

Company directors and competition law

OFT Guidance

June 2011

OFT1340

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1 INTRODUCTION

What this Guidance is about

- 1.1 This Guidance is intended to help company directors¹ understand their responsibilities under competition law.
- 1.2 The OFT considers that directors play a key role in establishing and maintaining an effective competition law compliance culture within their company.² Without the full commitment of individual directors to compliance with competition law, any compliance activities undertaken by the company are unlikely to be effective.³
- 1.3 Having an effective culture of compliance with competition law will help a company to avoid the many adverse potential consequences of infringing competition law, including the following:
- financial penalties of 10 per cent of group turnover
 - adverse reputational impact (business and personal) associated with having committed a competition law infringement

¹ The term 'director' is explained at paragraph 2.2 below.

² Throughout this Guidance, we refer to directors of a 'company', as a competition disqualification order can only be made in respect of a director of a company. The term 'company' is explained at paragraph 2.2 below and includes limited liability partnerships. Competition law more generally applies to 'undertakings'. The term 'undertaking' means any entity engaged in economic activity, irrespective of its legal status, including companies, partnerships, Scottish partnerships and individuals operating as sole traders, as explained in our more detailed competition law guidelines.

³ See OFT1341 *How your Business can Achieve Compliance With Competition Law* and the OFT Report *Drivers of compliance and non-compliance with competition law* (OFT1227).

- director disqualification orders for the directors of infringing companies
- criminal convictions for those individuals involved in a cartel
- considerable diversion of management time and incurring of legal expenses in order to deal with investigations by competition authorities
- unenforceability of restrictions in agreements that infringe the law, and
- lawsuits from those who have suffered harm as a result of the infringement.

1.4 Directors, in particular, should note that if their company infringes competition law and a court considers that a director's conduct in connection with that infringement makes him/her unfit to be concerned in the management of a company, he/she may face being disqualified from being a director under a Competition Disqualification Order (CDO) for a period of up to 15 years.

1.5 Directors can eliminate the risk of a CDO being made against them by ensuring that their company does not infringe competition law. Accordingly, directors have a direct individual incentive to be committed to ensuring that their company has an effective competition law compliance culture.

1.6 The purpose of this Guidance is to explain:

- the key competition law risks that directors should be aware of and the ways in which directors can minimise the risks of their company infringing competition law, and

- how the OFT⁴ will assess the extent of an individual director's responsibility for an infringement of competition law in deciding whether to pursue a CDO against the director, in particular when considering whether: (i) a director had reasonable grounds to suspect an infringement of competition law by the company but took no steps to prevent it; or (ii) a director did not know but ought to have known about an infringement of competition law by the company.⁵

1.7 Directors who are unclear about how competition law applies to their business and its daily operations should seek further legal advice.

1.8 This Guidance should be read alongside the OFT's Guidance on *Director disqualification orders in competition cases* (OFT510) and *How your Business can Achieve Compliance With Competition Law* (OFT1341).

1.9 Directors may also wish to consult the OFT's *Quick Guide to Competition Law Compliance*.⁶

⁴ This Guidance sets out the views of the OFT in relation to CDOs. It does not necessarily reflect the views of the court, nor is this Guidance binding on the court.

⁵ See paragraph 2.4 below.

⁶ www.oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/quick-guide.pdf

2 BACKGROUND - COMPETITION DISQUALIFICATION ORDERS

2.1 Under section 9A of the Company Directors Disqualification Act 1986 (the CDDA), the OFT and certain sectoral regulators have the power to apply to the court for an order disqualifying a director from being involved in the management of a company (a CDO).⁷ The court must award a CDO if it is satisfied that:

- there has been a breach of UK or EU competition law (involving a company of which the individual was a director), and
- the director's behaviour in connection with that breach makes him unfit to be concerned in the management of a company.

2.2 A CDO can only be made against a director of a company. 'Company' includes unregistered companies⁸ and limited liability partnerships.⁹ For these purposes, a '**director**' includes any person occupying the position of director, by whatever name called. This includes a person formally appointed to a company board, as well as any person who assumes to act as a director (a de facto director). It also includes a 'shadow director', defined as any person in accordance with whose directions or instructions the directors of a company are accustomed to act (other than advice given purely in a professional capacity). The rules do not

⁷ Section 9A Company Directors Disqualification Act 1986. Competition disqualification orders are explained in more detail in OFT Guidance *Director disqualification orders in competition cases* (OFT510).

⁸ Section 22(2)(b) CDDA. For a definition of unregistered companies, see section 220 of the Insolvency Act 1986. 'Unregistered companies' may include companies registered outside of Great Britain – see, e.g. *Re a Company* (No 007946 of 1993) [1994] Ch 198 and *Re Normandy Marketing Ltd* [1993] BCC 879.

⁹ See Regulation 4(2)(a) of the Limited Liability Partnership Regulations 2001 (SI 2001/1090).

extend to other company officers who hold the title 'director' but who do not fall within this definition.

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

2.4 In making its assessment of whether an individual is 'unfit to be concerned in the management of a company', the court will have regard to whether:

- the director's conduct contributed to the breach of competition law
- the director's conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it, or
- the director did not know but ought to have known that the conduct of the undertaking constituted the breach.

2.5 In its Guidance on *Director disqualification orders in competition cases* (OFT510), the OFT sets out the five-step process that the OFT will follow in order to decide whether it would be appropriate to pursue a CDO against an individual director. The OFT will:

- Step 1: consider whether there has been a breach of competition law
- Step 2: consider the nature of the breach and whether a financial penalty has been imposed (in particular, the OFT is more likely to consider CDO applications to be appropriate in cases involving more

serious infringements of competition law, such as those in which a financial penalty has been imposed)

- Step 3: consider whether the company in question has benefitted from leniency
- Step 4: consider the extent of the director's responsibility for the breach of competition law, and
- Step 5: have regard to any aggravating or mitigating factors.

2.6 The OFT will, in all investigations under the CA98, actively consider whether it would be appropriate to apply for a CDO. At Step 4, if the OFT finds sufficient evidence of behaviour which falls into any of the three categories of behaviour listed in paragraph 2.4 above, the OFT will be likely to apply for a CDO, provided the other steps set out in OFT510 *Director disqualification orders in competition cases* are also satisfied.

2.7 At Step 4, in order to determine the extent of the director's responsibility for the infringement of competition law (and whether there is evidence of behaviour falling within the three categories of behaviour listed in paragraph 2.4 above), the OFT will consider a number of factors such as the level of knowledge the director had of the infringement.¹⁰ The OFT will also take into account the individual director's level of commitment to competition law compliance and the steps he/she took to prevent, detect and bring to an end infringements of competition law by the company, bearing in mind the nature of the business and the individual director's role within the company.

2.8 Where a director is genuinely committed to competition law compliance and has taken reasonable steps to ensure that the company has an

¹⁰ See OFT 510 *Director disqualification orders in competition cases* for more detail.

effective compliance culture (which may include asking questions, making enquiries and taking steps to prevent or bring to an end any infringements of competition law as appropriate), it is unlikely that the OFT would apply for a CDO against a director on the basis that the director had failed to take steps to prevent a breach of competition law or ought to have known of conduct that constituted a breach of competition law.

- 2.9 Where, on the other hand, a director engages directly in behaviour which he/she knows (or ought to know) infringes competition law, the OFT is likely to apply for a disqualification order against that director regardless of his/her role in the company or whether the director had taken steps to ensure that his/her company had an effective competition law compliance culture.¹¹
- 2.10 Directors can eliminate the risk of a CDO by ensuring that their company does not breach competition law. Accordingly, directors have a direct individual incentive to be committed to ensuring that their company has an effective competition law compliance culture.

¹¹ Provided the other steps set out in the OFT's Guidance *Director disqualification orders in competition cases* (OFT510) are also satisfied.

3 THE DIRECTOR'S ROLE – EXECUTIVE AND NON-EXECUTIVE DIRECTORS

Relevance of the director's role

- 3.1 The OFT acknowledges that the majority of companies and their directors wish to comply with competition law.
- 3.2 All company directors should refrain from any personal involvement in an infringement of competition law and should take appropriate and reasonable steps to prevent, detect and bring to an end any infringements of competition law by their company more generally. If they do so, they will minimise the risk of a CDO application being made against them.
- 3.3 When considering whether to apply for a CDO in individual cases, the OFT will take into account the director's role in the company and, in particular:
 - whether the director has an executive or non-executive role
 - the director's specific responsibilities within the company, and
 - the size of the company and wider corporate group.
- 3.4 These factors are relevant to a consideration of:
 - the level of understanding of competition law it is reasonable to expect of a director, and
 - the steps it is reasonable to expect a director to take to prevent, detect or bring to an end infringements of competition law.
- 3.5 As stated in Chapter 2 above, where a director engages directly in behaviour which he/she knows (or ought to know) infringes competition

law, for example where a director attended cartel meetings or exchanged commercially sensitive information with a competitor, the OFT is likely to apply for a CDO against that director regardless of his/her role in the company or the steps that a director had previously taken to ensure that his/her company had an effective competition law compliance culture.¹²

Executive and non-executive directors

- 3.6 Executive directors have management responsibility for specific functions within a company. An executive director will usually have decision-making responsibilities and a supervisory role over at least one area of a company's operations on an ongoing basis, for example as director of finance, marketing or operations.
- 3.7 Non-executive directors are not involved in the day-to-day management of a company. The role of a non-executive director is to 'constructively challenge and help develop proposals on strategy'.¹³ Non-executive directors act as independent advisors to, and supervisors of, the company's executives.
- 3.8 The OFT recognises that this distinction is important when considering whether to apply for a CDO against an individual director. As set out more fully in Chapter 4, the OFT expects an executive director to have a more detailed understanding of, and familiarity with, the way in which the company operates on a day-to-day basis.
- 3.9 Non-executive directors are not expected to have an intimate knowledge of the company's day-to-day activities and transactions, but are

¹² Provided the other steps set out in the OFT's Guidance *Director disqualification orders in competition cases* (OFT510) are also satisfied.

¹³ The UK Corporate Governance Code, June 2010, Main Principle A4.

expected to challenge the decisions and actions of the executive directors. They may also be responsible for internal audit within a company. As part of this function the OFT expects non-executive directors to ask appropriate questions of the company's executives, in order to ensure that appropriate compliance measures have been put in place within the company to prevent, detect and bring to an end infringements of competition law.

Executive director's responsibilities within the company

3.10 In the case of an executive director, it is also necessary to consider that director's specific role within the company.¹⁴ Certain areas of a business will, by their nature, be more exposed to the risk of competition law infringements than others. For example, outward facing staff (such as sales staff) are more likely to come into contact with competitors than staff with a purely internal function.

3.11 The OFT expects directors with responsibility for areas of a business with higher exposure to competition law risk to take greater steps to prevent, detect and bring to an end infringements of competition law within the area of the business that they oversee. For example, a director with responsibility for sales or for setting prices would be expected to take (or ensure that his or her company was taking) steps to identify, assess and mitigate any potential areas of competition law risk that may arise in connection with that area of the business. For example, a sales director would be expected to be able to recognise whether the risk of cartel activity within a company is high due to its sales staff having frequent contact with competitors at trade association meetings or through involvement in other industry bodies and ensure that

¹⁴ Non-executive directors have a general supervisory role, not limited to specific areas of the company's activities.

appropriate mitigating activities (such as training, policies and procedures) are in place to bring about any behaviour change that is necessary to achieve compliance.

- 3.12 The OFT Guidance OFT1341 *How Your Business Can Achieve Compliance With Competition Law* sets out some suggestions for how companies can identify, assess, mitigate and review risks in different areas of a business. Under such a risk-based assessment, a business may tailor its compliance activities according to the level of risk within a business. For example, it may be appropriate that higher risk staff (such as those who work in sales) receive more extensive training than those in lower risk areas (such as HR staff who do not have contact with their HR counterparts in other businesses) and for any audits to be targeted at higher risk areas.

Size of company

- 3.13 In practice, the roles played by directors differ significantly depending on the size of company (and its wider corporate group).
- 3.14 Directors in smaller organisations¹⁵ may have a more intimate knowledge of the day-to-day activities and transactions of their company, and may therefore be more likely to be aware of actual or potential infringements of competition law.
- 3.15 On the other hand, directors in larger organisations may not have an intimate knowledge of all day-to-day activities and transactions. Nevertheless, the OFT expects directors in larger organisations to take

¹⁵ Some businesses (including very small businesses) are not established as companies or limited liability partnerships (for example unincorporated sole traders or 'owner-manager' firms). In these cases the CDO rules will not apply. However, the possibility of enforcement action against the business and the possibility of criminal sanctions against individuals remain.

steps to ensure that there are appropriate systems in place to prevent, detect and bring to an end infringements of competition law.

- 3.16 In all cases, company directors are expected to demonstrate a commitment to competition law compliance, and to ensure that their organisation is taking steps to identify and to assess the company's exposure to competition law risks and put in place appropriate steps to mitigate those risks, reviewing these activities on a regular basis.

4 KNOWLEDGE OF COMPETITION LAW

- 4.1 As a general principle, all directors are expected to have the standard of skill and knowledge that is appropriate for their position and the nature of the company in question. Directors are also expected to update and refresh their knowledge on an ongoing basis.
- 4.2 The OFT considers that it is reasonable to expect **all directors** to understand that compliance with competition law is important and that infringing competition law could lead to serious legal consequences for the company and for them as individuals. The OFT expects all directors to be committed to competition law compliance.
- 4.3 The OFT recognises that not all directors have specific competition law expertise. However, it does expect directors to understand the most serious forms of infringement of competition law.

Cartels

- 4.4 The OFT takes the view that all directors ought to know that cartel activity will constitute a very serious infringement of competition law. Cartels are agreements where two or more businesses agree (whether in writing or otherwise) not to compete with each other. Cartels include agreements to:
- fix prices
 - engage in bid-rigging (for example, cover pricing)
 - limit production
 - share customers or markets.
- 4.5 Cartels can involve sharing or exchanging commercially sensitive information with competitors directly, or indirectly through a third party

(for example, competitors using a mutual supplier as a conduit to exchange future pricing information).

Other potentially anti-competitive agreements

- 4.6 Other types of agreement may potentially infringe competition law and need to be examined in more detail to determine whether they present any competition law risk.
- 4.7 The OFT recognises that it would be disproportionate to expect all directors to understand the detailed application of competition law. However, the OFT believes that directors ought to have sufficient understanding of the principles of competition law to be able to recognise risks, and to realise when to make further enquiries or seek legal advice. Directors should also understand the importance of taking appropriate steps to address any risks that have been identified.
- 4.8 When the OFT is considering whether to apply for a CDO, a director will be assessed against their actual knowledge of competition law, as well as the knowledge they are reasonably expected to have.
- 4.9 Any director with responsibility for commercial contracts is expected to understand the potential competition law risks that may arise from commercial agreements that their company enters into. Examples of the type of commercial arrangements that may give rise to competition law risks include:
- contracts with exclusivity provisions of long-duration (five years or more)

- agreements between a company and its customers which relate to the terms on which customers can resell its products, for example with respect to prices¹⁶
- intellectual property licensing agreements containing exclusivity provisions, particularly with competing businesses
- agreements involving standardisation
- agreements involving joint selling or purchasing
- agreements involving collaboration with competitors.

4.10 Agreements containing such provisions will not necessarily infringe competition law. However, such provisions may raise potential competition law risks that need to be considered.

4.11 In particular, the OFT expects directors with responsibility for commercial contracts to recognise potential competition law risks and take appropriate steps to mitigate these risks. This may include taking steps to ensure that the company's lawyers have the opportunity to review significant contracts for compliance with competition law before they are signed and that there are procedures in place to allow for competition law advice to be sought in other circumstances where competition law issues arise.

4.12 Where a director is committed to competition law compliance and has taken steps to mitigate competition law risks in a manner that is appropriate to the level of any identified risk, for example through taking legal advice before entering into the agreement that resulted in the

¹⁶ It should be noted that it may be a serious infringement of competition law for a supplier to impose fixed or minimum resale prices on a party which is reselling its products.

breach, the OFT is unlikely to consider it appropriate to apply for a CDO against that director.¹⁷

Abuse of a dominant position

- 4.13 Any director with responsibility for a company's commercial strategy or behaviour is expected to be able to identify whether there is a risk that the company may have a dominant position on any of the relevant markets in which it operates.
- 4.14 A business that enjoys substantial market power over a period of time might be in a dominant position. The assessment of a dominant position is not based solely on the size of the business and/or its market position. Whilst market share is important (a business is unlikely to be dominant if its market share is less than 40 per cent) it does not determine on its own whether a business is dominant.
- 4.15 A business is only likely to hold a dominant position if it is able to behave independently of the normal constraints imposed by competitors, suppliers and consumers.
- 4.16 The following factors should be taken into account:
- the relevant markets in which the business is operating

¹⁷ OFT 510 *Director disqualification orders in competition cases* stated that the presence of mitigating factors may reduce the likelihood that an application for a CDO would be made by the OFT. Such factors would include evidence indicating that there was genuine uncertainty prior to the breach as to whether the infringing activity constituted a breach or where the director contributed to the company taking quick remedial steps when the breach was brought to his or her attention, including the implementation or revision of a competition law compliance programme.

- whether the business has persistently high market shares, in excess, for example, of 40 per cent, in the relevant market¹⁸
- whether barriers to entry keep potential competitors from entering the market, and
- whether customers have any degree of buying power that can be exerted on the business.

4.17 Where a company has previously been found to hold a dominant market position (for example, in a previous decision of the OFT, sectoral regulator or European Commission or by the court), the OFT expects its directors to understand that the rules on abuse of dominance are likely to apply, assuming that the market position of the company has not changed significantly.

4.18 All directors are expected to understand that a company in a dominant position is required to take additional steps to ensure compliance with the law. In particular, a director should understand that it is likely to be appropriate for a business in a dominant position to make further enquiries or seek legal advice when contemplating any conduct or commercial strategy which could be found to exclude competitors from the market or exploit customers, such as:

- charging excessively high prices

¹⁸ Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position. Generally speaking, a market share above 50 per cent will indicate dominance. Dominance is unlikely where an undertaking's market share is below 40 per cent. For further guidance on this topic see the OFT Guidance *Abuse of a dominant position* (OFT402) and the European Commission's *Guidance on its enforcement priorities in applying Article 102 to abusive exclusionary conduct by dominant undertakings* (OJ 2009/C 45/02).

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

4.19 None of the above activities will necessarily constitute an abuse of a dominant position. However, they may be indicative of a risk that should be assessed and, if appropriate, mitigations put in place.

4.20 Where a director is committed to competition law compliance and has taken steps to mitigate competition law risks in a manner that is appropriate to the level of any identified risk, for example through taking legal advice prior to the conduct being undertaken that constituted the breach, the OFT is unlikely to apply for a CDO against that director.¹⁹

¹⁹ See footnote 17 above.

Compliance directors

4.21 A director with responsibility for compliance with competition law will be expected to have sufficient grasp of the principles of competition law to identify and assess the types of risk to which the company is exposed. Carrying out this assessment may require a compliance director to have a greater level of knowledge of competition law principles than other directors of a company. A compliance director will also be expected to take reasonable steps to mitigate those risks. However, provided he has done so, a compliance director will not be expected to have any greater awareness of specific infringements by the company than any other director.

5 DETECTING AND PREVENTING INFRINGEMENTS

5.1 As set out at paragraph 2.5 above, the OFT uses a five step process to decide whether it is appropriate to pursue a CDO against an individual director. At Step 4, the OFT considers the extent of the director's responsibility for the infringement of competition law, whether by action or omission, in order to assess whether the director is unfit to be involved in the management of a company. In particular, the OFT considers whether there is evidence that:

- the director's conduct contributed to the breach of competition law
- the director had reasonable grounds to suspect a breach of competition law by the company but took no steps to prevent it, or
- the director did not know but ought to have known that the company's conduct constituted the breach.

5.2 This section of the Guidance sets out the factors that the OFT will take into account when deciding whether (i) a director had reasonable grounds to suspect a breach of competition law by the company but took no steps to prevent it; or (ii) a director did not know but **ought to have known** that the company's conduct constituted a breach of competition law.

5.3 As set out above, the OFT believes that directors play a key role in ensuring a competition law compliance culture within a company and preventing potential competition infringements occurring in the first place.

5.4 The OFT's Guidance OFT1341 *How your Business can Achieve Compliance With Competition Law* sets out a proposed four step approach to an effective competition law compliance culture: risk identification, risk assessment, risk mitigation and review, with a

commitment to compliance throughout the organisation at its core. The OFT recognises that one size does not fit all in competition law compliance terms and that the appropriate actions to achieve compliance will vary.

- 5.5 As an overriding principle, the OFT considers that a director cannot be absolved from responsibility for an infringement of competition law through a failure to keep himself informed; a director 'turning a blind eye' may still be found to be responsible for an infringement if he/she had a reasonable suspicion of a breach of competition law but took no steps to prevent it, or did not know but ought to have known that the business was engaged in anti-competitive conduct.
- 5.6 The steps that an individual director is expected to take to prevent, detect and bring to an end infringements of competition law will depend on the size of the company, the nature of the risks identified in relation to the company in question and the director's role in the company.
- 5.7 The OFT suggests that all directors can, for example, ask the following questions regarding competition law compliance:
- What are our competition law risks at present?
 - Which are the high, medium and low risks?
 - What measures are we taking to mitigate these risks?
 - When are we next reviewing the risks to check they have not changed?
 - When are we next reviewing the effectiveness of our risk mitigation activities?

Direct or indirect responsibility

- 5.8 In considering the evidence that a director ought to be aware of, the OFT will consider whether the director had direct management responsibility for the individuals involved in the conduct that resulted in the breach of competition law.
- 5.9 Where a director has direct management responsibility, the OFT takes the view that the director ought to have greater awareness of any anti-competitive behaviour that has occurred as a result of conduct by individuals within a business area that a director has direct management responsibility for. Where a director is personally involved in the day-to-day activities and transactions of a company, the OFT will generally take the view that the directors ought to be aware of any anti-competitive behaviour which is occurring in relation to those activities or transactions.
- 5.10 A director with direct management responsibility is expected to be aware of the degree of exposure of their staff to competition law risk and ensure that appropriate mitigating activities (such as training, policies and procedures) are put in place to bring about any behaviour change that is necessary to achieve compliance.
- 5.11 In some circumstances it will be obvious that certain members of staff carrying out particular activities are at high risk. For example, where representatives of the company attend trade association meetings or where they are in regular contact with customers who are also competitors, this gives rise to the risk of discussions taking place relating to proposed future price movements, or other commercially sensitive information.
- 5.12 Appropriate risk mitigations will depend upon the nature of the business carried out by the company in question. Some companies may decide to ensure that staff are given targeted competition law compliance training

before attending such meetings, create a system whereby employees must report the nature of certain contact with competitors, and/or introduce sign-off procedures relating to legitimate business dealings with competitors.

- 5.13 These are illustrative examples and do not suggest that any or all of these actions are appropriate for all companies.
- 5.14 Ensuring a culture of compliance within a company may also involve a director asking questions and making enquiries where appropriate. In particular, certain events or activities by staff may act as a trigger for further enquiries to be made by a director to ascertain whether the conduct may indicate a potential breach of competition law. For example, the director may be prompted to make further enquiries if he/she suspects that a member of staff is in possession of commercially sensitive confidential information about a competitor's future prices or strategy. In other circumstances, it may be appropriate for a director with oversight of significant contracts to ensure that appropriate procedures are in place to provide an opportunity to assess proposed agreements for compatibility with competition law before they are signed, such as by requiring that the company's lawyers have the opportunity to review draft contracts.
- 5.15 Where a director has overall responsibility for a business area, but not direct management responsibility over the individuals directly involved in an infringement, the OFT will consider what evidence that director actually saw (or was presented with), and what evidence that director ought to have seen, having made reasonable enquiries.
- 5.16 When assessing what evidence a director ought to have seen, the OFT will take into account whether information would have been likely to come to light if appropriate compliance measures had been put in place, having regard to the size of the company and the nature of the competition law risks faced by the company.

- 5.17 A director with overall responsibility for a business area may need to ask questions and make enquiries where certain events or activities by staff suggest the existence of a competition law risk. For example, in the event of unexpected price increases, a director with overall responsibility for the department which sets prices should satisfy himself of the reasons for prices having increased.
- 5.18 The OFT does not expect a director to be aware of information in circumstances where the company has an appropriate compliance culture but the information has nevertheless been deliberately concealed from him/her.

Compliance directors

- 5.19 The core requirement to achieving competition law compliance within an organisation is a clear and unambiguous commitment from **all** directors (and across all levels of management) to competition law compliance.²⁰
- 5.20 The OFT recognises that a company may decide to designate a director with specific responsibility for competition law compliance. This could form part of a wider business compliance function. The role of a competition law compliance director is, principally, to introduce and maintain appropriate measures to identify, assess and mitigate the company's exposure to competition law compliance risks. The compliance director should also ensure that regular reviews are undertaken of the company's commitment to competition law compliance, its identified competition law risks, their assessment and the mitigating activities being undertaken in order to check whether these are being effective.

²⁰ See the OFT's Guidance OFT1341 *How your Business can Achieve Compliance With Competition Law*.

- 5.21 A compliance director may also be assigned responsibility for approving certain business decisions. For example, a company with a dominant market position may decide that any changes to its pricing policy must be reviewed and approved by the compliance director. It is for each company to determine whether it is appropriate to appoint a compliance director and the scope of that role based on its own assessment of the competition law risks to which it is exposed. Where a compliance director has specific executive responsibility for certain decisions, he/she will be treated (for the purposes of competition law) in the same way as any other director with responsibility for executive decisions - the OFT will assess the conduct of the compliance director in connection with any infringement on a case by case basis, just as it would any other director.
- 5.22 A compliance director will not be expected to have any greater awareness of specific infringements by the company than any other director. The fact that a company has appointed a compliance director does not absolve any other directors of their responsibilities under competition law.

Non-executive directors

- 5.23 Non-executive directors are expected to make reasonable enquiries of the company's executive directors to satisfy themselves that the executive directors have:
- demonstrated a commitment to competition law compliance throughout the company
 - taken appropriate steps to identify and assess the company's exposure to competition law risks
 - taken appropriate steps to mitigate those risks, including appropriate training activities, policies and procedures, and

- reviewed the company's commitment to competition law compliance, competition law risks and mitigating activity on a regular basis.²¹

5.24 Non-executive directors with internal audit responsibilities will be ultimately accountable for reviewing the company's compliance measures on a regular basis. For example, competition compliance could be included as a specific risk item for consideration by the company's audit committee.

5.25 As set out at paragraph 5.7 above, the OFT suggests that directors (including non-executive directors) can, for example, ask the following questions:

- What are our competition law risks at present?
- Which are the high, medium and low risks?
- What measures are we taking to mitigate these risks?
- When are we next reviewing the risks to check they have not changed?
- When are we next reviewing the effectiveness of our risk mitigation activities?

5.26 Competition law compliance can sit comfortably with other items on a company's governance agenda, such as anti-bribery and corruption, internal anti-fraud controls, health and safety and environmental concerns.

²¹ More guidance on the practical steps that can be taken is set out in the OFT's Guidance OFT1341 *How your Business can Achieve Compliance With Competition Law*.

5.27 Non-executive directors may also be involved in board level decisions to approve commercial activities (for example, a decision to enter into a new joint venture). In these circumstances all directors involved in the decision are expected to satisfy themselves that the proposal has, where appropriate, been reviewed for compliance with competition law.

6 PRACTICAL EXAMPLES

Example 1

Scenario

Company A and company B both manufacture widgets. They agree not to undercut each other's prices and not to sell to each other's customers.

The agreement was made by the managing director of company A and the sales director of company B, who met at a trade conference.

Analysis

This is a cartel agreement to fix prices and to share customers. It is an infringement of competition law, falling within the Chapter I prohibition and possibly also Article 101 TFEU. The companies should consider making a leniency application to the OFT or the European Commission (or both).

Directors of both companies were personally involved in setting up the cartel. Both directors may therefore be susceptible to an application for a CDO by the OFT.

Both directors may also be guilty of a criminal offence (see paragraph 1.3).

Example 2

Scenario

Company C is the leading manufacturer of blodgets in the UK and sells them to retail company D (who is the largest distributor of blodgets the UK). The sales terms between them provide that company D must not sell blodgets to consumers for less than £5 a packet.

The agreement was made by the managing director of company C and a junior buyer of company D. The junior buyer is not a director, but reports to the company's commercial director.

The junior buyer had informed the commercial director of the terms he received from company C (including the price arrangement) and e-mailed him a copy of the agreement.

Analysis

The agreement between company C and company D includes a resale price maintenance provision (fixing the minimum price at which the blodgets can be sold to consumers). This may constitute an infringement of competition law, falling within the Chapter I prohibition and possibly also Article 101 TFEU. The companies should consider making a leniency application to the OFT. (The European Commission does not offer leniency in relation to resale price maintenance agreements.)

The managing director of company C was personally involved in setting up the arrangement and did not take any steps to determine whether the conduct in question was lawful. He may therefore be susceptible to a disqualification order application by the OFT.

The commercial director of company D was not personally involved in setting up the arrangement, but had reasonable grounds to suspect the infringement and also did not take any steps to determine whether the conduct in question was lawful or to end the infringement. He may also be susceptible to an application for a CDO.

Example 3

Scenario

Company E and company F are both construction companies who bid for local government contracts. There are two contracts due to be tendered this year. The two companies agree that E will bid an excessively high price for the first contract and F will bid an excessively high price for the second. This way they hope to guarantee that they will each win one of the contracts.

The agreement was made over the telephone by the chief executive of company E and the managing director of company F.

Analysis

This is a bid rigging agreement (a type of cartel). It is an infringement of competition law, falling within the Chapter I prohibition and possibly also Article 101 TFEU. The companies should consider making a leniency application to the OFT or the European Commission (or both).

Directors of both companies were personally involved in setting up the cartel. Both directors may therefore be susceptible to an application for a CDO by the OFT.

Both directors may also be guilty of a criminal offence (see paragraph 1.3).

Example 4

Scenario

Company G is a small business manufacturing sprockets, with two directors and three other employees. One of those employees, Mr Brown, has been exchanging confidential future price lists with his counterpart at company H, a competitor.

The directors of company G know that Mr Brown usually has reliable information about this competitor's prices and so allow him to advise them on their own pricing strategy. They do not know how Mr Brown acquires his information and do not ask.

Analysis

The exchange of commercially sensitive information (including future pricing information) between competitors is likely to be an infringement of competition law, falling within the Chapter I prohibition and possibly also Article 101 TFEU.

The directors of company G were not personally involved in the infringement, nor did they know that Mr Brown was exchanging information with a competitor.

However, it is likely that in this scenario the directors ought to have known of the infringement since they were aware that Mr Brown usually had reliable information about a competitor's prices (and were happy to rely on that information) but made no enquiries about how he acquired it. They may therefore be susceptible to an application for a CDO by the OFT.

If, on the other hand, directors had promoted a compliance culture internally within the company and, following enquiries being made by directors about the source of his information, Mr Brown sent an email in which he falsely claimed to have received the information legitimately through a public website, then the OFT would not consider that the directors ought to have known of the infringement, as information had been deliberately concealed from the directors.

Example 5

Scenario

J plc is a large retailer. It has a board of directors, including non-executive directors. The directors are not involved in day-to-day business activities.

J plc has a culture of competition compliance, as part of its ethical business strategy. All staff with external-facing roles are required to attend competition law training, the firm has a whistle-blowing scheme and individual directors are required to make quarterly compliance statements to the Board, which are audited once a year by the non-executive directors.

Mrs Green is an area manager for J plc. She reports to the regional manager. Neither is a director. Despite having attended competition law training, Mrs Green enters into an agreement with her counterpart at K Inc, under which both agree to increase the price of gadgets by 5 per cent. She keeps this agreement secret.

Analysis

The price-fixing agreement is an infringement of competition law, falling within the Chapter I prohibition and possibly also Article 101 TFEU. The companies should consider making a leniency application to the OFT or the European Commission (or both).

There is no evidence that any director was aware of the cartel or had reasonable grounds to suspect a cartel. The directors have also taken reasonable steps to ensure competition law compliance throughout the organisation. There are therefore no grounds for an application for a CDO. However, the directors should consider why the breach occurred and how similar breaches could be prevented in future.

Mrs Green and her counterpart may have committed a criminal offence (see paragraph 1.3).

Example 6

Scenario

Domco is the leading supplier of gludgets in the UK. It has a stable 80 per cent market share and two years ago was fined by the OFT for abusing its dominant position in the UK gludget market.

The average total cost to Domco to manufacture a gludget is £4. It sells gludgets for £5 each. A competitor, Newco, has just entered the market, selling gludgets for £4.50.

The head of marketing (who is not a director) introduces a strategy to drive Newco out of the market. The plan is to sell gludgets for £3.50 until Newco goes out of business, and then raise prices again. The sales director of the company submitted a summary of the proposal (including the commercial rationale) in the monthly board papers, but it was not discussed at the board meeting and was approved without further enquiries by the board.

Analysis

Domco is likely to hold a dominant position. The strategy to drive a competitor out of the market by pricing below cost is a predatory strategy. It is an abuse of that dominant position and will infringe the Chapter II prohibition and possibly also Article 102 TFEU.

In the OFT's view the directors of Domco ought to know that the company holds a dominant position (or is likely to) and they should also be aware that a strategy aimed at excluding a competitor from the market could constitute an abuse of that dominant position.

In these circumstances the OFT would expect the sales director and other directors of the company to appreciate the need for legal advice when considering the proposal, and to ensure it is obtained and acted upon. The sales director (and potentially other directors) may therefore be susceptible to an application for a CDO by the OFT.