance as helping them to win business through being able to position themselves as **ethical** businesses. One respondent thought that competition law compliance activities resulted in **confident employees** who knew the rules of the game and who could compete for business without fear of breaching competition law.
- 1.11 We explored with respondents the competition law challenges that might arise despite their compliance efforts. Any apparent **ambiguity or lack of management commitment** to competition law compliance was mentioned

by the majority of respondents as creating the risk of non-compliance. Other possible reasons for non-compliance mentioned include **rogue employees**, confusion or **uncertainty** about the law, **employee error** or naivety, **loss of trust** in legal advice, a '**box-ticking**' approach to compliance and competition law compliance having to compete for attention with other compliance activities.

### **How the OFT could drive compliance**

- 1.12 We are keen to understand how we can best use our limited resources to support businesses wishing to comply with competition law – both in conducting a competition law risk assessment and in identifying appropriate activities and actions to mitigate those risks. A number of suggestions were made in the interviews and group discussions, which we have considered.

#### **Financial Penalties**

- 1.13 A number of respondents suggested that the OFT should change its policy in relation to the setting of financial penalties for breaches of the competition law so as to allow increased discounts from the penalty where the infringing party had undertaken appropriate competition law compliance activities prior to the infringement. These respondents considered this would help to drive compliance since the potential benefit of competition law compliance activities would become more clearly visible, and measurable, to businesses. Concerns were also expressed about whether the OFT would regard a pre-existing compliance programme that had failed to prevent a breach occurring as an aggravating factor, justifying an increase in the financial penalty. Respondents expressing this view were concerned that such an approach would discourage businesses from investing in competition law compliance activities.
- 1.14 After thorough consideration, we have decided not to change our penalties policy in relation to compliance activities. We will continue with our current **neutral starting position** with regard to competition law compliance activities when setting financial penalties. The key reward of

an effective competition law compliance programme is the avoidance of an infringement decision in the first place. Where, in an individual case, we consider that the existence or adoption of a compliance programme should be regarded as a **mitigating factor**, we will generally reduce the financial penalty by up to 10 per cent. Save for exceptional cases, we will not treat the existence of a compliance programme as an aggravating factor justifying an increase in the financial penalty, since we recognise that such an approach might create disincentives for engaging in competition law compliance activities.

### **Other Suggestions**

- 1.15 We already have plans to implement a number of other suggestions made by respondents. In particular, we intend:
- to update our current guidance on competition law compliance to reflect current best practice
  - to issue guidance for directors on what they need to do to comply with competition law, following on from our proposed changes to our policy on director disqualification orders
  - to provide more guidance to businesses on novel or unresolved questions of competition law through our new short-form opinion tool, and
  - to consider how the findings of this research might be relevant to smaller businesses.

### **Proposed Four Step Approach to Compliance**

- 1.16 Our proposed updated guidance on an effective competition law compliance culture is summarised in Figure 1.1 and the paragraphs below.<sup>3</sup> We suggest a four step approach to an effective competition law

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<sup>3</sup> We intend to publish for consultation a revised draft version of our quick guide OFT 424, *How Your Business Can Achieve Compliance* later this year, based upon the approach below.



compliance culture and intend to publish a draft guidance document for consultation, with more detail on each of the steps, later this year.

**Figure 1.1: Effective Competition Law Compliance Culture: Virtuous Circle**



**Core: Commitment to Compliance**

1.17 The core of an effective compliance culture is to have an unambiguous commitment to competition law compliance from the top down. Our current guidance already recognises the need for senior management commitment as an essential ingredient for an effective compliance culture. However, the findings from this report have emphasised that this commitment needs to be unambiguous and that the commitment needs to be at all levels of the management chain. We have therefore included this at the centre of the virtuous circle of an effective competition law compliance culture. Without unambiguous commitment, the remaining steps are unlikely to be effective.

### **Step 1: Risk Identification**

- 1.18 The first step is for the business to identify the key competition law compliance risks it faces. The findings in this report highlight some examples of the way in which businesses approach this exercise. For some businesses the key risks relate to the risk of cartel activities, for some abuse of dominance might be more of a concern, others face a broader range of risks. Some businesses might have known risk areas based on previous enforcement action. Businesses might seek to identify the key areas of the business in which risks might arise, for example the sales and marketing departments, staff who attend trade association meetings or otherwise have contact with competitors, and new staff joining the business. Businesses might also identify specific risks when engaging in mergers and acquisitions activity or entering a new product or geographic market.

### **Step 2: Risk Assessment**

- 1.19 The second step is for the risks identified to be assessed as high, medium or low risks for the business based on the likelihood of the risks occurring. The findings in this research provide some examples of how businesses might assess the risks facing them. For example, the risks arising from the arrival of new staff might be assessed as high if the new member of staff is joining from a competitor, is joining the sales and marketing department or will be undertaking a role requiring contact with competitors. Conversely the risk might be assessed as low if the new member of staff will have a back-room function with no contact with competitors or customers.

### **Step 3: Risk Mitigation**

- 1.20 The third step is for appropriate risk-mitigation activities. These would generally include appropriate policies and procedures, and appropriate training activities. The business should also consider how best to achieve behaviour change within the organisation to achieve an effective competition law compliance culture.

- 1.21 The identification of appropriate policies and procedures and appropriate training activities will depend on the risks identified and the assessment of those risks. This reports sets out some examples of risk-mitigation activities that have been undertaken by businesses. For example, if the business has identified a risk arising from new staff joining the sales and marketing department and assessed the likelihood of the risk occurring as high, the business might establish procedures to ensure that such new staff are given competition law compliance training as part of their induction programme. Businesses might also establish procedures for obtaining advice on possible competition law issues and internal disciplinary procedures for staff involved in breaches of competition law.
- 1.22 Appropriate training in competition law compliance should be targeted at the risk areas identified. This might include online training, face-to-face training or a combination of the two. It might be supported by other activity such as testing of employees' knowledge and understanding and/or written materials summarising competition law. Businesses should consider how best to focus their training activities to mitigate the risks identified. For businesses with large numbers of staff in low risk areas, it might be appropriate to concentrate training activities on staff in high risk areas.

#### **Step 4: Review**

- 1.23 The fourth step is the review stage. It is important that businesses regularly review all stages of the process to ensure that there is 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 are appropriate and effective. 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 breaching the abuse of dominance rules becomes high risk. 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.

## **Structure of this Report**

1.24 This report is structured as follows:

- Chapter 1 – Executive Summary
- Chapter 2 – Introduction and Background
- Chapter 3 – Methodology
- Chapter 4 – Findings
- Chapter 5 – Respondent Suggestions on what more the OFT could do to drive compliance
- Chapter 6 - OFT Response to Respondent Suggestions on what more the OFT could do to drive compliance
- Chapter 7 – Conclusion

## 2 INTRODUCTION AND BACKGROUND

2.1 This report presents the findings of an Office of Fair Trading (OFT) research project exploring the drivers of compliance and non-compliance with competition law.<sup>4</sup> We conducted this research in order to gain a better understanding of the practical challenges faced by businesses seeking to achieve a competition law compliance culture. The OFT was keen to learn what businesses have found works well in practice, to explore with them the key reasons for competition law compliance issues arising in their businesses and, in turn, to share through this report these examples of best practices with other businesses. The OFT's overall aim in this research has been to find out how we might support UK businesses in achieving an internal competition law compliance culture, so that breaches of competition law are avoided in the first place.

### Other OFT compliance workstreams

2.2 In parallel with this research into the drivers of compliance and non-compliance with competition law, the OFT has undertaken research into the drivers of compliance and non-compliance with consumer law,<sup>5</sup> as well as research into levels of awareness of competition law among businesses.<sup>6</sup> The OFT is committed to helping businesses comply with the laws we enforce in order to avoid breaches of law occurring in the

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<sup>4</sup> The OFT carried out this research pursuant to section 5 of the Enterprise Act 2002 (EA02). Under section 5(1) of EA02 the OFT has the function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions. In carrying out that function the OFT may carry out, commission or support (financially or otherwise) research (section 5(3) EA02). Information relating to the business of an undertaking that has been collected in this research is therefore specified information to which section 237 of EA02 applies and has been disclosed in accordance with the provisions of Part 9 of EA02.

<sup>5</sup> See OFT 1225 *Drivers of Compliance and Non-Compliance With Consumer Law* (to be published) and OFT 1228 *Factors Affecting Compliance with Consumer Law and the Deterrent Effect of Consumer Enforcement* (to be published).

<sup>6</sup> See *OFT Competition Law Awareness Business Survey* (to be published).

first place. These workstreams have been designed to assist the OFT in assessing the most effective ways we can use our limited resources to drive compliance with both competition and consumer law.

## **Background on the OFT**

- 2.3 The OFT is the UK's consumer and competition authority. Our mission is to make markets work well for consumers. Our vision is for competitive, efficient, innovative markets where standards of consumer care are high, consumers have choice and are empowered and confident about making choices, and where businesses comply with consumer and competition laws but are not disproportionately burdened by Government regulations. Competition within the economy is good for business and good for consumers. Strong competition regimes encourage open, dynamic markets, and drive productivity, innovation and value for consumers. Competitive and open markets at home increase the global competitiveness of UK firms, raising economic growth and standards of living in the UK, and benefiting consumers by ensuring lower prices and a greater variety of goods and services.
- 2.4 The UK's competition regime is built on the prohibitions set out in the Competition Act 1998 (CA98), which prohibits anti-competitive agreements and abuses of dominance, and provisions in the Enterprise Act 2002 (EA02), which made it a criminal offence for individuals to engage in cartel activity in the UK and empower the OFT to apply to the court for a Competition Disqualification Order (CDO) against directors whose businesses have infringed competition law in certain circumstances. In addition, Council Regulation 1/2003 empowers the OFT to enforce the prohibitions under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) of anti-competitive agreements and abuses of dominance, where the agreement or conduct in question has the potential to affect trade between EU Member States. The EA02 also gives the OFT powers and duties in relation to mergers and market investigations.
- 2.5 Accordingly, the UK competition regime comprises both sanctions against businesses and sanctions against individuals. The competition

law prohibitions under the CA98 and Articles 101 and 102 of the TFEU are civil, or administrative, in their nature and exclusively relate to the conduct of undertakings. The criminal cartel offence and CDO powers introduced by the EA02 are sanctions against individuals.

## **Existing OFT research**

### **Deloitte research**

- 2.6 The OFT in 2007 published a research report prepared for it by Deloitte<sup>7</sup> (the Deloitte Report) which addressed a number of questions about the deterrent effect of its enforcement activities in the areas of merger control and competition law, from the viewpoint of businesses and their legal advisors. The businesses surveyed highlighted the importance of individual sanctions in driving compliance with competition law, in addition to concerns about adverse publicity, financial penalties and private damages actions.

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<sup>7</sup> OFT 962, *The Deterrent Effect of Competition Enforcement by the OFT*, November 2007, available at [www.of.gov.uk](http://www.of.gov.uk).

**Perceived Importance of Sanctions in Deterring Infringements of Competition Law<sup>8</sup>**

<b>Ranking by Businesses</b>	<b>Ranking by Lawyers</b>
1. Criminal Penalties	1. Criminal Penalties
2. Disqualification of Directors	2. Fines
3. Adverse publicity	3. Disqualification of Directors
4. Fines	4. Adverse publicity
5. Private damages actions	5. Private damages actions

2.7 According to the Deloitte Report, the most common compliance measure was taking external legal advice (40 per cent of businesses). Other relatively common compliance measures were:

- having a policy code (34 per cent)
- providing seminars on competition law (26 per cent)
- employing a dedicated competition compliance officer (20 per cent)
- taking economic advice (16 per cent), and
- requiring employees to take an online training programme (nine per cent).

2.8 Whether a business undertakes compliance activities was found to be strongly related to the size of the business.<sup>9</sup>

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<sup>8</sup> OFT 962, at footnote 7 above, at paragraphs 5.55 to 5.59.

<sup>9</sup> Ibid. at paragraphs 5.98 to 5.99.



## **London Economics research**

- 2.9 In 2009 the OFT published research<sup>10</sup> by London Economics (the London Economics Report) assessing the penalty regime, and how the UK penalty regime compared to an 'optimal' regime. This involved a comparison of the UK regime with international peers in relation to the tools used and the level of financial penalty imposed.
- 2.10 The London Economics Report suggested that, if anything, OFT financial penalties were relatively low by international standards. OFT financial penalties were found to be around 65 to 75 per cent lower than financial penalties imposed by the other competition authorities considered in the report.
- 2.11 The London Economics Report emphasised that financial penalties were not the sole way of achieving deterrence. Other policies, such as leniency, individual sanctions and settlements, are important ingredients in an optimal enforcement regime. The London Economics Report concluded that the overall UK enforcement regime was good, with recourse to financial penalties and individual sanctions backed by a strong leniency policy.

## **Existing OFT publication on compliance**

- 2.12 The quick guide OFT 424, *How Your Business Can Achieve Compliance* was published by the OFT in 2005. This offers general advice to businesses on what they can do to encourage competition law compliance. The guide recognises that the steps that need to be taken in order to ensure compliance will vary from business to business and will depend on a range of factors, including the size and nature of the business. It suggests that as a starting point it is helpful to assess the extent to which competition law impacts upon the business and the risk of the business committing an infringement. The guide advocates a risk-

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<sup>10</sup> OFT 1132, *An Assessment of Discretionary Penalties Regimes*, October 2009, available at [www.of.gov.uk](http://www.of.gov.uk).

based approach to compliance, noting that the higher the risk of infringement, the more comprehensive measures that are likely to be required in order to ensure compliance.

- 2.13 In order to assist this risk assessment, the quick guide sets out a short series of questions in order to help the reader assess their business's position in the market as well the degree to which directors and employees of the business might have contact with competitors. The guide also sets out the need for businesses to raise competition law awareness among employees.
- 2.14 The quick guide aims to encourage businesses to consider whether they ought to implement a competition law compliance programme. It notes that in some cases, where the risk of infringing competition law might be high and/or where the business is so large and diverse it is simply too difficult to monitor the activities of individual employees, 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. While acknowledging that the content of a compliance programme must be tailored to the business's particular requirements and that there is no standard compliance programme that can apply in all cases, the guide nevertheless sets out certain general features that must be included as a minimum in any compliance programme if it is to work effectively. These are:
- support of senior management
  - appropriate policy and procedures
  - training, and
  - regular evaluation.
- 2.15 In addition, the guide states that the existence of a compliance programme in an infringing business might be taken into account as a

mitigating factor when the OFT calculates the level of a financial penalty.<sup>11</sup> It states that the OFT will give careful consideration to the precise circumstances of the infringement and the efforts made by management to ensure that the programme has been properly implemented. It notes that the OFT will take into account the seniority of the persons involved in the infringement and that the OFT will view very seriously the involvement of directors or senior management in any infringement.

- 2.16 In practice the OFT has, in some cases, taken the adoption of a compliance programme into account as a mitigating factor to reduce the amount of the financial penalty imposed for infringements of the Chapter I prohibition, by up to 10 per cent.<sup>12</sup>

### **Policies/publications of other competition authorities on compliance**

- 2.17 We have reviewed the practice of other competition authorities in relation to competition law compliance and, where applicable, their published guidance. We have summarised these below.

#### **European Commission**

- 2.18 The European Commission (the Commission) has not published any guidance on competition law compliance programmes. Whilst in some decisions the Commission has noted the adoption of a competition law compliance programme by an infringing undertaking, the Commission has not tended to treat such a programme as a factor to reduce the amount of the fine.<sup>13</sup> The legality of this approach by the Commission has been upheld by the General Court, which has held that the Commission is not

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<sup>11</sup> As noted in OFT 423, *OFT's Guidance as to the Appropriate Amount of a Penalty* at paragraph 2.16.

<sup>12</sup> See, for example, the OFT decision of 21 September 2009 *Bid-Rigging in the Construction Industry in England* (Case CE/4327-04) at paragraphs VI.316 to 319.

<sup>13</sup> See, for example, *Graphite Electrodes* (2002/271/EC) OJ 2002 L100/1 at 193.

required to take the adoption of a competition law compliance programme into account as an mitigating circumstance when setting the amount of the fine, especially when the infringement in question amounts to a manifest infringement of Article 101 TFEU.<sup>14</sup>

### **US Federal Sentencing Guidelines**

- 2.19 The US Federal Sentencing Guidelines (the Sentencing Guidelines) are generally used by the US Federal Courts when imposing sentences, including for criminal violations of section 1 of the Sherman Act, the main US antitrust statute. The Sentencing Guidelines indicate that an 'effective compliance and ethics programme' might reduce the fine that will be imposed.
- 2.20 According to the Sentencing Guidelines, in order to be considered as having an 'effective compliance and ethics programme', an organisation must:
- exercise due diligence to prevent and detect criminal conduct and
  - otherwise promote an organisational culture that encourages ethical conduct and a commitment to compliance with the law.
- 2.21 The Sentencing Guidelines make it clear that the compliance and ethics programme must be reasonably designed, implemented and enforced so that the programme is generally effective in preventing and detecting criminal conduct. They also provide that any failure to prevent or detect the offence before the court 'does not necessarily mean that the programme is not generally effective in detecting and preventing criminal conduct.'<sup>15</sup> A summary of the approach in the Sentencing Guidelines is set out in Annexe 1.

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<sup>14</sup> See *Archer Daniels Midland Co v Commission* (Case T-329/01) [2006] ECR II-3255 at paragraph 299.

<sup>15</sup> The Sentencing Guidelines, §8B2.1.(a)(2).

## **Australian Competition & Consumer Commission (ACCC) guidance and 'three-phases of compliance'**

2.22 The ACCC published 'Corporate Trade Practices Compliance Programs' (the ACCC Guidance) in 2005. This guidance acknowledges that there cannot be a generic compliance programme, as each organisation's circumstances are different, but that whatever the type and style of the compliance programme, it should be well managed, adequately resourced, properly documented and actively supported by the board and senior management. The guidance states that a successful compliance programme is likely to include:

- **Strategic vision** – compliance activities must be linked to the business's strategic goals. Therefore, the method employed by the business to achieve those goals must be communicated, along with the benchmarks for implementation.
- **Risk assessment** – the business must actively identify its compliance risks and reassess them at regular intervals. A business must also do this when it enters into new business activities. The programme must ensure that specific compliance risks that might arise within each business unit or area of operations are considered.
- **Control points** – each of the identified risks are managed at specified control points, which are themselves reinforced by establishing behavioural and procedural controls. Procedural controls address and mitigate high risk areas in a business's operating environment, while the behavioural mechanisms emphasise the business's policies for those risks.
- **Adequate documentation** – the business's compliance efforts are adequately documented to ensure that they can be substantiated in the event of a breach.
- **Identified people** (in appropriate positions of responsibility) that are accountable – these people manage each specific element of the compliance system.

- **Continuous improvement** – the business will evaluate its performance and its approach, to ensure that they are appropriate to its operations.

2.23 The ACCC Guidance also suggests that, based upon its experience, organisations go through three phases when institutionalising a compliance culture:

- **Commitment to comply:** during this phase, the business management develops a willingness or commitment to address compliance issues and allocate the resources to achieve compliance.
- **Compliance know-how:** at this stage, specialist personnel such as a compliance officer or compliance advisor are appointed and are made accountable for compliance programme development. Internal and external expertise will be sought and assimilated. The business's corporate strategy will take into account compliance. Policies and procedures will be developed in order to address compliance issues.
- **Compliance as a business practice:** in this final phase, compliance becomes the way that business is done and is no longer external to it. Compliance policies are now considered integral to the business's objectives. Operational procedures take account of compliance and the performance of work duties in accordance with the law is the norm. Compliant practices are expected and rewarded. Non-compliance is prevented and discouraged.

2.24 According to the ACCC, once the final phase is reached, businesses very rarely revert to the non-compliant state.

2.25 The ACCC Guidance also includes four compliance programme template undertakings<sup>16</sup> to provide an indication of what the ACCC considers advisable in compliance programmes implemented voluntarily by

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<sup>16</sup> The four template trade practice compliance programme undertakings differ in two respects—the number of elements present and the obligations within each of the templates.

businesses, as well as providing an example of what the ACCC is likely to accept by way of formal administrative undertaking.<sup>17</sup>

### **Canadian Competition Bureau – Corporate Compliance Programs Information Bulletin**

- 2.26 In 2008 the Canadian Competition Bureau published the revised Information Bulletin, 'Corporate Compliance Programs' (the Bulletin). This describes the measures that businesses should consider in order to prevent or minimise their risk of contravening the Canadian Competition Act and other legislation that the Competition Bureau enforces. The Bulletin also provides tools that help businesses to develop their own compliance programmes and includes a framework which sets out, in the Competition Bureau's opinion, the essential components of a 'credible and effective' compliance programme.
- 2.27 The Bulletin states that there are five elements fundamental to a credible and effective compliance programme, regardless of the particular model adopted, its level of complexity or the size of the business. These are
- Senior Management Involvement and Support
  - Corporate Compliance Policies and Procedures
  - Training and Education
  - Monitoring, Auditing and Reporting Mechanisms, and
  - Consistent Disciplinary Procedures and Incentives.
- 2.28 According to the Bulletin, while the existence of a compliance programme does not immunise businesses or individuals from enforcement action, when determining the most appropriate means to

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<sup>17</sup> Section 87B of the Australian Trade Practices Act 1974 empowers the ACCC to accept formal administrative undertakings, which may include compliance programme obligations.

resolve cases where due diligence is a factor,<sup>18</sup> the Competition Bureau (and the Director of Public Prosecutions) may give weight to the existence of a credible and effective compliance programme. The Bulletin adds that where a business has a compliance programme in place and a contravention of the Canadian Competition Act or other legislation enforced by the Competition Bureau occurs, then the programme might still be considered credible and effective where it can be demonstrated that it was reasonably designed, implemented and enforced in the circumstances of the case.

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<sup>18</sup> Under certain provisions of the legislation enforced by the Canadian Competition Bureau, it is a defence for a person to establish that they exercised due diligence to prevent the commission of the offence (see, for example, section 52.1(6) of the Competition Act R.S.C. 1985 in respect of deceptive telemarketing). Although an in-house programme is not, in and of itself, a defence, a credible and effective programme may enable a business to demonstrate that it took reasonable steps to avoid contravening the law. In this regard, such a programme may support a claim of due diligence. Documented evidence of corporate compliance will assist a business in advancing a defence of due diligence, where available.



### 3 METHODOLOGY

#### Approach

- 3.1 We undertook research into the drivers of compliance and non-compliance with competition law in order to gain a better understanding of the practical challenges faced by businesses seeking to achieve a competition law compliance culture. We wished to learn what motivated businesses to comply with competition law and what businesses had found works well in practice to achieve this. We also wished to explore with them the competition law compliance challenges that might arise in their businesses despite their compliance efforts.
- 3.2 Given the objectives of this research and pre-existing OFT research into deterrence which was largely quantitative in nature,<sup>19</sup> we decided to undertake qualitative research with larger businesses having existing competition law compliance activities, to learn from their experiences and build a picture of current best practice in competition law compliance.
- 3.3 We considered that we would gain the most valuable insights into the practical challenges of competition law compliance through holding confidential in-depth interviews with in-house staff (typically in-house legal advisers or compliance officers) having direct experience of driving competition law compliance. We saw such interviews as being the best way to gain practical examples of best practice in competition law compliance.
- 3.4 We did not include small and medium-sized enterprises (SMEs) within the sample since this research was targeted at the challenges of driving compliance with competition law within larger businesses. Care should therefore be taken before assuming that the insights provided in this report apply to SMEs. We recognise that some of the challenges in

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<sup>19</sup> For example, the Deloitte Report and the London Economics Report - see footnotes 7 and 10 above.

driving competition law compliance in SMEs might well be different to those in larger businesses. We will be considering how the findings of this research might be relevant to smaller businesses. With this in mind, we have conducted separate research into the levels of awareness of competition law among businesses.<sup>20</sup>

- 3.5 Before embarking on the research, we undertook a literature review into the drivers of compliance and non-compliance in order to inform us of the areas in which we should aim to gain insights. This phase involved the review of the OFT's current guidance on compliance, the Deloitte Report, the London Economics Report and the practice of other competition authorities in relation to competition law compliance including, where applicable, their published guidance<sup>21</sup> and research.<sup>22</sup> In addition, we reviewed literature on the drivers of compliance and non-compliance with various areas of law, including food standards, health and safety and environmental requirements.

### **Sampling and Recruitment**

- 3.6 While not a fully representative sample, we sampled a mix of businesses facing the range of competition law compliance issues, in order to maximise the insights likely to be generated. We therefore contacted some businesses which had been involved in competition law investigations and some which had not, some who might have

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<sup>20</sup> See OFT Competition Law Awareness Business Survey, at footnote 6, above.

<sup>21</sup> This review is summarised at paragraphs 2.6 and following, above.

<sup>22</sup> See, for example, the ACCC's Enforcement and Compliance Project at [www.cartel.law.unimelb.edu.au/go/related-projects/the-australian-competition-and-consumer-commission-enforcement-and-compliance-project](http://www.cartel.law.unimelb.edu.au/go/related-projects/the-australian-competition-and-consumer-commission-enforcement-and-compliance-project). The ACCC's Enforcement and Compliance Project's purpose is to test on an empirical basis the major theories of how businesses respond to regulatory enforcement and why they do or do not comply with the law. The project tests these theories using data collected in the ACCC Enforcement Compliance Survey involving 1000 larger businesses in Australia, as well as in quantitative interviews with ACCC staff, trade practices lawyers and business people. The project has produced a wealth of reports and working papers, accessible at the link above. The project issued a preliminary research report in 2003 and is scheduled to continue until 2011.

considered dominance issues as major part of their compliance strategy and some who were unlikely to face these issues, and a small number that were operating in industries where regulatory compliance would be required in addition to competition law compliance. As mentioned at paragraph 3.4 above, we did not include any SMEs in the sample.

- 3.7 As such, and given the qualitative nature of the research, care should be taken in making assumptions about the population of business as a whole from the findings in this report. This report summarises the views of those who have taken part in the research. That said, the report provides valuable insights into the practical challenges faced by larger businesses in driving compliance within their organisations.
- 3.8 We contacted 23 businesses by email or telephone in October and November 2009. Of these, 19 expressed a willingness and ability to take part in the research. We were also proactively contacted by three further businesses wishing to take part in the research.
- 3.9 Accordingly, between November 2009 and February 2010, we conducted 22 interviews with in-house counsel and other in-house competition law compliance specialists from a cross-section of businesses that are either based in, or trade in, the UK.
- 3.10 We carried out the majority of these interviews face to face, though we used telephone calls in some cases where face to face interviews were not possible. We held these interviews on a confidential basis, agreeing with respondents that we would keep their identities confidential and that all comments made would be reported anonymously in this report. We considered this to be essential in order to encourage respondents to take part in the research project and to speak freely in the interviews, so that we could gain the most value from the insights provided in the research. All comments in this report remain anonymous.
- 3.11 We also benefited from three group discussions with in-house counsel and private practice lawyers between November 2009 and February 2010. At these we explored the areas covered by the questionnaire in a group format and gained further insights.

### **Interview Structure**

- 3.12 We used a structured discussion format, using a questionnaire to structure the in-depth interviews. The questionnaire is at Annexe 2 to this report. The questionnaire was used as a guide to the areas for discussion rather than being a rigid framework for the interview.

### **Quotation Convention**

- 3.13 All the quotes included in this report have been sourced from the transcripts of the interviews carried out as part of this research. Quotations are shown within speech marks and, where we have removed some dialogue, we have indicated this with dots ('...').

## 4. FINDINGS

### 4.1 Drivers of Compliance

4.1.1 We explored with respondents the key drivers of competition law compliance within their businesses. Our aim was to gain some insights into the motivation for competition law compliance activities within their businesses.<sup>23</sup>

#### **Deterrent effect of competition law sanctions**

4.1.2 We asked respondents about the deterrent effect of competition law sanctions and the publicity associated with them. We wished to gain insights into the relative importance of the different sanctions and publicity in driving compliance within their businesses.

4.1.3 All respondents said that the adverse reputational impact of a competition law infringement decision was the overriding driver of compliance within their businesses. One respondent said this was because such decisions could call into question the ethics and business model of the firm against whom the decision was made, that it sent '...the message that the business has a dodgy business model...'

4.1.4 Some respondents said that there was a negative reputational impact from the fact of having a competition law investigation against their business, even if the business was subsequently cleared; because what would be remembered was the investigation, not the clearance at the end. One respondent expressed concern that stakeholders had perception that competition authorities would not pursue an investigation against a firm unless the issue was serious and there was substance behind the allegation.

4.1.5 One respondent observed that their business was most worried about reputational damage, suggesting that even if upon examination the issue

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<sup>23</sup> The questionnaire used to guide the interviews is included at Annexe 2.

was relatively minor, '...by that time a huge amount of damage has been done'.

- 4.1.6 All respondents stated that the risk of financial penalties of up to 10 per cent of global turnover were a key driver of compliance. However, the majority of respondents were of the opinion that the potential for reputational damage was an even greater driver of compliance within their businesses. One respondent observed that if an infringement decision could 'wipe millions off of our profit line, then people will tend to listen'. The same respondent added that the business would need to earn several times more in sales than the amount of the fine in order to cover the overall costs associated with the infringement decision. Another respondent commented that 'heavy fines are an important penalty; they are an important message to the world at large and to the individuals'.
- 4.1.7 Most respondents also said that they and individuals within their organisations were concerned about the implications of personal sanctions such as criminal penalties and CDOs. Most respondents said that discussion of personal sanctions was a helpful way to get the attention of individuals in the business when discussing competition law compliance. One respondent said that personal sanctions 'focus...the mind for an executive... at the end of the day, if they are going to think about what's in it for them...' Another respondent suggested that a focus on CDOs would help to drive compliance, saying that '...when somebody's personal reputation is at stake, that makes them think twice, without doubt'. Another considered that CDOs were a very useful tool where there was perhaps not enough evidence for a criminal conviction but it appeared that '...the Directors were not exercising sufficient governance'.
- 4.1.8 Some respondents felt that the threat of CDOs would not achieve a significant impact in compliance terms since they considered that the increased threat of CDOs would result in directors installing further process and procedures to protect and insulate their personal position from the threat of a CDO.

## **Management Commitment to Compliance**

- 4.1.9 All respondents said that the key driver of competition law compliance within their organisations was ongoing, clear, unambiguous, global messaging by senior management -- up to and including the board level - - that competition law compliance was a core part of the corporate culture and that senior management expected employees to comply with competition law. Without the active, visible and unambiguous commitment of senior management, respondents said there can be no prospect of successfully driving a culture of competition law compliance within a business. In many cases, compliance (with all applicable laws, not just competition law) is a fundamental part of the corporate identity of the business, part of the corporate vision that is actively embraced by the business's senior management.
- 4.1.10 Respondents noted that this senior-management commitment would be there for a number of reasons, chief of which was concern for the business's reputation, as well as the risk of financial and personal sanctions. The support of senior management will also be there where the business values a corporate image of being ethical and compliant. Some respondents emphasised this as driving compliance within their organisations: they said that the public (which includes both consumers and business customers) associated their brand with a reputation for compliance, since this is one way they distinguish their business offering from that of their competitors. One respondent commented that the chief executive impressed on employees at the beginning of compliance training that they were all 'custodians of the brand'.
- 4.1.11 One respondent said that, at its Executive Committee level, there is a non-financial risk management process which looked at the top one to 20 risks faced by the business and that competition law was routinely included in these. Likening a business to an 'ocean liner', it was only possible 'at the bridge' (in other words at the top) to get the proper perspective.
- 4.1.12 But most respondents also said that senior management commitment to competition law compliance, while critical to driving compliance, on its

own was not enough. They said that middle management had to be engaged with, and take ownership of, competition law compliance and that middle management and employee incentives had to be linked to competition law compliance. Most respondents mentioned that competition law compliance was an express part of their corporate code of conduct, applicable to all employees. All respondents said that it was made clear to employees that involvement in breaches of competition law might be considered to be gross misconduct and individuals engaging in such activity might be subject to internal disciplinary sanctions, including dismissals.

4.1.13 One respondent said their business's code of conduct required that all employees had to comply with all laws in the countries in which they operated. The code made a specific reference to competition law. Doing so served to 'get awareness across at every level' and emphasised the 'buy-in of senior management'.

4.1.14 such respondents also said that it was important that middle management had an appreciation of how competition law benefits both the business community and society more widely – people were more inclined to have a commitment to compliance when they understood the rationale for the law and sanctions. One said that it was important to show how 'competition law...benefits society, business and you'.

#### **Responsibility for Compliance**

4.1.15 Some respondents said that it was also important for individual businesses units within the corporate group to take ownership for compliance, and not to delegate responsibility to the legal team. This can be achieved by attributing competition law compliance costs (and, if appropriate, any infringement fines) to the relevant individual business unit, and ensuring the managers of the business are aware of their responsibilities.

#### **Internal Incentives to Comply**

4.1.16 In some respondent businesses, staff appraisals were linked to compliance programmes: if a person who was supposed to be trained



under a compliance programme had not received their training, this would come up during their performance appraisals. This was also the case with respect to managers whose employees were required to obtain competition law compliance training and who had failed to do so. Certain respondents mentioned that, for a person to be considered for promotion to certain positions or even for some lateral transfers, they had to be able to demonstrate that they had received competition law compliance training.

- 4.1.17 Some respondents said their businesses also linked individual and even business unit bonuses to corporate compliance efforts in order to provide enhanced individual incentives to comply. Thus an individual's bonus might in some cases be dependent, amongst other things, upon completion of the competition law compliance training required for that person. In some respondent businesses, a senior manager's bonus might not be paid if the business unit for which that person was responsible was found to have been involved in a competition law infringement – in some organisations, this applied to bonuses for all employees across the business unit.

### **Competition Law Compliance Advice**

- 4.1.18 Many respondents considered that if they wished to drive compliance, then in-house competition law compliance staff had to have the respect of both senior management and the everyday businesspeople within the organisation.
- 4.1.19 Another key driver of compliance noted by respondents was the need to ensure that competition law compliance advice and training was messaged in a non-legalistic, understandable and business-friendly way. One respondent said that they helped to drive compliance within their organisation by saying that engaging in potentially infringing activity 'is not the way that we do business' rather than 'our lawyers tells us we can't do that'. A few respondents emphasised that an approach to competition law within the business that showed an appreciation for business reality and the commercial objectives would tend to drive compliance, because employees would come forward with questions.

One respondent observed that 'it can't just be a lawyer using the stick approach and saying 'this is what you must do'.

- 4.1.20 Some respondents also said what could capture the interest of senior management in competition law compliance and help them to drive a culture of compliance was by showing that competition law compliance education can be commercially liberating within a business. This is because in some cases there can be misunderstandings as to what is and is not allowed under competition law and business people might sometimes not engage in beneficial transactions owing to the unfounded fear that the activity might infringe competition law. These respondents say to senior management that instilling a culture of competition law compliance and awareness can present business people with the tools to recognise and deal effectively with situations which might or might not create competition law risk and to embrace new business opportunities effectively. In effect, they know the rules of the game and are able to compete vigorously within them. One respondent commented that '[y]ou need to operate compliance in such a way that it is a competitive advantage'.

#### **Impact of competition investigations on compliance**

- 4.1.21 We asked respondents whether their businesses had been parties to a competition law investigation and, if so, whether the investigation had an impact on the business's competition law compliance culture.
- 4.1.22 Some of the respondents' businesses had been parties to competition law investigations by the OFT or other competition authorities, some had not. Some respondents mentioned that their business had become involved in a competition law investigation after having acquired another business that had been involved in an infringement.
- 4.1.23 A number of respondents whose businesses had been subject to competition law investigations said that the investigations did not in themselves have a noticeable impact on the corporate compliance culture. This was because the businesses already had a commitment to competition law compliance before the investigation started and the

investigations did not lead to infringement decisions. One respondent observed that 'we are very aware of the risk that competition law poses'.

- 4.1.24 In response to the same point, another respondent said that the criminalisation of cartels in different jurisdictions ensured even more than any specific competition law investigation that 'senior management...judge anti-trust as a real business risk'.
- 4.1.25 A few respondents said that competition law investigations tended to reinforce the need for a sound competition law compliance culture, even when the business had a pre-existing compliance programme. One respondent noted that a competition law investigation 'definitely heightened and sharpened people's awareness in compliance'. That respondent considered that to be 'fine' unless compliance concerns became 'so overwhelming that actually people don't pursue...legitimate contact because they're so worried'.
- 4.1.26 Among respondents whose businesses had been subject to competition law investigations, some said that this investigation did have a major impact on compliance, insofar as it captured the attention of senior management and caused them to review the compliance arrangements and culture within the firm. A respondent said that the investigation meant that competition law compliance could 'get onto the agenda of...the meetings of the board of directors...a couple of times a year, if not regularly every quarter'.
- 4.1.27 Two respondents noted that what had caused a major change in competition law compliance culture within their firms was not a competition law investigation, but a major non-competition law investigation, which led to an overhaul in the general compliance culture within their businesses, of which an increased commitment to competition law compliance was part. One noted that the non-competition law investigation led to 'a real cultural shift' within their business, leading among other things, to an antitrust 'risk assessment...across the [whole business]'.

- 4.1.28 One respondent observed that their business had been involved in a competition investigation for some time. According to the respondent, the investigation at first did indeed enhance the awareness of competition law within the organisation. However, as the investigation progressed, this impact was lost and employees within the organisation tended to view the investigation sceptically, for example, 'just another information request'.
- 4.1.29 Another respondent said that their organisation's compliance culture had developed from within and not as a result of a single investigation. Their organisation had, of its own accord, undertaken a strategic review of its businesses and taken the view that some of the activities could not continue. As a result, the organisation sought to regularise all of its supply relations, taking a pro-active approach to managing competition law risk. Competition law compliance now drove the direction of business and resulted in a cultural shift which has been maintained within the organisation.
- 4.1.30 A number of respondents mentioned the cost of dealing with competition law investigations and infringement decisions in terms of management time and business resources. For example, one respondent said that it would be a real concern 'to have to divert management resource to sorting all this out'.

## **4.2 Drivers of non-compliance**

- 4.2.1 This section considers respondents' views on what can potentially drive non-compliance with competition law. We explored with respondents the competition law compliance challenges that might arise in their businesses despite their compliance efforts.

### **Lack of senior management commitment**

- 4.2.2 All respondents commented that a solid commitment to competition law compliance by senior management was the crucial factor in driving compliance. Conversely, all respondents say that if senior management does not care about competition law compliance or sees competition law as something to be evaded, then that will drive non-compliance.

Even if internal lawyers or other compliance staff promote a compliance agenda within the organisation, they will be 'voices crying in the wilderness' if senior management does not see compliance as important – compliance efforts will always be 'trumped' by senior management's view that it is a waste of time and money. If there was not, according to one respondent, appropriate 'tone-setting...at the top' then 'other layers of management and...sales teams' would not 'be really committed' to compliance.

- 4.2.3 Some respondents pointed to businesses that had repeatedly been fined by competition authorities as being ones which had up until recently displayed senior management aversion to compliance. This set a corporate culture in which competition law was seen as something to be evaded or where the tacit message to employees was 'just don't get caught'.
- 4.2.4 Many respondents added that any perceived ambiguity in senior management's commitment to compliance could drive non-compliance. This might particularly be the case where staff are under commercial pressure to meet challenging targets. If they think that there is a chance that senior managers might take an 'ends justifies the means' perspective or that the senior management will turn a blind eye to the activity 'just this once', then that seriously risks driving non-compliance within the organisation. Many of our respondents said that in this kind of situation, some employees might even misinterpret such ambiguity as a subtle expectation by senior management that competition law compliance should be viewed as a 'nice to have', rather than 'must have'. One respondent suggested that employees might even feel 'pressured into cheating in some small or large way in order to hit their business targets'.
- 4.2.5 Another employee cautioned against senior management being seen to send mixed messages, saying 'on the one hand... here's the compliance programme' while on the other hand saying '...but hey, you'd better hit your targets' irrespective of how those targets might be met.

## **Lack of competition law commitment among middle management**

4.2.6 Some respondents said that they considered lack of middle management commitment to be a driver of non-compliance. For all that senior management might be committed to competition law compliance, if there is not an equal level of commitment among middle management, then staff at the working level might see competition law compliance as something that is remote and a 'board-level thing', rather than something that they need to be concerned about. This is particularly the case if their immediate line managers do not communicate an expectation of compliance. Accordingly, the expectation of, and commitment to, competition law compliance must be cascaded through management at all levels of the business. These respondents said that employees who work in roles that might create competition law risk must see that their immediate manager expects that they will comply and that there are internal governance structures which monitor this compliance. One respondent opined that the compliance message from the very top of the business might have had 'challenges getting down the very tips of the organisation's toes'.

### **The 'rogue' employee**

4.2.7 We explored with respondents the extent to which competition law compliance issues were caused by a 'rogue' employee in an otherwise compliant organisation. We also discussed what respondents considered to be the key characteristics of such a 'rogue' employee, where they considered that such an employee could exist.

4.2.8 Most respondents said that 'rogue' employees were the ones most likely to drive non-compliance within an organisation that had a very strong commitment to compliance. The 'rogue' employee was said to be a person who knew very well the sorts of activity that would be likely to infringe, but who went ahead and engaged in the infringing conduct anyway. Many respondents said that the rogue employee was a kind of 'wildcard' within the otherwise compliant organisation, as they were difficult to identify and it was difficult to predict when they might engage in activity creating competition law risk. They would seek to

conceal their activities and even use deceit and/or dishonesty to make it look as if they were actively following the business's compliance policy (for example, by falsifying records of meetings or even asking for competition law advice in advance of a cartel discussion and then proceeding to disregard that advice).

- 4.2.9 That said, not all respondents thought that 'rogue' employees actually were a driver of non-compliance. Some respondents said that they thought that it would be very difficult for a competition law infringement to be perpetrated by a single 'rogue' employee. They considered that, at the very least, others within the business would have turned a blind eye to the infringing activity. Such other employees might have been motivated to turn a blind eye out of personal loyalty, fear (such as where the so-called 'rogue' was a line manager or more senior person within the business), simple indifference or the belief that the activity was profitable. The same respondents also suggested that the fact that the 'rogue's' infringing activities had not been addressed was indicative of a lack of a compliance culture within the business. This might be due to the organisation's failure to have the necessary internal procedures and systems in place to identify non-compliant behaviour and 'out' the 'rogue' employee. Such respondents thought that it would be more likely that more than one person in the business would have to have been actively complicit in the infringement.
- 4.2.10 Respondents expressed a number of views on what might drive a 'rogue' employee. Many felt that the 'rogue' employee was a person who in any situation would feel that their way was the best way and that the compliance policies were foolish and got in the way of good business. Such employees might be driven by ego and arrogance, convinced that 'they knew better'. One respondent described the 'rogue' as someone who thought they were smarter than everyone else and that one day the business would be 'jolly grateful for them'. The same respondent opined that the 'rogue' would have an ego 'the size of a bus' and that they 'just don't take guidance or training seriously'.
- 4.2.11 In some cases, the 'rogue' might be under pressure to achieve targets or bonuses and they would consider that engaging in anti-competitive

activity was the best way to ensure success, even though they knew that what they were doing was actually or potentially unlawful. They would not see it fit to achieve those targets using only legitimate business means, in contrast to their colleagues.

4.2.12 Some respondents also suggested that a 'rogue' employee might be driven by frustration or resentment with the business: engaging in the infringing activity could be a means for them to meet their business objectives while at the same time 'getting back' at the business. They also suggested that in some cases it could simply be similar factors that motivate internal fraud: financial incentive (for example, fixing prices or sharing markets might help to achieve a personal bonus), opportunity (the person knows his or her counterparts in competitors and they are similarly motivated) and rationalisation (for example, 'competition law isn't that serious' or 'I'll never get caught').

4.2.13 Some respondents recognised that there was a risk that a business might use the concept of the 'rogue' employee to identify a scapegoat when an infringement occurred. In this way, the 'rogue' employee becomes an excuse as the business seeks to discharge its responsibility for non-compliance and possibly to hide more systemic issues indicating a non-compliant culture or a lack of appropriate compliance measures. In commenting on how a competition authority might determine the distinction between a genuine situation of one non-compliant 'rogue' employee and a non-compliant culture, one respondent acknowledged that it would be very difficult for the OFT to 'test the veracity of whether it was one or two rogue employees or whether there was wider awareness that this was going on' or even just 'limited efforts, by senior level management' to monitor the situation'.<sup>24</sup>

#### **Confusion or uncertainty about how competition law applies**

4.2.14 Nearly all respondents said that within their organisations, most or even all businesspeople were aware that hard-core cartel activity, such as

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<sup>24</sup> See also paragraph 6.16.



agreeing prices or sharing markets with competitors, was wrong and potentially criminal. Those respondents often did not find it difficult to gain a compliance commitment from employees with respect to hard-core cartels. What was more of a challenge was to drive compliance with regard to non-hard-core infringements that were less obviously 'wrong' and/or in areas where they perceived competition law to be unclear (for example, one respondent commented 'some of the stuff like 'hub and spoke' is terribly counter-intuitive to a lot of business people'). In businesses that had potential dominance issues, this challenge could be particularly acute. The special responsibility on a dominant undertaking might seem counter-intuitive to businesspeople, especially those striving to meet ambitious targets – they often would not understand why their business could not do things that they saw their smaller competitors doing.

- 4.2.15 Although they felt that within their own businesses there was a sufficient compliance infrastructure in place effectively to deal with such situations, respondents could easily see how uncertainty about the law in particular could drive non-compliance in businesses that did not have the resources to have advisers that could explain more complex or uncertain areas of competition law in a business-friendly way to employees. Such respondents suggested that one way to overcome this driver of non-compliance was for there to be clear and practical OFT guidelines as to what could or could not be done with respect to complex potential infringements and also to explain in non-technical terms the rationale for more complex areas of competition law and the harms intended to be avoided. This would give businesspeople the ability to spot issues and seek guidance from the legal team.

#### **Employee errors/naivety**

- 4.2.16 In some cases respondents said that human errors or simple naivety could drive non-compliance. It was not possible to rule out situations in which employees had been trained and were well aware of a business's commitment to competition law compliance, but they simply could not make the connection between what they had been told and potentially anti-competitive activity in which they were engaging. This could

especially be the case where very enthusiastic or aggressive sales people simply got carried away with a plan, forgetting to consider what the competition law compliance implications were, even if they had been trained to recognise high-risk situations. According to many respondents, this error factor could not be discounted, though it was something that could be addressed by businesses internally through more effective monitoring of business activity and improving employees' understanding of competition law on an ongoing basis.

#### **Excessively legalistic or risk-averse approach to competition law compliance**

4.2.17 Some respondents said that, in their view and experience, there is a real risk that legal advisers themselves might drive non-compliance when they give competition law advice that has any or all of the following characteristics:

- overly legalistic
- excessively risk averse, or
- impractical.

4.2.18 Such legal advice will not be seen as credible by businesspeople and might gain a reputation for obstructing, rather than facilitating effective business deals. In such situations, businesspeople might not come forward to ask for advice if they feel that they are constantly being told that they 'cannot do that'. This risk of non-consultation might be especially acute if they consider that the transaction or activity has a legitimate commercial justification and that the lawyers 'just don't get it', or indeed, if other businesses appear to be undertaking similar transactions or activities. This might be a particular issue if the commercial objective actually could be achieved compliantly, through slight modification to the proposed course of action on the basis of constructive legal advice. The risk is particularly acute with regard to transactions that do not involve classic, hard-core cartel activity, but instead involve activity that might be less obviously anti-competitive, particularly for business people.

- 4.2.19 Where the internal competition law compliance culture is seen as obstructionist, then people will not tend to come forward with more general questions or concerns that they might have about competition law. One respondent described their role when advising businesspeople on competition law as 'giving the general awareness, so that people then ask the questions'.
- 4.2.20 A similar theme was raised by some respondents in relation to engaging external advisors. These respondents recognised the value of external advisors for certain functions but had experience of external advisors focusing too heavily on the law, and on sanctions in particular, whilst also providing compliance messages that were general and did not take account of the business's specific competition law risk profile. One respondent said that 'I don't think external lawyers necessarily engender the right culture.'
- 4.2.21 Another factor identified by some respondents as potentially driving non-compliance was a non-risk-based approach to competition law compliance, that is one which is not tailored to the actual competition law risks faced by the business. Respondents from businesses that were very unlikely on any market definition to be dominant said that they often did not provide training about the abuse of a dominant position. This was to avoid creating confusion and instead to make a practical focus on the actual risk areas of the business. One respondent said that the overall structure of the their compliance programme was 'intended to be the same across the globe, regardless of vocational business or market' though the implementation was 'tailored to the needs of the specific risk base of [the] particular business'.
- 4.2.22 One respondent felt that adopting a rules-based approach, which does not take account of the specific risks of the business, engendered a culture in the business which focused on self-protection and 'box-ticking' rather than driving compliance with the law. It risked creating a culture in which 'lawyers... become overly protective'. This in turn could risk creating 'a compliance programme that is more draconian and less effective'.

4.2.23 On the subject of the self-protection and 'box-ticking' approach, according to one respondent, this can be an excessively rules-based approach to enforcement by competition authorities.

#### **Competition law having to compete with other compliance priorities**

4.2.24 A few respondents said that what could drive non-compliance with competition law was an internal environment in which there were limited compliance resources and where some distinct compliance areas were seen as higher priority than others. In such an environment, competition law compliance efforts have to 'compete for airtime' with other areas. This risks creating a situation in which competition law compliance only wins 'airtime' in the event of things going wrong or where there is an investigation. After such an episode has passed, competition law compliance might lose its priority within the organisation again and other compliance areas might come to the fore. This in turn risks driving non-compliance. One respondent said that there were many compliance issues competing for management time and that when discussing competition law compliance 'you really need to make sure that you're speaking to the business risks.'

#### **Financial Penalties**

4.2.25 Respondents made a range of comments in relation to the approach of the OFT in setting financial penalties and these are set out in more detail in Chapter 6 of this Report. In relation to financial penalties driving non-compliance, one respondent cautioned against using high financial penalties as a means of promoting the compliance message amongst senior management and at the board level. Whilst they recognised that high financial penalties were useful in capturing the attention of senior management, they thought that the OFT must maintain proportionality. Excessively high financial penalties would be corrosive to the trust and relationship that needs to exist between business and the OFT in order for a compliance culture to be promoted, and, most importantly, would result in the board doubting the credibility of the OFT and the competition law compliance message.

### **4.3 Best practice in competition law compliance**

#### **Introduction**

- 4.3.1 One of the aims of this research was to gain practical insights, from in-house competition law compliance experts, of current best practice in the ways that they approach competition law compliance within their business. We therefore explored with respondents the competition law compliance activities that they undertook. We were interested to gain insights from respondents about the practical challenges faced by them in driving competition law compliance within their organisations. We also wished to gain insights from their practical experiences of carrying out a competition law risk identification and assessment exercise and developing appropriate risk mitigation activities for their organisations.
- 4.3.2 We have included in the report examples of the competition law compliance activities undertaken by these businesses, in order to provide ideas to businesses designing or refreshing their competition law compliance strategy and share best practice. Due to the qualitative nature of the research and its focus on larger businesses, we do not suggest or imply that all or any of these activities are necessary in order to have an effective competition law compliance culture. Instead each business should conduct its own risk identification and assessment and identify the risk mitigation activities.

#### **Obtaining the commitment of senior management to competition law compliance**

- 4.3.3 We asked respondents how they went about obtaining the commitment of senior management to competition law compliance.
- 4.3.4 Most respondents said that senior management within their organisations took competition law compliance very seriously and that there was little need to persuade them to do this. Some respondents said that in the past, there might have been a perception that competition law was a 'storm in a tea-cup' among some corporate boards, but that was no longer the case. The publicity and high-financial penalties associated with competition law infringements had changed all

that. Moreover, effective competition laws were in force in all major economies, as well as in many growing economies, and senior management in international businesses were aware of this.

- 4.3.5 One respondent said that senior management were far more conscious now of their accountability to boards and to shareholders than they might have been in the past. According to the respondent, contemporary shareholders were 'far more concerned...about the litigation profile... and the reputation of the business'. The respondent said that when engaging with senior management, they emphasised how competition law worked 'not as a blocker, but as enabling you actually to do a lot of things in a very effective way.'
- 4.3.6 A number of respondents said that senior management were concerned about their personal reputation within the marketplace, which would be adversely affected if they were to be associated with a business that had been the subject of an alleged competition law breach. This in turn focuses the attention of senior management on driving competition law compliance efforts within the organisation. One respondent said that 'no senior manager wants to stand and explain, either before the authorities or in the press, why there was any form of anti-competitive conduct'. The same respondent observed that in their opinion, modern 'shareholders and boards are quite unforgiving.'
- 4.3.7 Many respondents nevertheless said that if they were to work in organisations where the senior management commitment to competition law compliance was not already there, then they would tend to emphasise the risk of personal sanctions, in particular CDOs, the reputational impact on the business of a competition law infringement decision and the risk of high financial penalties in order to get their attention and commitment.
- 4.3.8 Some respondents referred in passing to businesses with a prior record of recidivism in competition law infringement and suggested that what had finally changed the minds of senior management in those organisations were the high financial penalties to which they had been exposed.

## **Demonstration of Senior Management Support**

- 4.3.9 As noted above, all respondents viewed senior management support as being essential for successful competition compliance. Developing upon this point, some respondents suggested that senior management should be made ultimately accountable for competition law breaches, so that they pushed the compliance agenda within the organisation as a whole. One respondent noted the competition law compliance is 'first and foremost a management issue'.
- 4.3.10 Furthermore, all respondents emphasised that senior managers should send a clear message that competition law compliance is important for employees and for the organisation as a whole, and that they are committed to it.
- 4.3.11 At a practical level, respondents mentioned a variety of ways in which senior management could demonstrate their commitment to competition law compliance, including the following:
- Managing Directors or other very senior staff can send regular e-mails or other communications emphasising the importance of competition law compliance and that they expect staff to comply with competition law.
  - Senior management can ensure that competition law compliance is made part of an organisation's employee code of conduct.
  - The Organisation's competition law compliance manuals or other training materials can include a statement by senior management as to their commitment to competition law compliance.
  - Senior management are seen to attend competition law training, in addition to more junior employees.
  - Senior management within a particular area of the business can introduce the competition law training session for that area and give their view of the importance of competition law compliance.

- The Chief Executive saying to all employees that if anyone feared any form of retribution, or victimisation for raising compliance concerns, that they could actually come directly to him to actually provide information.

### **Competition law compliance commitment and general corporate governance**

- 4.3.12 We asked respondents where competition law compliance sat within their business's overall corporate governance agenda. We wished to gain some insights as to whether competition law compliance tended to be addressed on its own or in combination with other compliance requirements.
- 4.3.13 Very few respondents said that competition law compliance occupied a unique place within their business's approach to corporate governance. Instead, virtually all respondents said that competition law compliance was part of their business's general approach to corporate governance and corporate responsibility, occupying a place alongside other compliance requirements in areas such as business law, anti-bribery and corruption, financial reporting, data protection and health and safety. One respondent suggested that compliance, including competition law compliance, was a form of 'corporate hygiene'. This tendency was particularly strong among respondent businesses in regulated sectors, where sectoral regulation compliance was 'a way of life' and was often linked to the organisation's licence to operate. Competition law compliance tended to be viewed by such businesses as simply another compliance area. Some respondents from businesses active globally noted particular affinities between anti-bribery and corruption compliance and competition law compliance.
- 4.3.14 Many respondents also said that competition law compliance was an express part of their statement of corporate responsibility and some published their competition law compliance policies on their websites. Employees were expected to help the business comply with its corporate responsibilities. Some respondents noted that it would be difficult to separate competition law compliance activities from other



legal/corporate governance compliance activities, as competition law would then need to 'fight for its own airtime' within the organisation since management has limited time to consider legal and compliance issues. One respondent said that it could be 'about grabbing attention... when there is so much else going on'.

- 4.3.15 A small number of respondents said that competition law compliance occupied a special place over and above other areas within the broader corporate governance agenda. One respondent explained that this was the case within their business owing to the nature of the business (which involved frequent contacts with competitors) and owing to a legacy of previous infringement cases involving the business. This meant that there was a tendency within their business to view competition law compliance as having even greater priority than other compliance areas.

#### **Risk-based approach to compliance**

- 4.3.16 We explored with respondents the way in which they designed and targeted their competition law compliance activities in order to address the key competition law compliance risks that their business faced. We were particularly interested to hear practical insights into how they went about this exercise and how they targeted their activities, for example at particular areas of the business, particular compliance risks or particular categories of employees. Paragraphs 4.3.24 to 4.3.28 provide insights into the way in which some respondents target their compliance activities to the key competition law risks identified.

#### **Identifying the competition law compliance risks**

- 4.3.17 We first asked respondents to describe the key competition law compliance concerns for their businesses. We were interested to hear how respondents approached the identification of the key competition law risks facing their business. We also wished to gain some insights into whether businesses viewed all competition law risks equally or prioritised some risks over others.

- 4.3.18 Virtually all respondents said that ensuring that their business did not enter into cartels was their key compliance concern. This concern was particularly acute for businesses in industries where there was frequent contact with competitors, for example through joint ventures with competitors, where competitors were also suppliers or customers or where there were active trade associations. One respondent suggested that every responsible business was 'worried about [not entering into] cartels because [cartels were] the clearest [infringement and] there's criminal sanctions involved'.
- 4.3.19 Some respondents whose businesses involved the retail sector indicated that a further key compliance concern was 'hub-and-spoke' indirect information sharing arrangements.
- 4.3.20 Respondents' responses in relation to abuse of dominance concerns were mixed. A small number of respondents said that their businesses had no real compliance concerns about abuse of dominance whatsoever. This was because their firms had relatively small market shares and operated in global markets. Most said that abuse of dominance was not a key compliance issue for them as the current time.
- 4.3.21 A minority of respondents said that abuse of a dominant position was a key compliance concern for their business, even more so than cartels. One respondent commented that within their organisation they strenuously wanted to avoid making '...the competition law mistakes of other dominant businesses'.
- 4.3.22 Some respondents said that the overall compliance concern for their businesses was not abuse of dominance, though they did not rule out that there might be parts of the overall corporate group that had dominance concerns.
- 4.3.23 A few respondents said that their businesses did not draw any distinction between compliance issues relating to anti-competitive agreements or abuse of dominance, instead saying that both areas were addressed in equal measure in their businesses. Further, a number of respondents said that they did not use legal labels (such as cartels or

abuse of dominance) to describe concepts in their compliance programmes at all and preferred to use business language (for example, 'risky business') to engage with the people in the business. One respondent said that they did not 'see life in terms of cartels, abuse of dominance or restrictive agreements ...life is more like are there any issues, what are they and how can you deal with them.'

### **Identifying appropriate competition law compliance activities to mitigate risks**

- 4.3.24 All respondents said that 'one-size fits all' or 'off the shelf' competition law compliance programmes would not drive compliance within their organisations. While there were certain standard ingredients for an effective compliance culture (such as senior management support: see for example paragraph 4.3.9, above), most respondents said that only compliance activities that were geared to the specific business needs of the audience would drive compliance within their businesses.
- 4.3.25 While most respondents tended to the view that all or the majority of employees should receive competition law training, some respondents thought that it was impracticable to train all employees and that there were some whose roles within the business meant that they did not require training.
- 4.3.26 A number of respondents said that they assessed employee training needs using a risk-based approach, based on the risk that individuals' roles might involve them in situations that were capable of giving rise to competition law issues. Within that identified group, some respondents considered that all employees should receive basic competition law compliance training but those who were at greater risk, or whose role was of a certain level of seniority, should in addition receive more in-depth training.
- 4.3.27 One respondent described a three-tiered risk classification system, where the steps taken to familiarise employees with competition law issues are proportionate to the level of competition law risk identified. The respondent stated that they rated employees as being 'not at risk',

'at risk' and 'at high risk'' 'Not at risk' staff included administrative and manual personnel, people who would have no reason to come into contact with competitors and/or who would not have access to sensitive commercial information. 'At high risk' staff included those in roles such as sales and procurement, line managers (whether or not in sales or procurement) and those who attended trade association meetings. 'At risk' encompassed all those who were neither 'not at risk' nor 'at high risk'.

4.3.28 A few respondents used similar categorisations to the above. One of these respondents described their business as having an online programme which was compulsory for everybody who was not in a low risk group, and which was then supplemented by face-to-face training for those in a higher risk group.

#### **Formal Competition Law Compliance Programmes**

4.3.29 Respondents said that achieving a competition law compliance culture in their organisations typically involved a range of measures to equip and incentivise employees to comply with competition law, including:

- a competition compliance policy that was integrated into the business's code of conduct
- an express commitment by senior management to the compliance programme
- competition law training requirements for staff, depending upon the level of competition law risk associated with their role (see above for discussion of risk assessment approaches)
- formal procedures (such as clearance processes for membership of trade associations, procedures for dealing with competition law compliance questions or 'incidents')
- disciplinary consequences for staff who breach the compliance policy, and

- ongoing review of the effectiveness of the programme and revision to it where necessary.
- 4.3.30 All respondents noted that their businesses had competition law compliance programmes containing all of the above provisions. One respondent said that their business had a 'five pillar' compliance framework. The first pillar involved management buy-in, policy and guidelines. The second was training, whether online or face to face. The third pillar was 'what we call audits and reviews'. The fourth was monitoring and reporting, which included certification and insurance letters from management and directors, 'right through to the Exco' of the organisation, which had to sign off competition or compliance. The fifth pillar was consequence management and preventative controls, including 'dismissal and sanctions, demotions, inability to apply for senior management jobs, and the fact that it is then on their record'.
- 4.3.31 Another respondent added that the real question was 'how do you really enable people to do their jobs better?' and that 'we have actually driven a policy of making compliance a competitive advantage for the business'.
- 4.3.32 Another respondent cautioned it was necessary to incentivise a compliance culture, to ensure that a compliance programme was not just 'a PowerPoint presentation' where people could just 'sign the attendance sheet, no matter whether they have slept through it'.
- 4.3.33 Some respondents volunteered to show us some of the materials that they use when promoting competition law compliance within their businesses.
- 4.3.34 These materials included interactive computer-based training involving business scenarios (often dramatised by actors) that staff were likely to encounter and which tested employees on how they should respond to such situations. Some of the scenarios demonstrated to the OFT specifically addressed how to avoid the exchange of commercially sensitive information at trade association events. Other materials included e-mail updates from Chief Executives and other senior staff

about the importance of competition law compliance and also easy-to-read written materials covering common competition law risks and/or advising how to deal with common business situations that present competition law risk.

### **Encouraging Individual Employees to Comply with Competition Law**

- 4.3.35 The majority of respondents said that they made it clear to employees that they were expected to comply with competition law, as indeed with all applicable laws. One respondent explained the rationale was that employees had to see that those who failed to comply with the law would face disciplinary consequences, saying that '[i]f you don't do that, if you don't ensure that there are those sorts of messages coming, you will not get people... to behave as you want them to.'
- 4.3.36 All organisations informed employees that involvement in competition breaches might attract disciplinary sanctions, up to and including dismissal. Some respondents noted that sanctions short of dismissal include forfeited bonuses, no salary increases and demotion. One respondent confirmed that that within their organisation, participation in a competition law infringement was 'gross misconduct, so you can be sacked for it'. The same respondent warned that '[o]n the other hand, you don't want to scare people so much that they don't tell you or own up to things...we want to encourage people to be open with us so that's the, sort of, balance we're having to strike'.
- 4.3.37 To encourage proactive competition law compliance activities, a small number of businesses explained that they had a system of 'compliance passports' or similar whereby an employee seeking promotion or a move to certain jobs within the business would have to demonstrate successful completion of competition law compliance training and/ or that in their work they adhered to the business's competition law compliance culture and values more generally.

## Competition Law Training Activities

- 4.3.38 Some respondents said that a key to making competition law compliance training relevant and well-received by employees was to focus the training on the specific business of the business and/ or business unit receiving the training and on the ways in which training could help employees, rather than using generic materials. For example, one respondent noted: that it was clearly preferable 'to have tailored approaches and... be as specific as possible to the business needs'. Having a compliance training that was calibrated to the actual business risk 'was the best way of having the message understood'.
- 4.3.39 These respondents sought to make competition law training business-focused in a number of ways, including the following:
- Stressing during training that a clear understanding of what was and was not permitted under competition law would allow employees to conduct business without fear of causing their businesses to infringe competition law.
  - Identifying those aspects that are most likely to give rise to competition law issues and focusing training accordingly. For example, in an industry where competitors regularly deal with each other, cartels could be a particular risk.
  - Reviewing and refining training programmes and advice in the light of queries and comments from the business. Appreciation of the key competition law risks for the business/business unit, on which the training is focussed, should be kept up to date.
  - Using 'business friendly' rather than legalistic language in training makes it easier for the business to understand the messages and harder to come up with a business objection.
  - Including business-specific scenarios in training instead of generic examples from pieces of legislation.

4.3.40 One respondent said that their business used externally produced online training which had been modified to deal with their business's specific examples. The same respondent said that their business used scenario-based overview training organisation that makes 'it easy to remember and easy to understand'. Another respondent said that in their view, 'a lot of people won't take it in the detail of a cartel offence or an Article 101 type [infringement] or an Article 102 [infringement]. They need to know the broad principles [and] how to use them'.

4.3.41 A few respondents did however note that while a more tailored training programme focussed on their business was generally more effective, such a programme often cost more to run than a more generic 'off the shelf' programme.

4.3.42 As regards the delivery of the training, the majority of respondents said they employed a range of training methods in their competition law compliance programmes. The broad categories of training methods identified by respondents were as follows:

- **Face-to-face.** All respondents identified this as a key method, some of them noting that they used it as an initial training tool to cover basic, overarching, competition law principles. A number of these respondents said that face-to-face training was followed up with other methods to reinforce the initial training.
- **E-learning.** Many respondents identified this as another key tool. Types of e-learning described by respondents ranged from simple online quizzes to more detailed, interactive training where employees watched videos of business scenarios and answered questions on the competition law issues raised. It was noted that, if well done, interactive methods of the latter sort could be a particularly effective tool, although they could be among the more expensive training options.

4.3.43 A number of respondents noted the importance of keeping training relevant and interesting in order to engage the attention of the staff and maximise the usefulness and impact of the training. Additionally, most



respondents said that it was also important to require employees to pass a test to ensure that they had taken the training on board.

### **Accessible Legal Advice and Guidance**

4.3.44 A number of respondents said that, in addition to training, it was helpful to have guidance (including written materials) and (in-house or external) legal advisors available to employees to deal with ad hoc competition law questions that employees might wish to ask. These respondents highlighted a variety of ways in which they provided guidance to employees:

- General guidance on the business intranet.
- A telephone helpline run by internal or external lawyers. In this context, some respondents noted that internal lawyers sometimes understood the business better and accordingly could sometimes give advice that was more targeted to the business and/ or that was perceived to have more credibility by the business.
- Ensuring that legal staff were approachable and that staff knew whom they should approach for advice and their contact details.
- Guidance in the business's code of conduct.

4.3.45 Some respondents suggested that the lack of legal professional privilege in European Commission investigations can complicate the provision of legal advice. One respondent said that they operated on the understanding that their in-house advice attracted 'no legal privilege... our whole education system is on the basis that legal advice given on competition law matters [is not privileged]'.

### **Mechanisms for employees to report problems/concerns**

4.3.46 A number of respondents said that, as well as giving employees access to guidance on competition law issues, an effective compliance programme needed to provide mechanisms for them to raise competition concerns or problems.

- 4.3.47 Certain businesses interviewed said that they have anonymous 'whistle-blowing hotlines', to which competition law compliance concerns can be reported and acted upon. These were either run internally or by an external provider such as an external law firm. Some respondents noted that such hotlines were rarely set up solely to address competition law issues, but dealt with a range of potential compliance concerns, including money laundering, anti-bribery and corruption, and health and safety issues. Some of these respondents acknowledged that, for such mechanisms to be credible, reports to such whistle-blower lines had to be followed up and further appropriate action taken where necessary. One respondent emphasised the importance of following-up such reports, adding that if 'we think there might be an infringement then that would be investigated'. Another respondent said that such a line is 'a protection for the individual, and it's a protection for the business too'.
- 4.3.48 One respondent noted that their business did not guarantee its whistleblowers immunity from internal sanctions. This respondent considered that 'the problem with giving someone blanket immunity when they've done something like be involved in a cartel knowingly, is that you actually send the wrong message to the organisation by allowing someone to continue within the organisation who has done that'.

### **Mock Dawn Raids**

- 4.3.49 Respondents had differing views on the value of carrying out mock 'dawn raids', designed to mimic the unannounced inspection visits that can be carried out by some competition authorities, including the OFT. Some respondents thought that whilst mock dawn raids could assist a business in terms of having processes in place to deal with an unannounced inspection visits and showing people how to respond to the situation, they were of limited value in helping to secure competition law compliance. For example, one respondent considered such a tool to be of 'limited impact' and one which 'involves significant disruption of the business operation'.

- 4.3.50 Those who thought that mock dawn raids could assist competition law compliance efforts thought that they were useful in focusing the minds of employees on the potentially serious consequences of breaching competition law.
- 4.3.51 One respondent observed that the absence of legal professional privilege for in-house legal counsel's advice made mock dawn raids a complicated and expensive tool, saying '[w]e obviously had to get an external law firm to do it because of the privilege situation with the... EU'.

#### **Competition Law Compliance Audits**

- 4.3.52 A number of businesses said that they carried out competition law audits of their business, or parts thereof, as a 'health-check' of the impact of their competition law compliance activities. Typically, such an audit would involve reviewing documents in the area being audited and speaking to employees about their internal processes and understanding of competition law. The businesses that chose to undertake audits thought that such audits could be useful in two ways. First, audits can help uncover potential breaches of competition law and secondly they can be used to check whether a business's internal competition law compliance controls are working. In particular, they might identify breaches of the business's competition law compliance programmes which might require additional advice or training to business people.
- 4.3.53 A number of respondents noted that audits could be conducted by internal staff or by professional external auditors or law firms and that, while the latter could be more effective because of their independence and the fact that they were strangers to employees in the area being audited, external audits could be very expensive.

#### **Monitoring and follow-up of Competition Law Compliance Activities**

- 4.3.54 Many respondents said that getting the monitoring and follow-up to competition law compliance training right was just as important as actually delivering training. In terms of monitoring, many respondents said it was important to identify which roles required training and to record when staff had completed relevant training. In this context, some

respondents said that an effective way of encouraging employees to take training was to send reports to the line managers of employees who had not completed training within the allotted time period.

- 4.3.55 Most respondents said that it was important to require employees to pass a test to ensure that they had understood the competition law training they had received. Respondents mentioned a variety of consequences that might ensue from an employee failing to pass the training, including the issue being relevant for performance appraisals, for decisions on whether a bonus was to be paid and/or for decisions on whether the employee could apply for promotion or even lateral transfer. Certain respondents noted that when an employee failed a test, they were required to retake it until they passed.
- 4.3.56 A number of respondents said that they monitored and put specific controls in place in relation to known risk areas for their businesses. A few respondents compared this with the need to do the same in a health and safety context. For example, one respondent expressed the view that compliance can be achieved ‘...through two routes mainly. One is behavioural, and one is what I call engineering’, the latter of which referred to the implementation of risk management systems and procedures.
- 4.3.57 A number of respondents gave the example of monitoring membership of trade associations and attendance at trade association events, as activities targeted at known risk areas. One respondent said that they required employees to register their membership of any trade associations, as well as the competition law compliance policies of the trade associations, for review. Another respondent said that they ‘required attendance [at trade association events] to be pre-approved’.
- 4.3.58 Another respondent said they were aware of businesses in other industries which required employees to undergo specific competition law compliance training before attending trade association meetings. Such specific training would cover a range of matters including how to react if issues raising competition law risk are discussed.

4.3.59 A smaller number of respondents also described contract management systems of varying degrees of complexity through which significant potential contracts and tenders are reviewed for competition law compliance pre-approval before the business goes ahead. One respondent stated that this was a laborious and time-intensive option, but that it meant that 'no contract, whether it's a deal or a miscellaneous matter, get any kind of business approval or signature without being reviewed'.

#### **Encouraging business ownership of competition law compliance risks**

4.3.60 Many respondents noted the importance of getting the business to 'own' competition law compliance risks. One respondent said that it appointed a person within each business unit to be a 'compliance champion' responsible for promoting compliance with key legal responsibilities within their area, including competition law and reporting back to senior management on compliance steps they have taken and the effectiveness of such steps. Another respondent said that they encouraged business units to embed competition law compliance planning in their annual risk and business planning.

4.3.61 One respondent described another way in which it used individual incentives to encourage people within business units to take competition law and other compliance rules seriously. Where one or more individuals within a particular business unit are involved in a breach, that respondent said that the entire business unit forfeits their bonus.

#### **Budgetary considerations**

4.3.62 Many respondents emphasised that an effective competition law compliance programme required a significant financial investment in internal and external resources, which could come under pressure especially in the current economic climate. Some respondents said that they found it helpful to quantify the investment in such training on a per capita basis and then to compare that amount with the maximum financial penalty of 10 per cent of worldwide turnover that might be

imposed for an infringement of competition law. Looking at it in this way showed a potential 'return on investment'.

## **5. RESPONDENT SUGGESTIONS ON WHAT MORE THE OFT COULD DO TO DRIVE COMPLIANCE**

5.1 We are keen to understand how we can best use our limited resources to support businesses wishing to comply with competition law – both in conducting a competition law risk assessment and in identifying appropriate activities and actions to mitigate those risks. Respondents gave us their views on the role the OFT could play in encouraging and fostering compliance with competition law by businesses. This section summarises respondents' views regarding:

- whether, when and how the OFT should recognise a pre-existing compliance culture within a business when setting a penalty for an infringement, for example where the business believes the breach was caused by a 'rogue' employee,<sup>25</sup> and
- other measures the OFT could take in order to increase and improve a competition law compliance culture.

### **Respondents' views on how the OFT should treat compliance programmes when setting penalties for an infringement**

5.2 Many respondents expressed a desire for competition authorities (including the OFT) to offer discounts from financial penalties where the business involved in an infringement had an effective pre-existing competition law compliance programme but, despite their efforts, a breach had occurred for example if the breach was caused by a 'rogue' employee or involved an unclear area of law. These respondents considered that businesses which had committed considerable resources to competition law compliance should be rewarded with a discount from the financial penalty in these circumstances in order to provide an incentive to invest time and money in competition law compliance.

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<sup>25</sup> See paragraphs 4.2.7 and following for respondents' views on what constitutes a 'rogue' employee.

- 5.3 One respondent said that businesses needed to be incentivised to implement compliance programmes. That same respondent thought that if a business in spite of its best compliance efforts had a 'rogue' employee that caused the business to infringe, 'that business should not be penalised as if it was corporate policy to drive that infringement'. Doing so would be 'grossly unfair'. The same respondent said that 'there should be some incentive for compliance' to help compliance efforts 'get the internal allocation of resources'.
- 5.4 A number of respondents considered that competition authorities were sending out mixed messages about how pre-existing competition law compliance programmes would be taken into account when setting financial penalties and whether such a programme could be regarded as being effective despite the infringement having occurred. These respondents considered that the policy needed to be clear and consistent. One respondent expressed concerns that they had heard 'some agencies say if there's any violation and [the business] have a compliance programme, then you should be punishing them for having a compliance programme that doesn't work'.
- 5.5 All the respondents expressed the view that the OFT's penalties policy should give some recognition to businesses that have taken substantial efforts, prior to investigation, to introduce a comprehensive compliance programme and instil a culture of compliance within the business. One respondent said that 'I think there needs to be some reflection of the business's own efforts to secure compliance' in any penalties imposed by a competition authority.

#### **Compliance as an aggravating factor**

- 5.6 A large proportion of respondents considered that a pre-existing compliance programme that has failed should not automatically be treated as an aggravating factor, otherwise this would lead to a perception that a business is 'damned if it has a compliance programme, and damned if it doesn't'. Another respondent said



that '[c]ompliance programmes should be allowed to be a shield for the business, and not a weapon to be used against the business'.

- 5.7 Moreover, some respondents considered that automatic treatment of a compliance programme as an aggravating factor would disincentivise businesses from fostering a competition law compliance culture and making funding available to introduce such a programme. One respondent suggested that some businesses might even say that '[i]f a compliance programme is going to be held against me, I might as well not bother having one'.
- 5.8 Some respondents also expressed the view that one instance of non-compliance with competition law does not necessarily mean that a compliance programme should be considered unsuccessful (for example, health and safety programmes are generally considered successful despite the occasional breach).

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

- 5.9 The vast majority of respondents considered that where a business and its senior management had at group-level made 'reasonable' efforts to introduce a comprehensive and effective competition law compliance programme and to maintain a genuine competition law compliance culture within an organisation, the OFT should reduce a business's fine to reflect this. One respondent said that 'I think the fact that you can have a compliance policy and get no credit for it is basically unfair'.
- 5.10 Another respondent considered that a reduction of between 10 and 30 per cent would be appropriate, depending on the case. Generally, respondents considered that the possibility of such a reduction in fine would act as a driver of competition law compliance. For example, one respondents stated that that 'would really help is if people see the value of it. People need to... see that there's a benefit [to having a compliance culture]'
- 5.11 Some respondents commented that the OFT should not, however, have a policy of automatically discounting a fine merely because a pre-existing compliance programme was in place. Rather, discounts should

be given only where a business has taken steps to put in place an effective competition law compliance culture. A business with a 'sham' or 'smokescreen' compliance programme – which should become obvious on close scrutiny – should not be rewarded, and could even be an aggravating factor.

- 5.12 Certain respondents noted the difficulty that would be faced by competition authorities trying to assess from the outside whether or not a business had an effective competition law compliance culture, in circumstances where a breach of competition law had occurred.
- 5.13 Almost all respondents considered that awarding a discount for having a pre-existing competition law compliance culture was particularly important where the infringement of competition law was brought about through the actions of a 'rogue' employee, despite a business's best efforts to create an effective competition law compliance culture.
- 5.14 Where a breach of competition law had been caused by a 'rogue' employee, a large proportion of the respondents considered that the OFT should look into the reasonableness of the steps taken, or that could have been taken, by the business to prevent the infringement from taking place. One respondent said that 'I don't see why that shouldn't be taken into account in the fine'.
- 5.15 However, a small number of respondents considered that, in many cases, an infringement would involve a number of employees acting together, including senior staff. In these cases, they considered that the OFT should take into account the activities of a 'rogue pocket' of employees in assessing the effectiveness of a business's attempts to create a competition law compliance culture.
- 5.16 A large proportion of respondents suggested that the OFT could, based on an objective assessment, give greater discounts to reward competition law compliance cultures that it considered to be more effective and where there was evidence that competition law compliance had been taken seriously within the business.

- 5.17 Many respondents considered that any decision by the OFT to award a discount in recognition of a business having in place an effective competition law compliance culture should be combined with clear reasoning in the published decision explaining the factors pertinent to the OFT's decision to do so.
- 5.18 In this context, some respondents considered that the OFT could take into account a number of objective criteria or use a 'ratings system' as part of this assessment. This might include some or all of the following:
- the level of commitment from senior management
  - the proportion of the workforce that have been trained
  - the maintenance of attendance records
  - the quality of the training materials
  - keeping records of compliance queries
  - regularly updating training materials and holding training sessions
  - whether the business publishes its compliance materials, and
  - whether the business employs an in-house competition law specialist.
- 5.19 However, a large number of respondents cautioned against allowing penalty discounts for competition law compliance activities to encourage the development of a 'box-ticking environment'. One respondent suggested that '[i]t depends on whether you pay lip service as a business or not'.
- 5.20 These respondents also stated that the assessment of the effectiveness of a competition law compliance programme is a 'very important part of the decision [to fine]' and that therefore the OFT should invest the time needed to conduct this assessment on a case-by-case basis. One respondent considered that the burden should be on the business to prove that it has taken all possible measures to introduce a

comprehensive competition law compliance programme and maintain a genuine competition law compliance culture, acknowledging that 'the agencies, quite rightly, don't want to be supervising the...internal compliance activities of businesses'.

- 5.21 A further respondent advocated for the OFT to recognise that, where the business (a) has a demonstrable competition law compliance culture, (b) has articulated to employees its competition law compliance expectations, and (c) has made competition law compliance training and materials available to them, the rogue must be attributed with knowledge of the competition law compliance culture and therefore as being personally responsible for the breach.

#### **Respondents' views on OFT's general fining policy**

- 5.22 Some respondents commented on the OFT's general approach to its fining policy, expressing mixed views as to whether the OFT's current approach was appropriate.
- 5.23 A small number of respondents expressed the view that larger fines for competition law infringements could help to encourage a culture of competition law compliance to develop. These respondents felt that shareholders had a very low tolerance for fines of this type and that, accordingly, businesses would be motivated to adopt the correct conduct. One said that '[i]f [the OFT] fines heavily, [then businesses] will find a way of improving their [compliance] systems'.
- 5.24 One respondent recognised that higher fines would be more likely to capture the attention of senior management and the business. One respondent commented that the fines imposed by the OFT should be used to compensate the consumers that have suffered harm as a result of the infringement.
- 5.25 A few respondents felt that the OFT should consider adopting a different strategic approach to fining. These respondents felt that the OFT currently focuses on sanctions and penalties, which emphasises the adversarial nature of proceedings. An alternative approach would be for the OFT to focus more on encouraging consensus, co-operation and

trust, which would involve parties engaging more openly and frankly from the outset. One respondent suggested this would result in businesses engaging more constructively with the OFT on potential compliance issues but would still reserve the OFT's right to act with appropriate severity if a case required it, for example because the business was aware of the rules and the clear expectations upon them as to the way to behave.

- 5.26 One respondent felt that the level of fines must be controlled to ensure that the credibility of the OFT and the proportionality of its enforcement measures are maintained.
- 5.27 A few respondents considered that the fine imposed by the OFT should be based on the turnover of the affected business unit, rather than the worldwide turnover of the business as a whole. These respondents were of the view that this would be appropriate in particular where the parent business has done everything possible to avoid non-compliance, for example where the infringement is caused by a 'rogue' employee within a business unit.

#### **Respondents' views on other measures the OFT could consider**

- 5.28 We asked respondents what more the OFT could do in order to encourage a businesses to foster a competition law compliance culture. This section summarises the ideas suggested to us by respondents.

#### **OFT Guidance on Competition Law Compliance**

- 5.29 Most respondents suggested that the OFT should update its guidance on the elements it expects competition law compliance programmes to contain, the standards which competition law compliance should achieve and how compliance efforts would affect its decisions. One respondent noted that 'competition authorities should want businesses to do the best they possibly can to make sure that their employees comply' and should accordingly provide guidance. Some respondents recognised the value of the current quick guide, OFT 424, *How Your Business Can Achieve Compliance* and suggested that OFT could usefully update and re-launch this document.

- 5.30 As to the format of guidance, most respondents suggested that a principles-based approach is more appropriate than a rules-based approach.
- 5.31 The majority of respondents who advocated OFT guidance on competition law compliance suggested that the OFT could share the findings from the Drivers of Compliance project so that businesses could learn and develop best practice in competition law compliance programmes from each other. In this way the OFT would be taking the lead in sharing information with business on how other businesses address competition law compliance in terms of approach, architecture, procedures and corporate commitment. For example, one respondent noted that 'some businesses do things better than others and some sectors do things better than others'.
- 5.32 These businesses felt that they would challenge themselves to meet such standards if they were published by the OFT, with one business stating, 'if it was in OFT guidance, I'd want to make sure that our programme fulfils as many of those requirements as possible'.
- 5.33 Some respondents thought that the OFT should approve competition law compliance programmes as it does in other areas (such as consumer codes of conduct) or could make public announcements about particularly noteworthy competition law compliance efforts, for example at the conclusion of an OFT investigation. These respondents believed that this would help to promote the value of a business's competition law compliance activities internally and promote the benefit of the compliance efforts to the senior management on an ongoing basis, making it easier to secure the internal allocation of resources. One respondent noted 'business needs the OFT's help to make sure that internal resources continue to be put into competition law compliance efforts'.
- 5.34 In relation to approval of compliance programmes, one respondent suggested that the OFT could consider endorsing or approving compliance materials that are produced by trade associations. These

materials could then be used by businesses in the knowledge that they have been checked by the OFT.

- 5.35 Conversely, some respondents counselled against the approval of compliance materials. These respondents did not think that it was the OFT's role to mandate or recommend a particular form of competition law compliance programme and felt that this risked encouraging a 'sham' programme, which would amount to nothing more than a box-ticking exercise. These respondents believed that each business needed a bespoke programme and the content of the programme should not be abstract. Instead the programme should be designed around the way the business operates and be a part of the way the business approaches business. One respondent said that the 'approval of compliance programmes is not an efficient use of OFT resources and might result in a culture of ticking boxes'.
- 5.36 A number of respondents said that a risk-based approach was key when considering the introduction of a competition law compliance programme. Some respondents felt that the OFT could usefully play a role in this area by identifying questions that could form part of a risk matrix which businesses could apply in order to spot potential competition law risks and determine how their competition law compliance programme could be tailored. For example, one respondent stated that 'it would be very helpful for OFT to identify the relevant questions which the business could use to bespoke its compliance programme'.
- 5.37 This respondent suggested that the questions which such a risk assessment might incorporate include:
- How is competition law compliance training rolled out within the business to new staff?
  - How closely are the activities of sales staff monitored by the business?
  - Has the business recently been involved in a merger or acquisition?

- Is the business proposing to do business in a territory that it has not previously? Is the business proposing to enter into a new product market?
- Is the business the subject of an ongoing investigation by a competition authority? Has the business been the subject of an investigation by a competition authority in the past?

### **OFT Guidance on the Law**

- 5.38 A number of respondents suggested that the OFT should give more guidance on what they perceived to be unclear or complex areas of the law, such as 'hub and spoke' indirect information sharing agreements, other forms of information exchanges, legal professional privilege and government policy initiatives. One respondent said that 'if [the OFT issued a general guidance note and had a cross-industry discussion about that, [that would be]...really helpful'. Another said that 'clearer guidance in terms of safe-harbours would be really appreciated'.
- 5.39 They considered that it was currently difficult for in-house counsel to provide practice advice to the business in these areas, which resulted in competition law becoming an obstacle to doing business and could have a detrimental effect on their attempts to achieve a competition law compliance culture. One said that in-house counsel risked losing '...the trust that you've established with [the business people] as being reasonable and giving them advice that is sound and makes sense and appeals to them'.
- 5.40 A few respondents suggested that it would be useful for the OFT to publish example scenarios of what it considered to be competition law non-compliance (especially in relation to legal concepts that are less clear and more complex). One respondent said that this would help increase the levels of awareness and could be used by in-house legal teams as part of their compliance programmes. One respondent suggested that OFT should adopt an approach that is 'more collaborative' when addressing these areas with business.



- 5.41 Opinions as to the content of the guidance were more mixed. For example, some respondents felt that any guidelines should be simple and not address detailed legal principles, with one respondent noting that 'guidelines need to be very simple because business-people are never going to analyse competition problems for themselves but do need to know and when to raise issues with the legal team'. Another respondent added that 'I think guidelines really work'.
- 5.42 Other respondents commented that guidance should be more detailed, with very clear statements on what is permitted and what is not permitted. These respondents felt that overly simplistic guidance risks stifling business.
- 5.43 Due to the importance of senior management in promoting the competition law compliance message within business, some respondents suggested it might be useful to produce guidance that was specifically designed to educate directors and the senior management team. This could be framed as business guidance and might involve using some of the pre-existing mediums that provide general governance guidance to directors. This guidance could incorporate information about the role and responsibility of directors and senior management in terms of competition law compliance and might also incorporate information on the use of the CDO sanction against directors.

#### **OFT compliance training materials and programmes**

- 5.44 Many respondents thought it would be helpful if businesses had access to OFT-produced training materials on competition law compliance. One respondent said that the 'OFT can't train everybody, but it can obviously play a significant part in creating a training and education environment'. Another said that 'creating a culture necessitates addressing the educational aspects'.
- 5.45 Respondents had differing views as to what compliance materials would be useful. Some respondents suggested that OFT-produced competition law compliance videos would be helpful, whereas others said that interactive training and materials available directly from the OFT website

would be useful because they could then be accessed easily by a business. One respondent suggested such training materials might be based on the facts involved in real cases (for instance, the marine hose cartel). In relation to compliance materials there was recognition that some businesses (particularly SMEs or smaller business units of larger businesses) might not have the necessary budget and/or expertise to run a competition law compliance programme themselves and that the OFT could play an important role in this context. Even for larger businesses, a standard OFT compliance programme could be a useful resource which the business could refer to and tailor its own programme accordingly.

### **Business engagement**

- 5.46 The majority of the respondents welcomed the opportunity to engage with the OFT on competition law compliance and commented that the OFT, historically, has not been pro-active in seeking to engage with the business community on the subject of competition law compliance. Many of these respondents emphasised that the OFT should continue to listen and discuss competition law compliance with business and champion the competition law compliance message to business through industry groups, director groups and in-house counsel forums. One respondent suggested that such a dialogue would mean that the 'OFT is not just seen as an arms-length [competition authority]. Business [would] understand where the OFT is coming from, and OFT can understand the pressures and reality of business'.
- 5.47 Some respondents felt that competition law guidance documents and materials could only go so far and that, in some cases, it is necessary to promote the message directly to business through face-to-face meetings. Suggestions as to the format of this engagement included annual workshops or webinars to highlight key competition law compliance issues or events hosted in conjunction with trade associations or industry groups.
- 5.48 One respondent noted that there is scope for informal discussions between the OFT and business (and, in particular, senior management) or trade associations to promote the OFT's understanding of business. It

was felt that if these discussions took place without any preconceived agenda or investigative context, it could be helpful in increasing the industry knowledge of the OFT.

### **International best practice**

- 5.49 Some respondents felt that there was currently an inconsistent approach to competition law compliance among different competition authorities and that the availability and content of guidance and materials varies by jurisdiction. One respondent suggested that it would be useful if an overarching international standard was adopted, which set out international best practice principles for competition law compliance. Another respondent said it would be particularly useful if there was a best practice standard for competition law compliance which applied throughout the EU, which could be adopted through the European Competition Network.

### **Opportunity to seek informal guidance.**

- 5.50 A small number of respondents felt that the ability to seek informal guidance from the OFT would be useful in driving competition law compliance, as it would give in-house counsel the certainty that was required in order to advise the business.

### **Helpline**

- 5.51 A number of respondents explained that they operated confidential telephone hotlines for employees to report, amongst other things, competition law infringements. One respondent suggested that the OFT could operate a hotline which could be made available to report instances of non-compliance and provide a basic guidance service, although they did recognise the resource implications involved in such an initiative.

### **Industry secondment**

- 5.52 One respondent said that business and competition authorities alike could benefit from staff secondments to each other, as 'the overall level

of knowledge on both sides of the equation improves'. The respondent noted that the OFT already recognised the potential value since it took private practitioners on secondment. In the same way, industry secondments could be mutually advantageous: in-house counsel could benefit from the experiencing cases from a competition authority's perspective and, in turn, the competition authority could benefit from the in-depth business knowledge of the in-house counsel. The reverse arrangement could also be set up, with competition authority staff being seconded into business.

### **Education**

- 5.53 One respondent said that the OFT might consider taking a greater role in encouraging universities and colleges to teach the benefits and role of competition law compliance in legal and business-based programmes.

### **Publicity**

- 5.54 As a general point, one respondent said that daily publicity of competition law (including infringements and sanctions) was very useful in maintaining the focus and attention of directors because it made the issues 'real to them'. In light of this, the OFT should seek to continue to publicise competition law widely, although the respondent counselled against unnecessary scaremongering.

## 6 OFT RESPONSE TO RESPONDENT SUGGESTIONS ON WHAT MORE THE OFT COULD DO TO DRIVE COMPLIANCE

- 6.1 It was clear from the interviews that many businesses adopt innovative and practical ways in which to seek to achieve a competition law compliance culture in their business. We appreciate these efforts and encourage businesses to continue their commitment to competition law compliance.
- 6.2 We have given careful consideration to the suggestions made by respondents (set out in chapter 5 above) on what more the OFT could do to drive compliance with competition law. This chapter contains our response to the various suggestions made.

### Impact of pre-existing compliance programmes on penalties for competition infringements

- 6.3 As set out at paragraphs 5.2 to 5.21 above, respondents made a number of suggestions about the impact that pre-existing compliance programmes should have on penalties for infringements, with most suggesting that a discount should be given from the penalty where the business had an effective competition law compliance culture yet, despite their best efforts, a breach had occurred. Some respondents suggested that such an approach might be particularly justified where the breach had been caused by a 'rogue' employee.

#### The OFT's current approach and practice

- 6.4 We note that our current penalties policy already recognises that it might be appropriate to reduce a penalty for a business's compliance activities. Specifically, paragraph 2.16 of OFT 423, *OFT's Guidance as to the Appropriate Amount of a Penalty* ('the Penalties Guidance') states:

'The basic amount of the financial penalty...may be increased where there are other aggravating factors, **or decreased where there are mitigating factors.**

**Mitigating factors include:**

**...adequate steps having been taken with a view to ensuring compliance with Articles [101 and 102] and the Chapter I and Chapter II prohibitions...'**

(Emphasis added).

- 6.5 In accordance with the approach set out in the Penalties Guidance, we consider the existence or adoption of a competition law compliance programme on a case-by-case basis to determine whether a discount should be awarded in the circumstances of the particular case.<sup>26</sup>
- 6.6 We have not made any decisions under the CA98 in which the existence of a compliance programme was considered to be an aggravating factor in determining the appropriate financial penalty, that is we have not to date increased a financial penalty on the basis that a compliance programme has been unsuccessful in preventing the breach.

**Going forward**

- 6.7 We have considered carefully the respondents' suggestions, but have decided not to change our penalties policy in relation to compliance programmes. That said, we wish to take this opportunity to clarify our

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<sup>26</sup> For example, in the *Construction* decision, the OFT was satisfied that in the case of around 80 parties that they had adequately demonstrated that they had taken positive steps to introduce a formal compliance policy that was appropriate for the size of the undertaking in question (taking account in each case of all the entities forming part of the undertaking concerned), and to ensure that all appropriate staff had been made properly aware of their competition law obligations. For these parties, the OFT considered that discounts in the range of five-10 per cent was appropriate. The remaining parties did not however provide the OFT with sufficient evidence that they had taken sufficient positive steps to introduce a formal compliance programme appropriate for the size of the undertaking (taking account in each case of all the entities forming part of the undertaking concerned), and therefore received no discount for compliance. See OFT decision of 21 September 2009 *Bid-Rigging in the Construction Industry in England* (Case CE/4327-04) at paragraphs VI.316 to 319.

current policy since this might address some of the concerns expressed by respondents.

- 6.8 Our basic starting position with regard to competition law compliance programmes when setting financial penalties is **neutral**, that is, we do not view the existence or adoption of a compliance programme as automatically leading to a decrease or increase in the level of financial penalty. The key reward of an effective competition law compliance programme is the avoidance of an infringement decision in the first place.
- 6.9 Where, in an individual case, we consider that the existence or adoption of a compliance programme should be regarded as a mitigating factor, we will reduce the financial penalty by up to 10 per cent.
- 6.10 We consider that larger discounts for compliance programmes would be undesirable for two reasons. First, the availability of a large discount might have an adverse impact on the deterrent effect of the potential financial penalties, perhaps even having an adverse effect on compliance activities. Second, such a policy could encourage the adoption of 'sham' compliance programmes in order to qualify for a discount.
- 6.11 The fact that a business has adopted a compliance programme does not negate the need for deterrence. The need for deterrence is forward-looking and is directed at securing ongoing incentives for compliance, both by the business on which the penalty is imposed and on other businesses. The adoption of a compliance programme, however laudable, is no substitute for the incentives that must govern management both within the infringing business and in businesses more generally. The OFT needs to ensure that the right incentives are in place to achieve and maintain compliance. In particular, the effectiveness of a penalty in deterring infringements by other business is to a large extent likely to depend on the degree to which the final penalty figure is one

that will be perceived by third parties as representing the seriousness of the infringement, in the light of the business's size and turnover.<sup>27</sup>

- 6.12 That said, we agree with the respondents who commented that the existence of a competition law compliance programme **should not generally be regarded as an aggravating factor**, that is, the financial penalty should not generally be increased to reflect the fact that the compliance programme did not prevent the breach from occurring. We agree that such an approach could disincentivise businesses from investing resources in competition law compliance activities. We wish to encourage businesses to engage in competition law compliance and not to deter them from doing so.
- 6.13 It would only be in exceptional circumstances that we can foresee regarding a pre-existing compliance programme as an aggravating factor. This might be the case, for example, where there is evidence that a competition law compliance programme was used to conceal or facilitate an infringement or to mislead the OFT during its investigation into an infringement.
- 6.14 We do not consider it appropriate to give prescriptive guidance as to the specific type of competition law compliance activities that a business should undertake in order to merit a discount from a financial penalty. We fear that such a rules-based approach would result in a box-ticking approach to compliance. It might also create incentives for the adoption

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<sup>27</sup> The OFT's approach in this regard is consistent with the principles set out by the General Court in Case T-13/03 *Nintendo v Commission* (judgment of 30 April 2009) at paragraphs 72 to 74: '...when assessing the need to increase the amount of the fines in order to ensure that they have deterrent effect the Commission is in no way required to evaluate the likelihood that the undertakings in question will reoffend...[T]he applicants cannot therefore claim that the Commission infringed the principle of proportionality on the ground that the amount of the fine could be increased by the Commission in order to ensure its deterrent effect only if there was a risk that the undertakings concerned might infringe the competition rules again. As the Commission has stated, the pursuit of deterrent effect does not concern solely the undertakings specifically targeted by the decision imposing fines. It is also necessary to prompt undertakings of similar sizes and resources to refrain from participating in similar infringements of the competition rules.'



of 'sham' compliance programmes or policies matching the criteria listed.

- 6.15 Instead we advocate a risk-based approach to competition law compliance. Our proposed risk-based framework going forward is at paragraphs 6.36 to 6.49 below. We will therefore assess on a case by case basis whether the activities undertaken by an individual business should be regarded as a mitigating factor.

#### **The 'rogue' employee**

- 6.16 We have considered carefully whether our penalties policy in relation to compliance policies should be changed to deal with the situations in which the breach has been caused by a 'rogue' employee in an otherwise compliant business. On balance, we do not consider it would be appropriate to do so for the following reasons.
- 6.17 First, we consider that a business with an effective competition law compliance culture will often be one in which such activities by 'rogue' employees are likely to be detected and dealt with, for example through the business approaching us under our leniency programme and/or the employee facing internal disciplinary action.
- 6.18 Secondly, doing so risks creating incentives for businesses to find a 'scapegoat' within the organisation to present as a 'rogue' in order to obtain a discount from the penalty rather than addressing the underlying compliance issues.
- 6.19 Thirdly, the OFT considers that doing so might undermine the twin objectives in the OFT's Penalties Guidance of setting penalties that reflect the seriousness of the infringement and deter undertakings from committing competition infringements. Such a situation is different from the OFT leniency programme, under which immunity or significant discounts on the amount of the penalty have a real law enforcement benefit by uncovering and assisting in bringing enforcement action against cartels.

### **General fining policy**

- 6.20 As set out at paragraphs 5.22 to 5.27 above, respondents expressed mixed views on the general level of financial penalties imposed by the OFT. Some respondents thought that high fines would encourage greater compliance, while a small number of respondents thought that lower fines and a more collaborative approach to dealing with infringements would achieve greater competition law compliance.
- 6.21 We have no plans to change our general Penalties Guidance at this time, but note that there was no consensus amongst respondents as to whether higher or lower financial penalties would encourage greater compliance.

### **OFT Guidance on compliance**

- 6.22 As set out at paragraph 5.29 above, most respondents thought that it would be helpful for the OFT to update its current guidance to businesses on competition law compliance, in particular on the key elements of an effective compliance programme and of the way in which businesses should implement a risk-based approach to compliance.
- 6.23 We recognise that we have a role to play in providing guidance to help businesses comply with competition law. We agree that our current quick guide on competition law compliance, OFT 424, *How Your Business Can Achieve Compliance*, should be updated to provide a clearer framework for businesses seeking to drive a competition law compliance culture within their businesses. We agree with many respondents that this guidance should not be overly prescriptive to avoid creating a 'box-ticking' approach and discouraging businesses from carrying out a risk-based assessment of their own compliance needs. Accordingly, while we intend to update our existing guidance on compliance to reflect the findings of this project, the guidance will not prescribe a 'preferred' compliance programme. Rather, it will set out an approach to identifying, assessing and mitigating against competition

law compliance risks. We have included in paragraphs 6.36 to 6.49 below our proposed future approach to competition law compliance.

### **OFT compliance training materials and programmes**

- 6.24 As set out at paragraphs 5.44 and 5.45 above, some respondents suggested that the OFT could itself produce competition law compliance training materials or programmes to assist businesses seeking to comply with competition law. Whilst we recognise that these options might be of benefit to some businesses, we are also aware that such materials might equally be produced by external or in-house counsel.
- 6.25 Paragraphs 5.33 and 5.34 note the suggestions that the OFT could endorse compliance programmes; either for individual businesses or in relation to programmes and materials that are produced by trade associations. We note this suggestion but consider that the OFT's resources, at least at the present time, are better spent on pursuing some of the other ways respondents considered the OFT could help businesses achieve competition law compliance.
- 6.26 We note that we are currently considering the implications of this report for SMEs. Some respondents highlighted that such materials might be particularly beneficial for SMEs, who might not have the resources to pay for their own materials to be developed. We will therefore consider whether the development of such resources would be a good use of our limited resources.

### **International best practice**

- 6.27 Paragraph 5.49 above notes that some respondents considered that inconsistent approaches to compliance programmes in different jurisdictions and the lack of international 'standards' of compliance made it more difficult for businesses to comply with competition law. The OFT recognises that this might present challenges, but considers that some of the other suggestions made are of higher priority at the current time in order to drive compliance in businesses in the UK.

## General guidance on the law

- 6.28 As set out at paragraphs 5.38 and following, a number of respondents considered that the OFT could provide more guidance on the application of competition law to help businesses comply with competition law, especially where they perceived the law to be unclear or complex. We note that since 2004 businesses have been required to self-assess whether they comply with competition law. That said, we recognise the benefits of businesses and their legal advisers having a clear understanding of competition law, especially where the law is developing or complex.
- 6.29 With this in mind, the OFT has recently begun trialling a new short-form opinion process under which businesses can seek the OFT's opinion on prospective horizontal collaboration agreements that raise novel or unresolved questions of competition law. This has been introduced in response to concerns expressed by businesses that uncertainties over competition law were preventing some beneficial collaboration agreements from going ahead. The short-form opinion will be published in order to provide guidance to the wider community about the application of competition law, rather than only to the parties to the proposed agreement. The OFT anticipates that it will be issuing around three to four short-form opinions per year. We hope that this goes some way to addressing some of the concerns expressed by respondents too.
- 6.30 We also intend to prepare and publish guidance for directors on how to comply with competition law and drive a competition law compliance culture within their organisations, in light of our recent proposed change of policy in relation to CDOs.
- 6.31 With regard to the suggestions of providing more informal advice to businesses or even some form of helpline service (see paragraphs 5.50 and 5.51 above), we have reservations about whether these are an efficient use of our limited resources. Such advice would only be provided to the businesses approaching the OFT and would not be available to the wider community. Instead, we plan to focus on the pilot of our short-form opinion process, which will provide wider guidance on

the assessment of competition law issues. Furthermore, by prioritising casework over providing more individual advice, the OFT can, as appropriate, seek to ensure that its competition law enforcement decisions help to clarify the law in areas of perceived uncertainty. In the long-term, this will be of greater benefit to facilitating competition law compliance.

- 6.32 We also note that we currently run, and expect to continue running, occasional 'round-table' discussions and other public events to discuss competition law topics of interest with in-house and external legal advisers, economists and other interested parties. These events provide an opportunity for us to engage directly with businesses on issues, to promote better understanding of our priorities and approach by business and for us to gain a better understanding of the concerns of businesses.

### **Best practice**

- 6.33 A number of respondents felt that it would be useful for the OFT to share the examples of best practice that has been gathered as part of the research. We agree with this suggestion and have included in the report examples of the competition law compliance activities undertaken by these businesses, in order to provide ideas to businesses designing or refreshing their competition law compliance strategy and share best practice. Due to the qualitative nature of the research and its focus on larger businesses, we do not suggest or imply that all or any of these activities are necessary in order to have an effective competition law compliance culture. Instead each business should conduct its own risk identification and assessment and identify the risk mitigation activities.

### **Other suggestions**

- 6.34 We note the respondents' suggestions in relation to secondments, education and publicity, which are set out at paragraphs 5.52 to 5.54 above. As regards publicity, we note that, as recognised by one respondent, we already publicise our competition law enforcement and other work. In relation to secondments and education, we recognise that

these suggestions might present some opportunities to assist businesses to comply and might consider these further in the future.

### **Effective Competition Law Compliance Culture**

- 6.35 We intend to update the quick guide OFT 424, *How Your Business Can Achieve Compliance* to reflect current best practice. We also intend to hold a consultation later this year on the draft revised guidance before adopting it in order to give businesses and their advisers the opportunity to comment on it. The proposed updated guidance will include a risk-based framework businesses might use to develop an effective compliance culture. The proposed framework has been informed by our discussions with respondents and is summarised in figure 6.1 and paragraphs 6.36 to 6.49 below.
- 6.36 An effective competition law compliance culture requires at its core an unambiguous commitment to compliance. It also requires compliance activities that are appropriate to the risks faced by a business. We propose a four step approach to an effective competition law compliance culture through which a business, as part of its commitment to compliance, identifies and assesses its risks, determines appropriate measures to mitigate these risks, then keeps the whole process under review. In the full revised guidance we aim to build upon some of the practical insights provided by respondents as part of this research project.

**Figure 6.1: Effective Competition Law Compliance Culture: Virtuous Circle**



**Core: Commitment to compliance**

6.37 The core of an effective compliance culture is to have an unambiguous commitment to competition law compliance from the top down. In our current guidance, we already recognise senior management commitment as being an essential ingredient for an effective compliance culture. However, the findings from this report have emphasised that this commitment needs to be unambiguous and also that this commitment needs to be at all levels of the management chain. We have therefore included this at the centre of the virtuous circle an effective competition law compliance culture. Without unambiguous commitment, the remaining steps are unlikely to be effective.

**Step One: Risk identification**

6.38 The first step is for the business to identify the key competition law compliance risks it faces. These risks will be specific to the operations

of the business and might even vary between different business units within the same business. The findings in this report highlight some examples of the way in which businesses approach this exercise. For some businesses the key risks relate to the risk of cartel activities, for some abuse of dominance might be more of a concern, others face a broader range of risks. Some businesses might have known risk areas based on previous enforcement action. Businesses might also seek to identify the key areas of the business in which risks might arise, for example the sales and marketing departments, staff who attend trade association meetings or otherwise have contact with competitors, and new staff joining the business. Businesses might also identify specific risks when engaging in mergers and acquisitions activity or entering a new product or geographic market. We will aim to give further detail in the revised guidance on the type of questions a business should ask itself in order to identify the risks it faces.

### **Step Two: Risk assessment**

- 6.39 The second step is for the risks identified to be assessed as high, medium or low risks for the business based on the likelihood of the risks occurring. This assessment should be undertaken for each risk that has been identified. From this basis the business can tailor its competition law compliance measures (Step Three) to fit both the type of risks involved (Step One) and the level of that risk (Step Two).
- 6.40 The findings in this research provide some examples of how businesses might assess the risks facing them. For example, the risks arising from the arrival of new staff might be assessed as high if the new member of staff is joining from a competitor, is joining the sales and marketing department or will be undertaking a role requiring contact with competitors. Conversely the risk might be assessed as low if the new member of staff will have a back room function with no contact with competitors or customers.



### **Step Three: Risk mitigation**

- 6.41 The third step is for appropriate risk mitigation activities to be identified. These would generally include (a) appropriate policies and procedures, and (b) appropriate training activities designed to mitigate the risks identified and assessed at Steps One and Two. The business should also consider how best to achieve behaviour change within the organisation with a view to developing an effective competition law compliance culture. At this step, depending on the risks that have been identified and how they have been assessed, a number of the compliance activities referred to by respondents and set out at paragraphs 4.3.1 and following might be considered.

#### Appropriate policy and procedures

- 6.42 The identification of appropriate policies and procedures will depend on the risks identified and the assessment of those risks and should be designed to reduce the likelihood of the risk occurring. We will aim to give further detail in the revised guidance on the type of policies and procedures a business might wish to consider and the ways in which these could be implemented, based on the practical insights gained from this research.
- 6.43 For example, if the business has identified a risk arising from new staff joining the sales and marketing department and assessed the likelihood of the risk occurring as high, the business might establish procedures to ensure that such new staff are given competition law compliance training as part of their induction programme. Businesses might also establish procedures for obtaining advice on possible competition law issues and internal disciplinary procedures for staff involved in breaches of competition law.

#### Appropriate training

- 6.44 The identification of appropriate training activities will depend on the risks identified and the assessment of those risks.

- 6.45 Appropriate training in competition law compliance should be targeted at the risk areas identified. This might include online training, face-to-face training or a combination of the two. It might be supported by other activity such as testing of employee's knowledge and understanding and/or written materials summarising competition law. Businesses should consider how best to focus their training activities to mitigate the risks identified. For businesses with large numbers of staff in low risk areas, it might be appropriate to concentrate training activities on staff in high risk areas.
- 6.46 Many respondents commented that the content of the training must also be tailored to the risks faced by the business. We note that this recognises that businesses need to focus their training towards mitigating the risks that have been identified. In addition we note that a number of respondents commented that training must be business-focused in order to be effective. We consider that the proposed risk identification and assessment process at Step Two and Step Three provide a framework to develop and tailor the content of the training in this way at Step Three.

#### **Step Four: Review**

- 6.47 The fourth step is the review stage. It is important that businesses regularly review all stages of the process to ensure that there is 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 are still appropriate and effective. This step is designed to highlight that this framework for competition law compliance is not static. Indeed, 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 it now faces a high risk of breaching the abuse of dominance rules. The competition law compliance activities must adapt to such changes in order to maintain an effective competition law compliance culture.
- 6.48 Businesses should also regularly evaluate their policy, procedures and training activities to see whether these are being successful in mitigating

the risks identified, making improvements where appropriate. For example, some respondents mentioned that they tested their employees at regular intervals to review the success of their training activities. In this context, there might be a role for audits to review the success of the competition law compliance activities of a business. Some businesses indicated to us that they have found audits can be a helpful way to review the effectiveness of their internal policies and procedures and/or training.

- 6.49 We will aim to give further detail in the revised guidance on the type of review activities a business might wish to consider, based on the practical insights gained from this research.

## **7. CONCLUSION**

- 7.1 Competition within the economy is good for business and good for consumers. Strong competition regimes encourage open, dynamic markets, and drive productivity, innovation and value for consumers. Competitive and open markets at home increase the global competitiveness of UK firms, raising economic growth and standards of living in the UK, and benefiting consumers by ensuring lower prices and a greater variety of goods and services.
- 7.2 The OFT undertook this research to better understand the practical challenges faced by businesses seeking to achieve an effective competition law compliance culture.
- 7.3 We therefore chose to undertake qualitative research with larger businesses having existing competition law compliance activities. The OFT is also carrying out research into levels of awareness of competition law among businesses, which complements the research in this report.
- 7.4 Also, the OFT is carrying out work in relation to other aspects of business compliance with laws that the OFT enforces. The OFT has undertaken research into the drivers of compliance with consumer law and into the factors affecting compliance with consumer law and the deterrent effect of consumer enforcement.
- 7.5 We believe that the insights gained from this research project have increased, and in some cases reinforced, our understanding of the key factors that drive compliance and non-compliance with competition law. The research has also identified examples of current best practice in competition law compliance and generated a number of suggestions as to what more the OFT could do to help businesses comply with competition law.
- 7.6 Based on the research, we propose to adopt a new four step approach to an effective competition law compliance culture, as set out in detail in chapter 6 above.

- 7.7 Most of the businesses we interviewed adopted a risk-based approach to competition law compliance, focusing their activities on the areas of greatest risk in their businesses. We support a risk-based approach to competition law compliance to focus activities in the areas they are most needed. We also support a principles-based approach to compliance, rather than a rules-based approach that might result in a 'box-ticking' exercise and impose unnecessary burdens on business.
- 7.8 We recognise that one size will not fit all in competition law compliance and that the appropriate actions in order to achieve a competition law compliance culture will vary by size of business and also by the nature of the risks identified. Our research has focused on larger businesses with experience of competition law compliance activities. We will be considering how the findings of this research might be relevant to smaller businesses.
- 7.9 We have included in the report examples of the competition law compliance activities undertaken by these businesses, in order to provide ideas to businesses designing or refreshing their competition law compliance strategy and share best practice. We do not suggest or imply that all or any of these activities are necessary in order to have an effective competition law compliance culture.
- 7.10 A number of the businesses we interviewed emphasised that, whilst important for their organisation, competition law compliance was part of a broader compliance agenda. Some businesses sought to emphasise their commitment to competition law compliance through including it in their business's overall corporate responsibility or ethical trading statement.
- 7.11 The research has provided a number of insights into the drivers for competition law compliance, including:
- fear of reputational damage to the business if it is involved in an infringement and this is made public in some way
  - risk of financial penalties being imposed on the business for breaching competition law

- importance of sanctions against individuals (e.g. criminal prosecution, director disqualification, personal reputational damage, internal disciplinary sanctions) in encouraging individuals to focus on competition law compliance
- commitment to competition law compliance from the top down – through senior management and middle management layers
- competition law compliance helping the business to win business through being able to position itself as an ethical business, and
- competition law compliance activities resulting in confident employees who know the rules of the game and can compete for business without fear of breaching competition law.

7.12 It has also generated a number of insights into the drivers for non-compliance with competition law, including:

- perceived lack of commitment or ambiguity in the level of commitment to competition law compliance at any layer of the organisation
- rogue employees
- confusion or uncertainty about the law
- employee errors or naivety
- loss of trust in legal advice that is excessively risk averse or does not take account of business needs and practicalities
- a 'box-ticking' approach to compliance, and
- competition law compliance having to compete for attention with other compliance activities.

7.13 We are keen to understand how we can best use our limited resources to support businesses wishing to comply with competition law – both in conducting a competition law risk assessment and in identifying

appropriate activities and actions to mitigate those risks. A number of suggestions were made in the interviews and group discussions, which we have considered. We have responded to these suggestions in the report and already have plans to implement a number of these. In particular, we intend to

- update our current guidance on competition law compliance to reflect current best practice
- issue guidance for directors on what they need to do to comply with competition law, following on from our proposed changes to our policy on director disqualification orders
- provide more guidance to businesses on novel or unresolved questions of competition law through our new short-form opinion tool, and
- consider how the findings of this research might be relevant to smaller businesses.

## ANNEXE 1

### Summary of US Federal Sentencing Guidelines

- A.1 The Sentencing Guidelines set out the minimum standards that must be met in order for the business to be regarded as having exercised due diligence and promoted an organisational culture that encourages ethical conduct and a commitment to compliance, as follows:
- the organisation must establish standards and procedures to prevent and detect criminal conduct, and
  - 'high-level personnel' (which means the board or, if the organisation does not have a board, the highest-level governing body of the association) must ensure that the organisation has an effective compliance and ethics programme, be knowledgeable about the content and operation of the programme and must exercise reasonable oversight with regard to the implementation and effectiveness of the programme. Specific high-level personnel must be assigned overall responsibility for the compliance and ethics programme.
- A.2 In addition, specific individuals within the organisation must be delegated day to day operational responsibility for the compliance and ethics programme. They must report periodically to high-level personnel on the effectiveness of the programme and be given adequate resources, appropriate authority and direct access to senior management.
- A.3 The organisation is required to take reasonable steps not to include within its senior management (or positions involving substantial commercial discretion) anyone who it knows, or ought to have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics programme.
- A.4 The organisation must take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance programme to its management and



employees, by conducting effective training and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

A.5 The organisation must take reasonable steps to:

- ensure that the organisation's compliance and ethics programme is followed. The programme must include monitoring and auditing mechanisms to detect criminal conduct
- evaluate periodically the effectiveness of the organisation's compliance and ethics programme, and
- have and publicise a system, which might include mechanisms that allow for anonymity or confidentiality, whereby the organisation's employees and agents might report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

A.6 The organisation's compliance and ethics programme must be promoted and enforced consistently through:

- appropriate incentives to perform in accordance with the compliance and ethics programme, and
- appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

A.7 After criminal conduct has been detected, the organisation must take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organisation's compliance and ethics programme.

A.8 When implementing the due diligence and promotion of a compliant and ethical organisational culture requirements, the organisation must periodically assess the risk of criminal conduct. It must take appropriate steps to design, implement or modify each requirement set out in the

relevant part of Sentencing Guidelines to reduce the risk of criminal conduct identified through this process.

## ANNEXE 2

### Drivers of Compliance – Questionnaire

#### Introduction: Competition Law Compliance within your Organisation

- A.9 What do you see as the key competition law compliance areas for your company? Cartels? Abuse of dominance (if so, what categories of abuse)?
- A.10 What competition law sanctions do you as an in-house counsel worry about the most for your company and its people? How much of a concern is the publicity resulting from a competition law investigation against your company?
- A.11 Has your company had any competition law investigations against it? Did the investigation affect your corporate culture and the general approach to compliance? What do you do differently now?

#### Competition Law Compliance in Corporate Culture

- A.12 What do you say to senior management (executive level) in your organisation to instil in them the importance of ongoing compliance?
- A.13 Where does competition law compliance sit with the broader corporate governance agenda in your organisation: is part of the general agenda or is it regarded as a special issue distinct from that general agenda?

#### The Challenges of Compliance

- A.14 Do you have a competition law compliance programme in place? If you do have a compliance programme, how does it affect or influence business decision making in your company? Is it an intrinsic part of the business decision-making process?
- A.15 What do you see as the critical ingredients in a competition law compliance programme?

- A.16 How does your budget impact upon your ability to disseminate the competition law compliance message through your organisation?
- A.17 How do you overcome logistical challenges in delivering the competition law compliance agenda? For example, have you had to overcome IT challenges?

### **Some Practical Issues**

- A.18 When you provide competition law training, it is generic (which is to say, standard across the organisation) or do you have specific training for certain countries, regions or areas of operation?
- A.19 What are your internal sanctions for employees who are responsible for causing a breach of competition law?
- A.20 What is your view of competition law compliance audits and mock dawn-raids?
- A.21 Where you provide in-house competition law compliance training, who gives the training? To what extent is training tailored/bespoke for the company and to what extent 'off-the-shelf'/generic?
- A.22 With regard to your international operations, are there particular challenges in ensuring compliance in certain jurisdictions and if so, to what are these attributable?

### **The Role of the OFT in Instilling a Compliance Culture**

- A.23 What criteria do you think that the OFT should look at in deciding upon the level of penalty against an infringing firm, where the firm already had a compliance programme in place and the infringement is claimed to be attributable to rogue employees? How do you think the OFT's sanctioning tools should be deployed in such a case?
- A.24 What do you think that the OFT can be doing more of in order to help encourage a greater culture of compliance in companies?