

# The Cooperitition Incubator

Helping nurture a co-regulating, responsible economy

## Briefing Note

# THE BIS ROLE IN CREATING AN ENABLING ENVIRONMENT FOR GOOD BUSINESS THROUGH 'RESPONSIBILITY DEALS'

September 2010

## Summary - Competition law and voluntary agreements

*"We will end the culture of 'tick-box' regulation, and instead target inspections on high-risk organisations through co-regulation and improving professional standards ...[and] investigate further ways of improving corporate accountability and transparency."*

Coalition Agreement, May 2010

An important consideration in the process of conceiving, drafting and operating voluntary agreements (co/self-regulation) must be compliance with competition law. Competition law at a UK, EU and global level has sometimes prevented, or at least slowed, development of new responsible business practices, particularly in complex 'non-win-win' situations where the external social and environmental costs of doing business need to be internalised.

The current inhibiting nature of competition law/ guidance could be a barrier to progress to the self/co-regulation, which is being encouraged by the Coalition Government, which has coined the term 'Responsibility Deals' for a new generation of self-/co-regulatory agreements. Changes are needed to legislation and guidance, as well as the development of an online tool that will encourage the active involvement of all stakeholders in the monitoring of voluntary agreements, as well as developing new ones.

## Key messages to Government

1. Promote reform of competition law to incorporate environmental & social concerns in the European Union and international institutions;
2. Support the development of stronger, more effective Responsibility Deals through the dissemination of 'How to' Guides and the development of RaceToTheTop.org concept;
3. Further research and improve co-/self-regulation guidance and tools;
4. Ensure Sustainable Consumption and Social impact assessment tools are utilised in Competition Impact Assessments.

## Key messages to business

1. **Manage your company's competition law compliance processes and potential risks with care** and ensure that trade associations (or similar) of which you are a member are building their compliance capabilities;

2. **Participate actively in the design and roll-out of voluntary agreements relevant to your sector** drawing upon appropriate advice from the ISEAL Alliance, Business in the Community, the Trade Association Forum, law firms and other advisors;
3. Whilst responsible collaboration is already possible, **further improvements to competition law/ guidance – and their application – must be encouraged** so that social and environmental (public policy) factors are given due weight in decisions by competition authorities in the UK and around the world.

## Recommendations to Government

### Promote reform of competition law to incorporate environmental & social concerns in the European Union and international institutions

The World Economic Forum highlighted in 2008: *“Underdeveloped global governance is characterized by either a lack of rules or institutional capacity at the multilateral or global level necessary to create a level playing field or greater certainty regarding issues that have an important bearing on commercial and investment decisions across national borders (e.g. labour, environment, product safety or technical standards, etc.)”*<sup>1</sup> These governance problems are born out in the area of competition law.

Hon’ble Dr. Justice Arijit Pasayat, Chairperson, Competition Appellate Tribunal (India) said in July 2010: *“It is crucial that nations across the globe integrate sustainable development goals into their competition regimes. Sustainable development law deals with the interface between social, economic and environmental law. A competition policy that is sustainably apt would take environmental factors into consideration along with the economic considerations on which it is based. It has often been seen that in the mad world of competition where everyone is running the rat race independent of his choice, one tries to sell its product and service at every cost. All methods are adopted to gain an unfair advantage over the competitor and cheap methods are adopted to increase profits. This often leaves resources scrupulously used and most of this is often wasted. ...”*<sup>2</sup>

Voluntary agreements that go beyond national and EU boundaries would benefit from further guidance from DG Comp as to their acceptability under EU competition law/ WTO agreements, as well as processes for approval. I.e. What degree of pass-on benefit to consumers is required? Guidance as to how market concentration will be considered in the assessment of social/ environmental agreements with global application would be valuable (i.e. situations beyond the small market concentrations of Fair Trade).

More fundamentally EU competition law could be reformed along South African lines to explicitly reference the need to take into consideration sustainability factors in its primary objects.<sup>3</sup> The UK Government could also advocate that these issues are more closely considered by the OECD and in UNCTAD model competition law<sup>4</sup> and then promote reform through the G8, G20 and WTO.

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<sup>1</sup> World Economic Forum (2008), *Partnering to Strengthen Public Governance – The Leadership Challenge for CEOs and Boards* 2008

<sup>2</sup> <http://cooperatition.org/2010/08/02/nations-must-integrate-sustainable-development-goals-into-competition-regimes-says-pasayat/>

<sup>3</sup> <http://www.oecd.org/dataoecd/39/15/37981581.pdf>, pg 197

<sup>4</sup> <http://www.unctad.org/Templates/Download.asp?docid=8370&lang=1&intItemID=4108>

Social and environmental sustainability should be a critical consideration for all areas of Competition law including mergers, abuse of dominance, state aid, procurement, voluntary agreements and Market Studies.

### Support the development of stronger, more effective Responsibility Deals through the dissemination 'How to' Guides and the development of RaceToTheTop.org

For more Responsibility Deals (co-/self-regulation) to emerge, we believe multiple stakeholders – particularly government and consumers – must be engaged in the process of conceiving social and environmental regulation and monitoring its effectiveness.

### Corporate responsibility, voluntary agreements and competition law – A 'How to' Guide

The 'How to' Guide (now drafted with discussions underway with Cranfield re joint publication) was conceived to remove some of the uncertainties that have existed in the business community over the past decade as to when and how companies can collaborate and co-/self-regulate through voluntary agreements and standards. The guide is written to assist professionals working in corporate responsibility, trade associations, competition law, investment and government navigate international competition law and encourage more voluntary agreements and standards between companies where there are demonstrable public benefits. Throughout the guide, we highlight best practice and top tips.

### RaceToTheTop.org

'RaceToTheTop.org' is a provisional name for a concept *The Cooperatition Incubator* is developing for a website that will overtime have the functionality to:

- enable comparison (by consumers, for example) of companies' support and participation in relation to voluntary agreements and standards, as well as the impact of those voluntary agreements and standards;
- provide users with associated information about the industries, companies and products etc. using a Wikipedia-type platform to underpin other functionality;
- harness the encouragement of website users for the initiation of work by companies towards new voluntary agreements and their input for all stages of the process;
- serve as a tool assisting with the scrutiny and development of existing voluntary agreements and standards.

This vision of 'RaceToTheTop.org' extends the suggestion of the 'Conservative Working Group on Responsible Business' report (2008) that with more than 30 Private Voluntary Initiatives (e.g. FSC) in existence a biannual review of their progress should be commissioned to discover the lessons learned.

The information on the website, including references to Fair Trade/FSC accreditation, for example, could also be used to provide the basis for a holistic assessment of companies' corporate responsibility practices.

We believe this would enable bottom up, as well as top down, development of Responsibility Deals – and/or trade associations or regulatory agencies (not just Whitehall) to take on more of a leadership role.

### **Further research and improve co-/self-regulation guidance and tools**

*The Cooperatition Incubator* has argued over the past two years for further research to enable competition law and guidance to do a more effective job of enabling voluntary responsible business practices where appropriate. As the OFT's Chief Economist has acknowledged self-regulation has not been significantly addressed by the academic economic literature.<sup>5</sup> Our exploration of the issues has identified a number of issues at a national, European and International level that would appear to need to be examined.

#### **National guidance and process improvements**

##### **1. Develop and then apply a framework to identify those issues demanding co-/self-regulation in order to incorporate external costs**

Evaluate social and environmental indicators to strategically plan where the UK government envisages:

- *No regulation* - allowing normal competition to run its course thereby retaining the benefits of price efficiency already encompassed within the current system, but risking the neglect of social/ environmental standards; versus
- *Self-regulation, co-regulation, regulation* - delivering environmental and social sustainability objectives where this is deemed more important than pure efficiency-focused competition.

The Defra Food Strategy 2030, acknowledges the “Government’s core role in the UK food system is to correct market failures where they arise (for example distortions to the food economy caused by poor information, imperfect competition, the failure to price externalities and the under-provision of public goods), and to ensure that social equity is safeguarded...Government will favour voluntary industry-led and owned measures wherever possible, but we recognise that regulation may be required in some instances.”<sup>6</sup> We believe a vital next step for Defra will be to map the market failures and appropriate responses. The same principle applies in other sectors with significant environmental and social impacts.

Businesses and other stakeholders should continue to be invited to contribute to such processes.

##### **2. Research to clarify how to minimise the anti-competitive effects of voluntary agreements and quantify their Total Net Benefits**

Robust and independent assessment mechanisms need to be developed to better understand the consumer price increases and net benefit that a range of non-win-win voluntary agreements/ standards may facilitate.<sup>7</sup>

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<sup>5</sup> [http://oft.gov.uk/shared\\_oft/economic\\_research/oft1059.pdf](http://oft.gov.uk/shared_oft/economic_research/oft1059.pdf), pg 2

<sup>6</sup> <http://www.defra.gov.uk/foodfarm/food/pdf/food2030strategy.pdf>, pg 8

<sup>7</sup> At present the OFT estimates conservatively that cartels that are established to the consumer detriment lead to a 10 percent overcharge. Source: ‘A Review of OFT’s Impact Estimation Methods’, Professor Stephen Davies, January 2010, pg 24 [http://www.oft.gov.uk/shared\\_oft/reports/Evaluating-OFTs-work/oft1164.pdf](http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1164.pdf)

### **3. Remove conflicting signals by introducing new guidance**

There appears to be contradictory guidance in this area. Broadly it appears the EU is more amenable to voluntary agreements than is reflected by the UK competition authorities/ Department for Business, Innovation & Skills (BIS). BERR (now BIS) Advice for officials of Government and devolved administrations: 'Competition law: issues which arise for business when the government or lobby groups seek to encourage businesses to work together to deliver desired policy outcomes' (2008)<sup>8</sup> states: *"Recently businesses in various sectors, including retail, have shown concern over pressure being applied to them to enter into voluntary agreements or concerted practices to deliver public policy outcomes. This is often in response to a particular issue that maybe in the public eye through high profile media campaigns. Examples of such engagement include the delivery of environmental or public health policy objectives."*

*"...Agreements are generally considered bad for consumers and productivity because they undermine the need for businesses to reduce their costs and increase their quality to succeed. Hence, if evidence shows there is a valid reason to phase out a product or behaviour, then it is best to consider whether other proportionate, but not illegal, options are available. This may include an appropriate legislative vehicle. This may seem disproportionate to the issue that is being addressed but will give legal certainty and may, in the final analysis, be less costly for business."*

Whilst this guidance document was aimed at a Civil Service audience, it was widely read and had a deterrent effect (along with the Dairy Investigation) on companies' appetite to collaborate on complex responsible business issues. New guidance should address the mixed signals to the business community.

### **4. Use a range of mechanisms to increase business confidence in voluntary agreements compliance with competition law**

- a) Promote the Short-form Opinion procedure as a means of resolving novel issues.
- b) Set out on which key issues the Secretary of State for BIS might occasionally provide additional reassurance through a 'public policy exclusion' order.
- c) Promote the ISEAL Alliance Codes of Practice and invest in building the capacity of trade associations and other intermediaries facilitating the development of voluntary agreements that are statutorily exempt (fulfilling the four cumulative criteria).

### **5. Research, and then apply when appropriate, optimal approaches to enforcing voluntary agreements (both for signatories and non-signatory 'free-riders')**

### **6. Research and advocate effective international use and application of voluntary agreements**

#### *a) EU guidance improvements*

Unlike the OFT the EU does not have an accessible, resourced procedure (along the lines of the SFO) for issuing opinions on topical issues relating to voluntary agreements/ self-

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<sup>8</sup> <http://www.berr.gov.uk/files/file45711.pdf>

regulation. This needs to be established so opinions can be issued with pan-European application. Evidence would suggest that the legal uncertainties/ costs in this area has led to “forum shopping” with MNCs going to national competition authorities most able and willing to issue opinions. This has a direct impact on European competitiveness with investment being directed into other markets where competition authorities issue opinions that give greater comfort and reduce investment risks.

It is to be seen if the European Commission amends the Draft Horizontal Agreement Guidelines according to the comments submitted by the public, including the International Chamber of Commerce<sup>9</sup> or *The Cooperatition Incubator*<sup>10</sup>.

*The Cooperatition Incubator* welcomed the draft EU Horizontal Agreements Guidelines 2010, which are much clearer than the 2001 guidance. The response focused on the “standardisation agreements” guidance (pgs 66-82) and concluded with five recommendations:

- i. The need to include a worked example around a supply chain social voluntary standard, perhaps labour-related, where additional employment costs are passed on to the consumer;
- ii. The need to include additional, contrasting, worked environmental examples where increased production costs to deliver qualitative benefits may be passed on to the end consumer;
- iii. The need to include best practice guidance and/or examples on what parties to discussions around a potential voluntary agreement should consider “general and aggregated” versus “specific or sensitive” information;
- iv. The need to include information on where in EU nations’ competition authorities groups of companies seeking to form voluntary agreements can get advice, such as the unit responsible for ‘Short-form Opinions’ in the UK OFT;
- v. Consideration needs to be given to how the European Commission encourages national competition authorities (and departments for business) to issue guidance that compliments, rather than undermines EU guidance.

### Ensure Sustainable Consumption and Social impact assessment tools are utilised in Competition Impact Assessments

Alongside the UK Treasury’s Green Book (2003)<sup>11</sup>, two key practical tools for assessing the positive/ negative impacts of environmental agreements/standards are:

- Environmental Impact Guidance<sup>12</sup>
- Environmental Valuation Guidelines<sup>13</sup>

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[http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/Statements/Horizontal\\_Coop\\_Agmnts\\_Final\\_25\\_06\\_10.pdf](http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/Statements/Horizontal_Coop_Agmnts_Final_25_06_10.pdf)

[http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/Statements/Horizontal\\_Coop\\_Agmnts\\_Final\\_25\\_06\\_10.pdf](http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/Statements/Horizontal_Coop_Agmnts_Final_25_06_10.pdf)

<sup>10</sup> <http://cooperatition.org/wp-content/uploads/2010/06/The-Cooperatition-Incubator-EU-Horizontal-Agreements-Guidelines-2010-consultation-response-June-2010-v1.1.pdf>

<sup>11</sup> [http://www.hm-treasury.gov.uk/d/green\\_book\\_complete.pdf](http://www.hm-treasury.gov.uk/d/green_book_complete.pdf)

<sup>12</sup> <http://www.defra.gov.uk/corporate/policy/guidance/env-impact/index.htm>

<sup>13</sup> <http://www.defra.gov.uk/environment/policy/natural-environ/using/valuation/index.htm>



Voluntary agreements focused on social concerns in the coming years seem likely to focus on public health concerns such as excessive consumption of alcohol and obesity (e.g. The Department for Health's Public Health Responsibility Deal<sup>14</sup>). *The Cooperatition Incubator* has suggested that the fashion supply chain may also be an appropriate sector for a voluntary agreement with greater force.<sup>15</sup>

In building the case for voluntary agreements to address social concerns these impact assessment tools may be useful:

- Sustainable Development Impact Test<sup>16</sup>
- Health Impact Assessment<sup>17</sup>
- Human Rights Impact Assessment<sup>18</sup>

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<sup>14</sup> <http://cooperatition.org/2010/07/12/doh-sets-out-how-responsibility-deal-will-be-part-of-new-approach-to-public-health/>

<sup>15</sup> <http://cooperatition.org/2010/01/31/does-fashion-sector-offer-opportunity-for-new-responsibility-deal/>

<sup>16</sup> <http://www.defra.gov.uk/corporate/policy/guidance/sd-impact/index.htm>

<sup>17</sup> [http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Healthassessment/DH\\_4093617](http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Healthassessment/DH_4093617)

<sup>18</sup> <http://www.justice.gov.uk/guidance/humanrights.htm>