

## **The importance of a competition agency providing guidance: the UK experience**

### **Comisión Federal de Competencia, Mexico**

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### **Introduction**

I would like to thank Eduardo Pérez Motta and colleagues at the CFC for inviting me here today to discuss this topic, which is of relevance to competition agencies worldwide, whether new or mature, large or small. The transparency initiatives and guidance being issued by the CFC are very similar to those happening at the OFT, and are a fine example of how competition policy is evolving and converging through national and international learning and communication. So it gives me great pleasure to discuss our experience in this area here today.

Providing guidance is a vital component of the OFT's work, and contributes greatly towards our drive for fair and competitive markets. Effective competition brings benefits to consumers and the economy as a whole, which is particularly important in a time of economic uncertainty.

At the OFT, we pursue our mission – to make markets work well for consumers – through a mixture of enforcement and business education. In other words, we balance helping companies and individuals to comply with the law with taking firm action when they do not. Issuing guidance forms an important part of business education, by providing clarity to business. Past

decisions of the agency can also serve as guidance to business on what is, and is not, acceptable.

Consistency and clarity in the application of the law is crucial. It means businesses can plan ahead, and become more efficient. This, at a time when the UK is striving for economic growth, is a very important consideration. Effective use of our resources is also key as the OFT is put under increasing pressure to deliver value for money. The use of guidance immensely increases our ability to deliver effective outcomes for consumers.

During the course of this speech, I plan to explain further the reasons why the OFT considers it so important to provide guidance, in particular, by reference to the benefits created by issuing guidance. I will raise certain questions for your consideration and reflect on some recent OFT experience.

This speech is particularly focussed on the competition regime, but it is important to stress that the OFT also issues guidance on complying with UK consumer and credit legislation. Competition and consumer policy are inextricably linked - consumer law enforcement helps to create informed and empowered consumers able to drive competition within the market.

### **The OFT's work: instruments available and constraints**

Before I explain to you the benefits and importance of the OFT's work in giving competition guidance, I would like to set the scene of the work that we do, in terms of the instruments that are available to us and the constraints to which we are subject. This will help me explain more clearly the value that giving guidance adds to our mission and toolkit. As I will be arguing throughout my speech, issuing guidance is necessary for us to maximise the impact of our work, making the most of the powers and resources available to us.

Let me turn into our available tools first.

The OFT can use a wide range of tools in tackling markets that are not working well for consumers, namely enforcement action, market studies, merger control, competition research and advocacy, and advice on specific

competition issues (notably through our relatively new short-form opinion tool).

Competition law enforcement is the fundamental focus of our work to secure compliance – in particular, seeking to ensure that companies do not enter into agreements which prevent, restrict or distort competition and that dominant companies do not abuse their market position.

The OFT has a flexible range of powers to create incentives for companies and individuals to comply with the law, including powers to impose financial penalties on undertakings and bring criminal prosecutions against individuals for the cartel offence. The OFT may also apply to the court to disqualify directors whose companies have breached competition law and where the director's conduct was connected with the breach. Additionally, in the UK, persons harmed by competition infringements can seek redress in the civil courts for the loss they have suffered as a result of the infringement. Private actions for damages have become an increasing trend in the UK in recent years.

The OFT also has a range of tools to promote competition where markets are functioning less well as a result of more deeply-rooted issues such as barriers to entry, a lack of transparency, or a low level of consumer engagement. The OFT has the power to carry out market studies and, where appropriate, to refer markets to the Competition Commission to carry out an in-depth market investigation.<sup>1</sup>

The OFT also reviews mergers between businesses and decides whether they might substantially lessen competition in the UK. The OFT is the 'phase I' agency for UK merger control, acting as a filter to identify mergers raising significant competition concerns which would benefit from a more detailed 'phase II' review by the Competition Commission.

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<sup>1</sup> A key strength of the UK regime is the OFT's ability to take a holistic approach to assessing markets both from a competition and consumer angle and, if necessary, to then choose the appropriate intervention.

At the OFT, we also consider it important to invest time in seeking to influence businesses to comply with competition law and to encourage Government policy, through competition advocacy, to take fully into account potential competition concerns, both avoiding new laws and regulations that restrict competition, and dismantling existing ones. We consider this an effective complement to enforcement action. By publishing research reports and participating in public debates, we also aim to influence businesses and policy makers.

We constantly strive to innovate and find better ways of doing things where appropriate. For example, the OFT has recently developed a new tool, the 'short-form opinion'. This is a new, streamlined process, which is currently being trialled. Short-form opinions allow the OFT to provide guidance on novel or unresolved issues of competition law relating to prospective agreements, in situations where clarification of the law would benefit a wider audience. Short-form opinions are published for the benefit of other businesses.<sup>2</sup>

It must be recognised, however, that the work of a competition agency is subject to important constraints.

Firstly, a competition agency's resources are limited and so the agency should aim to use these efficiently and effectively. In the UK, the OFT is able to choose which cases it investigates. When deciding what cases to prioritise, the OFT makes an assessment of the likely impact of our work, the strategic significance of the case and balance these against the likelihood of a successful outcome and the resources that would be required to pursue the case.

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<sup>2</sup> The process is designed to be simple, short and flexible, resulting in a published short-form opinion within an envisaged timeframe of two-three months. Short-form opinions provide a new, streamlined way of providing guidance on specific competition law issues. One opinion has been issued so far, in relation to collective purchasing:  
[www.of.gov.uk/OFTwork/competition-act-and-cartels/short-form-opinions](http://www.of.gov.uk/OFTwork/competition-act-and-cartels/short-form-opinions).

Secondly, we are constrained by the rule of law and the scrutiny of the courts, which provide vital checks and balances on the work of a competition agency.<sup>3</sup>

Issuing competition guidance plays an important role in helping us fulfil our objective of making markets work well for consumers and managing these tools and constraints, as I will go on to explain.

### **What is meant by competition guidance?**

Before I go on to discuss the rationale for providing guidance in greater detail, I should briefly clarify what I mean by competition 'guidance' in this speech. I will talk about guidance *generally* as the work of competition agencies in providing advice and information about the application of the law, or about the processes and policies of the agency.

Guidance can therefore cover a variety of issues. Some of our guidance is designed to increase awareness and understanding of the law so that businesses know more clearly what they can and cannot do. Other guidance is aimed at providing transparency as to the processes and policies that we follow. This is important so that, for example, parties have a better understanding of the steps that the OFT follows in an investigation, or our views on agreements or conduct likely to give rise to competition concerns. Guidance could also cover other issues in addition to these two broad categories.

The OFT has a wide discretion to decide how and when to publish guidance. In certain instances, the provision of guidance is required by law. For example, the OFT was required to give 'advice and information' on the application and enforcement of the UK Competition Act 1998 when it entered into force and following its amendment to accommodate new EU rules in 2004. The OFT is also required by law to publish 'guidance' as to

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<sup>3</sup> The main way for the courts to exercise that function is by reviewing our decisions on appeal. In the UK, the decisions of the OFT can be appealed to a specialist court, the Competition Appeal Tribunal, which provides a full appeal on the merits of OFT decisions. There is the possibility of further appeals on points of law to the Court of Appeal and then to the Supreme Court. Additionally, the decisions, actions or failures to act by the OFT in the exercise of its public functions are subject to judicial review under administrative law.

the circumstances in which it may be appropriate to accept commitments from the parties to a competition investigation that address the competition concerns that it has identified, as well as guidance on the OFT's methodology for calculating financial penalties, which both need to be approved by the Secretary of State. The OFT also considers that speeches play an important role in supplementing more detailed guidance and, by publicising such guidance, enhancing its effectiveness. I will refer to all this work as forms of 'guidance'.

### **The rationale for providing guidance**

Issuing guidance is a vital component of the OFT's work to promote well-functioning markets. As I said before, it is a key instrument for us to maximise the impact of what we do, for many different reasons. This is best explained by looking at the range of benefits that the provision of guidance creates.

Firstly, we consider that guidance is a tool that helps us do our work better. Issuing guidance provides an opportunity for us to take stock of our thinking or processes and reflect on the ways to improve them.

One good example of our efforts to increase the effectiveness of our work are the merger assessment guidelines that the OFT and the UK Competition Commission issued jointly in 2010.<sup>4</sup> These guidelines, which replace earlier ones issued by each of the two agencies, show that our understanding of topics changes over time as we gain more experience, and that it is right to articulate what our understanding is in new or revised guidance.

Secondly, the process of engaging with external parties to produce guidance provides us with a unique opportunity to improve our understanding of the impact that our work has and to enhance our credibility as a competition agency.

By engaging on guidance, the OFT can collect comprehensive, valuable feedback on the impact of its activities. Our work on guidance allows parties

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<sup>4</sup> Merger assessment guidelines (CC2(Revised)/OFT1254)

to engage in a principled debate, which is less likely to happen in the context of individual enforcement cases. We also build trust, seminal working relationships and credibility for our work, by demonstrating active listening and responsiveness to the concerns of the many different 'constituencies' we work with (businesses, consumers, regulators with concurrent competition powers, and Government).

The OFT has successfully used various forms of engagement, including not only public consultations on draft guidance (providing an opportunity for interested parties to provide comments), but also hearings, roundtables and workshops.

For example, the OFT has recently published guidance on the procedures that it follows during competition investigations under the UK Competition Act, which sets out how the OFT starts, deals with and closes cases.<sup>5</sup> The guidance outlines certain changes that the OFT has made in recent years in order to make its procedures more efficient and transparent and ensures that parties to investigations and their lawyers are aware of these. In providing guidance, we sought views of businesses and their advisors on our own procedures, via a public consultation and a public event to discuss those procedures. The OFT has taken on board comments from external parties about aspects of our procedures that were working well and those that were not always delivering efficient outcomes.

Thirdly, issuing guidance can improve the transparency of our work. By issuing guidance, we communicate with the outside world, for example, how we exercise our discretionary powers; the procedural steps we take to reach decisions; the ways in which we engage with businesses or other interested parties; and/or the rights of parties to investigations. Guidance can also indicate where enforcement activity is likely to focus, for example, by setting out the administrative priorities of the agency.

The benefits of transparency are manifold. On the one hand, issuing guidance makes us more accountable. Through increased transparency, parties to investigations and also the courts will be able to anticipate our

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<sup>5</sup> A guide to the OFT's investigation procedures in competition cases (OFT1263)

likely approach to addressing competition issues and expect us to follow it unless there is a good reason for not doing so. Further, guidance can increase transparency regarding our approach to enforcing the law in 'grey' areas where practices could in different circumstances be anti-competitive or pro-competitive. In such grey areas, intervention by an agency could either have a chilling effect on potentially beneficial, pro-competitive behaviour, or under-deter anti-competitive conduct. To the extent that guidance narrows these grey areas, this increases business certainty, fostering investment and lowering costs to business. Certainty and investment matter hugely to us. We also recognise, however, that complete predictability regarding the circumstances in which we will take enforcement action may undermine the deterrent effect of our work.

The OFT has been moving towards providing greater transparency in its work where appropriate. We published a transparency statement in 2010 which included commitments for increased transparency across our work.<sup>6</sup> As I mentioned, we also have recently published guidance on the procedures we follow during competition investigations which provides greater transparency for potential complainants and parties to competition investigations about our case-handling procedures. The OFT has also published case selection and prioritisation principles, which describe the factors we consider when we make decisions on how to prioritise our work.<sup>7</sup>

Fourthly, publishing guidance may educate businesses about the law, thereby facilitating and encouraging business compliance. Guidance allows businesses to gain a better understanding of the boundaries of the law, so as to encourage behaviour within those boundaries. The OFT recognises that the vast majority of businesses seek to comply with competition law and is keen to help them to do so. As outlined above, guidance can also help mitigate the risk that uncertainty about the law has a chilling effect on pro-competitive behaviour.

An example of guidance achieving this benefit is our recently published guidance on the application of competition law to land agreements.<sup>8</sup> Until

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<sup>6</sup> Transparency: a statement on the OFT's approach (OFT1234)

<sup>7</sup> OFT prioritisation principles (OFT953)

<sup>8</sup> The application of competition law following the revocation of the Land Agreements



recently most types of agreement concerning the use of land were excluded from the anti-competitive agreement provisions of the Competition Act. The UK property industry has been very concerned about how they should assess land agreements under competition and our guidance in this area sets out a framework for assessing such agreements, to help parties to self-assess their own agreements. Another example is the OFT guidance on how companies might approach competition compliance, and about the duties of directors under competition law, which will be published in its final form in the coming weeks, following a consultation launched at the end of 2010.<sup>9</sup> Our work on these areas has been expressly welcomed by businesses and legal advisors.

Fifthly, guidance may help to foster a consistency of approach across domestic competition agencies and also within an agency. This may be particularly important in a jurisdiction such as the UK, where several concurrent regulators have the power to enforce competition law, in addition to the OFT.<sup>10</sup> Some of the OFT's guidance is published jointly with the UK regulators that have concurrent competition powers in the UK, in order to explain our common approach to an issue. Guidance may also have an important influence within an agency, by promoting consistency amongst case officers in relation to, for example, the substantive competition assessment of a particular issue, or procedures that will be followed.

An important example of guidance fostering consistency across agencies are the joint merger assessment guidelines published by the OFT and the UK Competition Commission, which I mentioned earlier. A further example is our guidance on director disqualification orders, which explains the circumstances in which the OFT and the sectoral regulators would consider applying to court for a director disqualification order.<sup>11</sup>

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Exclusion Order (OFT1280a)

<sup>9</sup> Draft guidance (closed consultations awaiting response) - Company directions and competition law (OFT1277) and How your business can achieve compliance (OFT1278)

<sup>10</sup> The following sectoral regulators have concurrent powers to enforce competition law in the UK: the Office of Communications; the Gas and Electricity Markets Authority; the Water Services Regulation Authority; the Office of Rail Regulation; the Civil Aviation Authority; and the Northern Ireland Authority for Utility Regulation.

<sup>11</sup> Director disqualification orders in competition cases (OFT510)

Finally, guidance may have some influence over the development of competition law and its application by the courts. This could be the indirect result of guidance setting out the views of an agency on the agreements or conduct likely to give rise to competition concerns. Whilst guidance published by competition agencies is generally not binding on courts, the courts may have regard to it. In the UK, courts must have regard to the European Commission guidelines by virtue of section 60 of the Competition Act 1998.

### **The role of guidance in facilitating consistency and convergence across jurisdictions**

Guidance can also be instrumental in working towards achieving consistency, convergence and cooperation in the application of competition law across different jurisdictions. First, guidance on the law and how it is enforced in a particular jurisdiction can facilitate experience-sharing and cooperation between agencies. Secondly, consulting our international peers when we develop guidance can promote consistency across jurisdictions.

Consistency across the EU regarding the application of EU competition law is particularly important since the national competition authorities are each applying the same substantive competition rules. The European Commission has published detailed guidance on various areas, most recently on the assessment of horizontal cooperation agreements and of vertical agreements, to which the OFT contributed significantly. The European Commission guidance is developed in conjunction with national competition authorities within the EU, and is available to national authorities to assist them to understand the way in which the Commission interprets the law. There are additional routes too – through the European Competition Network, Member States' competition authorities inform each other of proposed decisions and discuss the work of their peers. This allows for the identification and sharing of experience and best practice as well as enhancing informal cooperation between agencies.

Competition agencies may also seek comments from their international peers when developing guidance. For example, the US antitrust agencies held a series of public workshops when developing their 2010 horizontal merger

guidelines. The debate around those guidelines was very valuable and the transparent way in which it was done will be useful to other agencies. We participated in that debate and found it very useful in the UK. Another example are the recent mergers guidelines that the OFT has jointly issued with the UK Competition Commission. The collaboration of other agencies in the EU and the US was very important in producing robust guidelines. The OFT also recently contributed to a Commission set up in France to review the French competition authority's approach to setting penalties and has commented on the subsequent draft guidance on penalty-setting that has been published for consultation by the French competition authority.

On the global stage, convergence and cooperation can help manage the gaps and overlaps created by a system of predominantly national enforcement against a background of increasingly international markets. Competition law is an area where there is increasing convergence - for example in the approach to assessing mergers or in the approach adopted in relation to cartel investigations. This is facilitated in part by discussions in fora such as the International Competition Network (ICN) and Organisation for Economic Cooperation and Development (OECD). Nevertheless, significant differences remain in some areas, such as the assessment of unilateral conduct and the rights of private parties to bring damages claims against those who have breached competition law.

The increased use of competition guidance in most jurisdictions worldwide is no doubt a key factor in facilitating the convergence of approaches between agencies, where appropriate. The OFT strives to maximise the benefits to us and others from sharing competition expertise and contributing to international best practice.

### **Questions to consider**

In the final part of my speech, I would like to discuss some of the risks and implications that a competition agency should be aware of when deciding to issue guidance and ways to manage them.

Firstly, the production of guidance involves an investment of resources by a competition agency and it is necessary to ensure as far as possible that this

investment of resources serves a valuable purpose. Producing guidance involves not only research and drafting, but also (and importantly) the process of engaging with others. Robust guidance is the result of the effort of many, including external parties that give feedback when consulted on draft guidance.

There is no single answer as to how much resource is used to make guidance. This will depend on the scope of the guidance, the existing precedents and other factors. In the OFT's view, however, effective engagement is key. This helps us ensure that our guidance addresses the important issues that matter to businesses, consumers or policy makers, and does it in the right way. Earlier in this speech I highlighted the very important benefits of the process of engaging with external parties to produce guidance, as well as the different forms of engagement that we have used in the past (such as consultations on draft guidance and public events).

I would like to draw particular attention to the importance of engaging with other competition agencies in the UK regime. Key examples of this are the different guidelines jointly published with the concurrent regulators and the recent mergers guidelines jointly issued by the OFT and the UK Competition Commission.

The second question to consider is when a competition agency should first issue guidance. Should guidance be issued after a minimum of experience has been gained in a certain area or perhaps as experience is still developing? To what extent should guidance build on and reflect existing practice? To what extent can it set new views or processes within an agency?

I think that guidance can strike the right balance between well-established practice and giving rise to innovative solutions to issues related to the work of an agency. Although existing law constitutes the necessary framework to develop guidance, there might be some limited scope for the agency to review its understanding of certain topics or its own processes through guidance. Where guidance is used to further develop the thinking of an agency or to propose new procedures, guidance should be issued at an early stage, particularly where this has a significant impact on enforcement action

taken by the agency. The importance of consulting on the guidance is even greater in these circumstances.

My third point for consideration is on the appropriate level of detail when issuing guidance. One risk is that too much detail is given through guidance, which could, for example, lead to guidance becoming overly prescriptive regarding an interpretation of the law, or could lead to a competition agency's procedures becoming unduly rigid.

The OFT generally supports a principles-based approach to providing guidance, rather than issuing detailed guidance which aims to cover every eventuality. We consider that a principles-based approach provides transparency about the agency's likely approach to an issue and reduces the risk of 'getting it wrong' when we provide guidance in an area where there is limited precedent. A principles-based approach provides flexibility which allows an agency to take into account the circumstances of a particular case and avoids a mechanistic point-scoring system that could potentially lead to arbitrary results.

Sometimes different levels of detail may be necessary for different audiences, to make the guidance useful and accessible. In certain cases, the OFT issues brief, high level 'quick guides' to complement more detailed guidance. An example of this is the quick guide on merger assessment issued some days ago by the OFT and the UK Competition Commission, which is designed for non-specialists, to complement their more technical mergers assessment guidelines issued in 2010.<sup>12</sup> A further example is when the OFT published a short re-statement of its position regarding the acquisition of 'failing firms' in 2008, which reflected the OFT's existing guidance and also its decisional practice to date in cases where merging parties have sought to persuade the OFT that a merger raising competition concerns should be cleared on 'failing firm' grounds.<sup>13</sup>

There is a fourth question regarding the frequency for reviewing existing guidance. There is a risk that guidance may become 'unstable' if it is revised

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<sup>12</sup>A quick guide to UK merger assessment (CC2(Summary)/OFT1313)

<sup>13</sup> Restatement of OFT's position regarding acquisitions of 'failing firms' (OFT1047)

too often, or obsolete, if it is infrequently reviewed. The OFT aims to review its existing guidance as and when it is appropriate to do so, in order to ensure that the guidance remains fit for purpose. We also believe that guidance that is no longer meeting its original objectives should be removed.

Finally, I would like to draw attention to what I call 'external risks' and in particular the risk of legal challenge, as this can have important implications for our guidance. It is important to bear in mind that in certain circumstances the value of guidance could change as a result of risks that can be managed only to a limited extent by competition agencies. Chief amongst them is the risk of legal challenge. As I mentioned at the start, the scrutiny of our work by the courts provides vital checks and balances in the work of a competition agency and makes us accountable in the use of our powers.

A potential frustration for a competition agency can be where the agency has followed its own guidance on policy in taking a decision, yet on appeal a court, which is not bound by the guidance of the competition agency, decides that a different approach should be adopted. In a way, the enhanced transparency provided by the competition agency about how it will approach decision-taking has not helped the agency. I would raise a question of whether robust processes to mitigate the risks that I have outlined in this part of my speech (such as (i) open and transparent external engagement, (ii) giving consideration to the appropriate balance between experience and innovative guidance within the framework of the law, (iii) giving consideration to the appropriate level of detail in guidance and (iv) sensible and timely reviews of existing guidance) can mitigate the risk that our guidance is challenged or disregarded by the courts.

## **Conclusion**

To conclude, I would first reiterate my earlier point that the OFT's mission to make markets work well for consumers is best achieved through a mixture of enforcement action, market tools (such as carrying out market studies), advocacy and working with business, whether through formal guidance or informal engagement and education work.

Issuing guidance is a vital component of the OFT's work. I have outlined some of the direct benefits of giving guidance, such as increased transparency, which makes us more accountable in the use of our powers and enhances certainty for businesses and investors. Giving guidance can also assist in educating business and encouraging compliance with the law and is instrumental in fostering consistency in the application of the law amongst competition agencies. I also argued that guidance may potentially have an influence on the development of the law.

Next to the direct benefits, I stressed that the provision of guidance enhances the capability of a competition agency to deliver positive outcomes for consumers. Giving guidance helps increase the effectiveness of our role to enforce the law and foster compliance.

The importance of this effect cannot be underestimated in a world where competition agencies are increasingly under pressure to deliver value for money. As I explained, issuing guidance helps the OFT do its work better, by allowing us to take stock of our thinking or processes and reflect on the ways to improve them. Moreover, the process of engaging with external parties to produce guidance helps us make the best of our relationship with stakeholders and increases our credibility as a competition agency.

The OFT continues to use guidance in its drive to make markets work well for consumers.<sup>14</sup> I referred today to some examples of our recent guidance in the areas of merger assessment and also regarding competition enforcement (Competition Act procedures, compliance and directors, land agreements). During the next year the OFT will review its penalties policy in light of the most recent judgments of the Competition Appeal Tribunal and will consider whether its current penalties guidance should be amended. A review of our leniency policy and guidance is also under way, which takes into account, amongst others, the findings and recommendations of the OFT Board-led review into the events leading up to the collapse of the criminal trial in the fuel surcharges case.<sup>15</sup> We have also announced our plan to

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<sup>14</sup> OFT guidance on the Competition Act can be downloaded from: [www.of.gov.uk/OFTwork/publications/publication-categories/guidance/competition-act](http://www.of.gov.uk/OFTwork/publications/publication-categories/guidance/competition-act)

<sup>15</sup> R v Burns and others

publish a summary of our experience to date regarding settlement in competition cases.

However, providing guidance is not a substitute for strong enforcement work. Indeed, research carried out for the OFT has consistently shown that the key drivers for compliance with competition law are concerns about the risk of financial penalties, sanctions against individuals, reputational damage and private damages actions.

Going forward, therefore, we believe that enforcement action is the key to an effective competition law regime, but that has to be complemented with sensible, smart guidance and business education. This balanced approach to achieving competition law compliance will enable competition policy to continue to make important contributions to both the well-being of consumers and the performance of the UK economy.

Thank you for your attention today.