

BUSINESSEUROPE



MAKING SENSE OF COMPETITION LAW COMPLIANCE

**A PRACTICAL GUIDE FOR SMES
2017**



WWW.BUSINESSEUROPE.EU



Who are we ?

BusinessEurope is the leading advocate for growth and competitiveness at European level, standing up for companies across the continent and campaigning on the issue that most influence their performance. A recognised social partner, we speak for all-sized enterprises in 34 European countries whose national business federations are our direct members.

Disclaimer

This booklet is not intended to provide you with the means to act as your own legal advisor and does not replace expert knowledge and legal assistance where appropriate. These are just guidelines aiming to facilitate executive understanding and guide the reader into the basic steps towards competition compliance. At the same time, the guide will help the reader identify those situations where legal assistance may be the best option. BusinessEurope takes no responsibility whatsoever for misuse of the information provided in this document. BusinessEurope strongly condemns any kind of competition law violation.



For further information: **Legal Affairs Department**

Guido Lobrano, Deputy Director

Tel: +32 (0)2 237 65 36

E-mail g.lobrano@businesseurope.eu

BUSINESSEUROPE Av. de Cortenbergh 168 – 1000 Brussels

Why should I read this booklet ?

Understanding the key principles of competition law is essential for every company whenever it makes decisions on sales strategy, pricing policy, distribution channels and many other commercial topics. Our aim is to present this important but complex subject in an easy and practical manner. The purpose of this booklet is to help you:

- avoid violations against competition law, which might result in severe sanctions and loss of reputation.
- avoid “over compliance” just to be on the safe side, which might result in missed business opportunities.
- identify when you need to turn to a professional legal adviser.

The booklet consists of two parts. Part 1 outlines the key elements and principles of competition law. Part 2 helps you implement competition law awareness in your organization. In other words, it helps make your company “competition law compliant”.

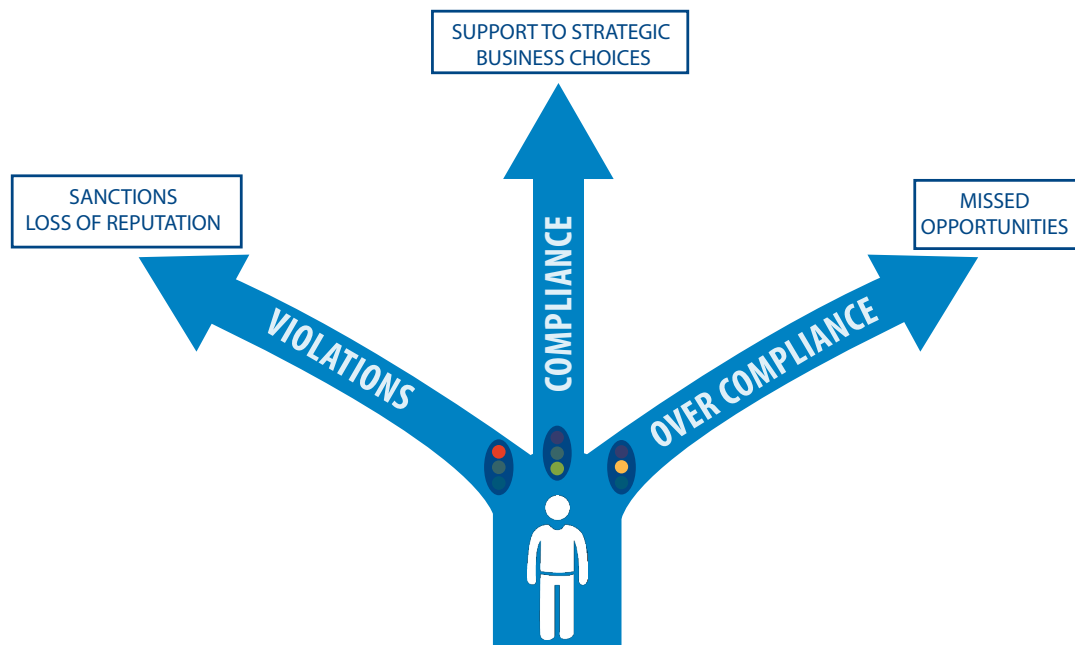


Table of content

	Introduction	6
Part 1	The general principles of competition law	7
1.	Why do we need to observe competition law ?	7
1.1.	Severe consequences for competition law violations	7
	Criminal sanctions for individuals	7
	Financial penalties/fines	7
	Compensation for damages	7
	Agreements being invalid	7
	Exclusion from public procurement and state aid	8
	Reputational damage and other “non-legal” charges	8
1.2.	Competition law violations are seldom self-evident and obvious	8
	The most severe competition law violations occur in secret	8
	Legal uncertainties - unintentional wrongdoing	8
	Factual uncertainties	8
2.	Investigations by competition authorities	9
	Investigative tools	9
	Leniency programmes	9
	Complaints by trading partners	9
	Ad hoc investigations	9
3.	The most typical violations of competition law	10
3.1.	“Hard-core” violations	10
	Price fixing	11
	Bid rigging	11
	Allocations of customers or territories	11
	Output restrictions	11
	Resale price maintenance	11
3.2.	Non hard-core violations	12
	Exchange of sensitive information	12
	Standardisation agreements	12
	Selective distribution systems	12
	Boycotts of customers and suppliers	12
	Exclusive dealing agreements	13
	Market information systems	13
3.3.	Abuses of dominance	13
	Tying and bundling	13
	Refusal to supply	13
	Predatory pricing	13
	Price discrimination	14
	Excessive pricing	14

Part 2	Competition law compliance programmes in practice	15
4.	What are the benefits?	15
4.1.	Manage risk: sharpen awareness, prevent violations and respect the law	15
4.2.	Uncover hidden competition law violations	16
4.3.	Identify violations by your trading partners or competitors	16
4.4.	Avoid over-compliance	16
5.	How to establish a competition law compliance programme in your company	16
5.1.	Four components of a successful programme	17
	Auditing and risk assessment	18
	• Document review	18
	• Employee interviews	18
	Training	19
	Guiding	20
	• Board statement on compliance commitment	20
	• Internal competition law guidelines	21
	• Document generation and administration guidelines	21
	Monitoring	22
6.	Successful preparation and implementation of competition law compliance	23
	Initial decisions by company management	23
	Design and implementation - Who should do the job?	24
	Be focused: identify the relevant areas	25
	Identification of key personnel	25
	Internal marketing of the competition law compliance programme	25
7.	How to deal with identified violations?	26
	Remain calm	26
	Never destroy evidence	26
	Analyse the situation and investigate the facts	27
	Terminate the violation	27
	Estimate consequences	27
	Potential fines	28
	Private damages actions	28
	Securities law disclosures & setting aside reserves	28
8.	Trade associations and competition law compliance	29
	No decisive influence on commercial decisions	29
	Particular attention with benchmarking and information exchanges	29
	Proper rules for trade association meetings	30
9.	Dealing with dawn raids	30
	General preparation	31
	How to behave during a dawn raid	31



INTRODUCTION

Competition laws throughout the world rest on the premise that competition is the best way to ensure consumers receive maximum innovation and quality at the lowest possible price. BusinessEurope strongly condemns any kind of competition law violation. Competition law – or antitrust law as it is called in the US – is designed to ensure that free competition is not restricted. The considerations that follow are equally relevant no matter if you talk about EU or national competition rules. These rules are extremely broad and impact on much of our day-to-day business. Pitfalls may reside in every competitor contact, in every distribution agreement, in every pricing decision, in every trade association meeting, in every sales strategy, in every customer contact and in many other daily business operations.

Why is competition law such a critical topic? Because it involves many business and strategic decisions. Because respecting competition rules is fundamental for healthy, well-functioning market. And because violations of competition law are very heavily sanctioned. That's why the so called competition law compliance programmes (explained in Part 2 of this booklet) are a vital part of corporate risk management. Complying with competition law is a risk-prevention exercise, which involves taking preventive measures to reduce exposure to liabilities as a result of violations. That is also why so many companies are establishing competition law compliance programmes as part of a total enterprise risk management plan.



Prevention is of course always the main objective. Unfortunately, no programme can guarantee 100 percent compliance for the future. It does, however, help you identify possible violations or risks early enough and take measures to minimise damage.

How does a competition law compliance programme have to look like in order to achieve prevention and elimination to a satisfactory extent? What are the main components of competition law compliance programmes? What are the main practical aspects that need to be taken into consideration when preparing and implementing competition law compliance programmes? Are expert lawyers indispensable?

This booklet suggests answers to these and many other questions. It helps understanding the importance of competition law compliance in general and helps executives and company officers – in particular those of SMEs who often do not dispose of in-house legal advisors – determine the best ways to cope with their duty to prevent, identify and stop potential competition law violations within their organisations.

This booklet does not provide a step-by-step manual to achieve competition compliance within your organisation. Companies are different and so are the compliance programmes that suit them best. What you have in your hands is a toolbox that provides fundamental considerations and suggestions regarding any corporate competition law compliance programme. There may be other, different ways to do things that are still valid. It will be up to you and your legal advisors to pick the right tools and use them correctly in order to craft the optimum compliance programme for your company and achieve its successful implementation.

PART I

THE GENERAL PRINCIPLES OF COMPETITION LAW

1. WHY DO YOU NEED TO OBSERVE COMPETITION LAW

Apart from the key importance of contributing and ensuring that markets function properly, there are two main reasons why it is so critically important to put in place compliance activities and observe competition law:

- First, the sanctions can be devastating for companies and individuals.
- Second, competition law violations are not always self-evident and can be hard to identify by company management.

1.1. Severe consequences for competition law violations

Criminal sanctions for individuals: around the globe, including the US and some EU Member States, violations of the competition laws may constitute a criminal offence. They can consist of both severe penalty payments, disqualification of company employees/management and even imprisonment. Extradition from the country is a standard procedure. A considerable number of European executives are currently serving jail time in the US.



Agreements being invalid: anti-competitive agreements or clauses are by law null and void, and therefore unenforceable. In other words, your contracting party might break important commercial agreements that might constitute the backbone of your operations without you having any possibility to react. There is no point in negotiating a lucrative contract if it cannot be fully enforced in practice.



Financial penalties / fines: competition authorities' most feared weapon in the battle against anti-competitive behaviours is the imposition of fines. They are aimed to both sanction the offender as well as to deter other potential wrongdoers from repeating an infringement. The European Commission alone imposes fines amounting to hundreds of millions of Euros every year for anti-competitive behaviour – both on large corporations and on SMEs.



Exclusion from public procurement and state aid: violations of competition law may also result in an exclusion from public procurement and state aid. Many public procurement and state aid rules can exclude companies guilty of anti-competitive behaviour.



Compensation for damages: companies or individuals having suffered damages as a result of anti-competitive conduct have a right to compensation. The availability of substantial damages claims and class actions has led to numerous court actions in many countries. Some companies have had to pay out billions of euros as a result. Taking into account in particular the recently introduced legislation to reinforce and encourage private enforcement in Europe, we may witness an increase of damages actions by victims of anti-competitive behaviour.



Reputational damage and other “non-legal” charges: antitrust investigations typically cause negative public attention for the company irrespective of whether it's proved guilty or not. The mere allegation that your company has been involved in inappropriate conduct may cause loss of image, reputation and shareholder value. In addition, investigations disrupt the business and cost the management precious time, preventing it from focusing on core business. Often, infringement decisions result in disciplinary measures including dismissals of the officers and employees involved in the violation which then entails additional HR challenges. Finally, the legal costs for defending competition law cases will always be significant.



1.2. Competition law violations are seldom self-evident and obvious

The most severe competition law violations occur in secret

Unlike other felonies, competition law violations are seldom obvious and companies are not necessarily aware of their wrongdoing. One of the most important reasons for this is that employees who engage in anti-competitive conduct often do so secretly. Motivation for violating competition law can be varied. A promised bonus payment for achieved results or the pressure to succeed can generate sufficient incentive for employees and officers to deviate from the path of legality. Misconduct by one single employee is enough to expose an entire company to the full rigours of competition law. «We didn't know» is not an excuse that competition authorities accept and it does not shield the company and its management from being exposed to the full array of competition law risks. Furthermore, SMEs do by no means benefit from a milder treatment compared to large corporations.

Legal uncertainties - unintentional wrongdoing

It is a common misconception that competition law violations always occur as secret midnight conspiracies in smoky rooms. This is not the case and people are often not aware that the competition rules have a very broad scope. Competition law violations very often occur in the context of “normal” business conduct and without the involved people being aware of their wrongdoing. In addition, the competition laws are often complex, ambiguous, and by no means self-explanatory. The legal concepts of “dominance”, “market”, or “agreement”, for instance, may be hard to grasp correctly without a legal background. In addition, sometimes different competition rules from another country can apply to the same case. Certain situations therefore require the expertise of competition law specialists to separate legitimate commercial conduct from illegal cartel behaviour or abuses of dominance. “Ignorance of the law does not excuse” and misinterpretation of a legal term or unawareness of the illegality of a given behaviour is indeed not an excuse that judges would readily accept. To the contrary, the law presumes that everybody doing business knows the applicable competition laws and complies with them.

Factual uncertainties

In addition to the legal uncertainties, the assessment of the legality of a certain conduct is often also dependent on factual circumstances which might be difficult to evaluate. One example is the market share test which largely determines whether a certain company holds a dominant position and is hence subject to the respective additional behavioural limitations. The definition of the relevant product and geographic markets as well as the assessment of the market shares of your company and of other market players is linked to substantial factual uncertainties which preclude waterproof results. In addition, the so-called “pro-competitive” aspects which might justify a given conduct despite its anti-competitive effects are in practice very difficult to capture and balance. You may have a rather firm perception of which market(s) your company is active in, but that may be very different from the legal market definition in a competition case.

2. INVESTIGATIONS BY COMPETITION AUTHORITIES

The chances that antitrust violations are uncovered are higher than ever. Rightfully so, considering that free competition is to the benefit of all whereas anti-competitive conduct benefits only few. Competition authorities are armed with broad and efficient investigative tools. In practice, the opening of an investigation is regularly based upon leniency applications (requests for immunity in exchange of cooperation in the investigation), complaints, or ad-hoc investigations.



■ Investigative tools

Competition authorities have wide powers of investigation. An important way for them to gather information are unannounced on-site inspection visits (commonly known as “dawn raids”). They can enter the premises, land and vehicles of a company (but also of natural persons), examine and take copies from the company’s books and other business records (including computer records), and ask for oral explanations on the spot. They use advanced forensic IT tools capable of tracking even deleted documents. In case of international infringements, authorities coordinate their dawn raids so as to maintain the surprise element. Competition authorities also have extensive powers to address written requests for information to the investigated companies or to third parties (e.g. competitors and customers).

■ Leniency programmes

The introduction of so-called “leniency programmes” or “immunity programmes” has led to the detection of some of the most harmful anti-competitive conspiracies. Under these programmes, companies can escape sanctions if they are the first to disclose a cartel to the competent authorities and collaborate with them throughout the investigation. As a consequence, leniency programmes have converted secret conspiracies into classic game-theory situations in which “disclosing the cartel” can be a favourable business decision for the company. Hence, leniency programmes have destabilized and eventually brought to an end many violations.

■ Complaints by trading partners

Competition rules are also used by companies to control and limit the commercial conduct of their trading partners – in particular customers, suppliers and competitors. Under most competition law regimes, individuals and companies have the right to submit complaints to competition authorities, which are required to take the appropriate measures to investigate the case and to bring the problematic conduct to an end. A general upwards trend in complaints can be observed. This mainly results from such complaints being relatively straightforward and inexpensive and the fact that the internet has generally increased market transparency, making it much easier for companies to identify or at least sense anti-competitive conduct by trading partners.

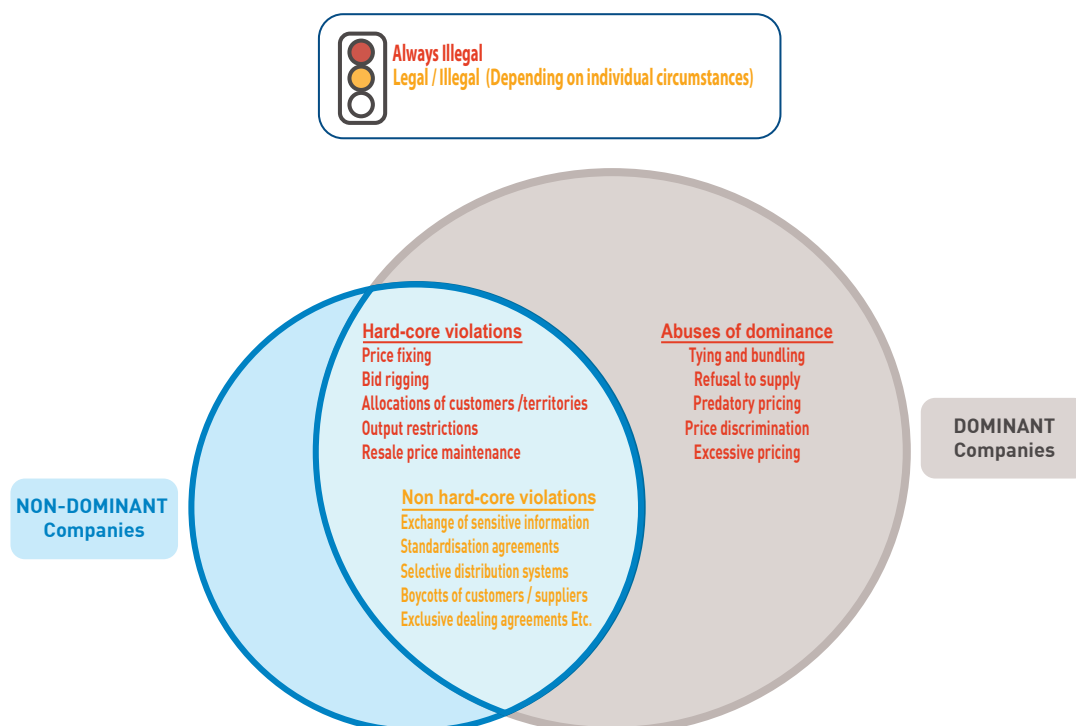
■ Ad hoc investigations

Competition authorities can also initiate their own investigations based on information or a mere suspicion that they have obtained during their normal course of business.



3. THE MOST TYPICAL VIOLATIONS OF COMPETITION LAW

Now – what kind of conduct is anti-competitive? What exactly is forbidden and what is not? This question is not an easy one to answer. Competition law pitfalls potentially reside in practically every competitor contact, distribution agreement, trade association meeting and in many other daily business activities. It is sheer impossible to give an exhaustive overview of all potentially anti-competitive activities. The same commercial conduct might be legal or illegal depending on the competitive environment in which it occurs. However, the regular areas of competition law concern can be subdivided into the following groups: (i) “hardcore” violations, (ii) non-hardcore violations (which both apply to all companies irrespective of their market position), and (iii) abuses of dominance.



3.1. « Hard-core » violations

The so-called “hard-core” violations are considered so profoundly anti-competitive that they are per se illegal always and in all circumstances. In other words, there is no legal defence, justification or excuse for the activity.

Activities that are per se illegal are typically subject to the harshest penalties, which may include severe fines for companies and incarceration for individuals.

Examples of this type of activity include agreements between competitors to:

- fix, increase or stabilize prices or terms or conditions of sale
- reduce the supply of goods or services
- rig bids (manipulate bidding)
- divide markets, territories or customers.

■ **Price fixing:** “price fixing” is an agreement among competitors about the price or the elements of pricing that they will charge. In other words, it is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. Every price fixing agreement is illegal, whether it is meant to raise, lower or just stabilize prices. Price fixing can take many forms, and any agreement among competitors that will affect the price to be charged can be price fixing. It is not necessary that the competitors agree to charge exactly the same price. For example, agreements among competitors regarding credit terms, discounts, margins, rebates or shipping charges will affect the price charged to customers and fit into the price fixing category, which is a per-se violation.

■ **Bid rigging:** Bid rigging refers to manipulating the bidding procedures or tenders in order to reduce competition. Essentially, competitors agree in advance who will submit the winning bid. As with price fixing, it is not necessary that all bidders participate in the conspiracy. In practice, bid rigging also takes many different forms.

■ **Allocations of customers or territories:** it is illegal for competitors to divide or allocate product markets, sales territories or customers among themselves. Illegal market division or allocation schemes are agreements by which competitors do exactly that. Under such arrangements, competing companies agree not to pursue a competitor’s customers, or not to pursue a category of customer commonly served by a competitor. In other market allocation schemes, competitors agree to sell only to customers in certain geographic areas and refuse to sell to customers in geographic areas allocated to the other companies. These types of anti-competitive arrangements restrict competition by contracting supply and also qualify as per se violations of the competition laws.

■ **Output restrictions:** “Output restriction” means reducing supply of products or services that can be sold within a specified market. Output restriction mainly consists in two or more companies agreeing to reduce production or sales quota. Such contraction of supply typically results in higher sales prices. Regarding the commercial effects, agreements on output restriction therefore equate to price-fixing and market sharing agreements. Raising prices, reducing output, and dividing markets have effectively the same anti-competitive effects and are therefore equally banned as per se violations of the competition laws.

■ **Resale price maintenance:** Under many competition law regimes, suppliers can legitimately propose certain (minimum) resale prices to their distributors or retailers – as long as these proposals are non-binding. It has to be up to the reseller, using its independent business judgment, to decide whether to follow the seller’s non-binding price recommendations or not. But it is per se illegal to have any understanding or agreement – whether formal or informal, express or tacit – that a reseller should charge a given (minimum) resale price. Hence, any arrangement between a supplier and a reseller under which the reseller is not allowed to advertise, display or sell the supplied goods below a specified price is illegal. Any type of threat on the side of the supplier will inevitably transform a legitimate price recommendation into illegal resale price maintenance.

3.2. Non hard-core violations

Other commercial activities that result in a restriction of competition may or may not be legal, depending on the individual circumstances of the case.

Prominent examples in this respect are standardisation agreements, patent pools, selective distribution, or market information systems. These activities do not solely aim to restrict competition. They rather aim to increase benefits in terms of product development & safety, opening of new markets, or efficient allocation of corporate resources, which in the end serve the benefit of consumers. In order to establish the legality of these activities, their respective pro-competitive benefits must be balanced against the anti-competitive harm they might cause. Determining whether such conduct ultimately will be lawful is complex and regularly requires legal advice. The outcome of the analysis will vary in every single case depending on the competitive environment in which the respective activity occurs. The legality of the following exemplary categories depends on the concrete circumstances of every individual case. However, you should be alert whenever you come across:

- **Exchange of sensitive information:** While information exchange can generate various efficiency gains, it may also lead to restricting competition. You should consider carefully what type of information your company is transferring and to whom, and whether the exchange is likely to reduce strategic uncertainty, or relates to information usually treated as confidential and/or can affect significantly each participant's future market conduct. If that is the case, even a single exchange of sensitive information may constitute a violation.

- **Standardisation agreements:** Competitors may create lawful agreements to establish industry product standards. The process of developing industry standards can often benefit the public. Standards are necessary for interconnection and interoperability of products and can be used to facilitate consumer knowledge, expanded choice of products and efficiencies in design, production and operation. Standardisation agreements may violate the antitrust laws, however, if they considerably restrict competition in a given sector or exclude competitors from certain business opportunities. Thus, it's important to ensure that there's an objective and legitimate justification for the standard. In order to be legal, the standard must genuinely serve its purpose. It may not be more extensive (more restricting in terms of competition) than what's reasonable.

- **Selective distribution systems:** Under the terms of a selective distribution system a supplier enters into agreements with a limited number of selected dealers in the same geographic area. Selective distribution agreements restrict competition in limiting the number of authorised distributors and regularly prohibiting sales to non-authorised distributors. This leaves the authorised dealers only other appointed dealers and final customers as possible buyers. Selective distribution is mainly used to distribute branded final products. Whereas qualitative selective distribution may be admitted under certain preconditions, purely quantitative distribution is in general considered to be illegal.

- **Boycotts of customers and suppliers:** As a general rule, companies are free to select their own trading partners – both customers and suppliers. Therefore, it is unlawful for two or more competitors to agree not to do business with a third party, even though each party may have a legitimate basis for taking the same action independently. Such refusal to do business does not have to be specific or absolute in order to raise competition law concerns. Because of this, it is normally inappropriate for companies to suggest any joint action by competitors, with respect to selling, purchasing or other contractual dealings.

■ **Exclusive dealing agreements:** Under certain circumstances, it may be equally illegal to agree that a buyer will purchase its full requirements of a particular product or service from a single seller or that a seller will commit its entire output to a single buyer. Such “non-compete obligations” or “exclusive supply obligations” can be anti-competitive because these practices result in demand being shifted away from competitors. Before entering into these types of agreements legal counsel should be consulted.

■ **Market information systems:** Statistical data may be collected and compiled for legitimate purposes. Market information systems can involve numerical data of many types, including data on production, inventories, sales, and shipments. However, a market information system that involves sharing non-public-domain information such as sales statistics, marketing reports, raw material costs etc. with competitors needs to be properly implemented to avoid competition law problems. The legality of a market information system mainly depends on the type of information exchanged, its specificity, the frequency of the information exchange, its dissemination, as well as whether the exchanged information is actual or rather historical. Broadly speaking, the more remote such data is from prices and costs, the less company-specific it is, the more historical it is, and the wider the public dissemination, the less likely it will be that competition law problems will be raised by the programme.

3.3. Abuses of dominance

Abuses of dominance are anti-competitive conducts which can only be committed by “dominant” companies. As a rule of thumb, companies can be deemed to hold a dominant position if they have a share of the market of more than 40 percent. (NOTE: company size is of no importance for the existence of a dominant position. Even small SMEs can very well be dominant within the meaning of competition law). Other factors to assess dominance include the ease for other companies to enter the market and the presence of entry barriers; the existence of countervailing buyer power; the extent to which the company is present at several levels of the supply chain (vertical integration). The following practices are forbidden for dominant companies if they disproportionately exclude competitors from commercial opportunities, discriminate against trading partners or qualify as an exploitation of the latter.

■ **Tying and Bundling:** “Tying” means requiring a customer to buy an additional product as a condition to buying the primary product. An example would be to sell a car (tying product) only under the condition that the customer accepts to have his car inspected once a year by the seller (tied product/service). “Bundling” refers to the practice of selling two separate products together, for instance the bundled selling of a copy machine and the copy paper it uses as a package. For dominant companies it is sometimes illegal to use tying or bundling as a commercial feature. Tying and bundling by a dominant company can lead to foreclosure effects, i.e. the exclusion of equally efficient competitors.

■ **Refusal to supply:** Refusals to supply or threats of refusals to supply by dominant companies may be forbidden under the competition laws. Typically, competition problems arise when the customer – to whom supply is refused – also is a rival to the dominant company. Certain other practices such as delaying tactics in supplying, giving unfair trading conditions or charging excessive prices are examples of refusal to supply.

■ **Predatory pricing:** Predatory pricing exists where a dominant company lowers its price for a sufficiently long time and thereby deliberately incurs losses in the short run in order to weaken the competitive position of its competitor (or preventing new competitors from entering the market). Pricing is not predatory just because the lower price means incurring losses in the short run.

This may be justified in order to enter a market or to make more customers familiar with the product,

but it is illegal to deliberately accepting short run losses with the intention to recoup such losses by eliminating competition.

■ **Price discrimination:** Price discrimination is generally understood as the practice by a dominant company to charge different prices to different buyers for the same product, when this cannot be justified by a difference cost for supplying the product. This concept covers many different practices whose objectives and effects on competition significantly differ (examples of this are discounts and rebates, selective price cuts, discriminatory input prices set by vertically-integrated companies, etc.). In order to avoid a charge of price discrimination, dominant firms must ensure that their pricing policies and decisions as well as their promotional plans are carefully assessed by counsel before implementation.

■ **Excessive pricing:** In many jurisdictions, disproportionately aggressive pricing is considered an abuse of dominance. Because customers cannot easily switch to an alternative source of supply, the dominant firm can raise price to enhance profits. The setting of excessive charges or the provision of poor quality services by a business holding a dominant position can therefore be prohibited.

PART II

COMPETITION LAW COMPLIANCE PROGRAMMES IN PRACTICE

4. WHAT ARE THE BENEFITS ?

Competition law compliance programmes refer to a systematic manner of implementing “law awareness” and risk management in your company. They serve the purpose of identifying, eliminating and preventing anti-competitive behaviour.



4.1. Manage risk: sharpen awareness, prevent violations and respect the law

Competition law compliance activities serve as an effective risk-management tool to prevent problems by sharpening the awareness of your staff. In particular the unintentional violations can be reduced drastically by training company staff to sense critical situations and to immediately involve and consult legal department or outside counsel. Training your employees on the most relevant competition law rules, sensitising them to critical situations, teaching them how to identify and to avoid apparent anti-competitive behaviour, and making them aware of the severe consequences that these violations entail, decreases significantly the company’s risk of running into problems. Although compliance programmes will not stop determined wrongdoers, they will educate most employees to avoid illegal conduct and may shield yourself and your business from legal charges, or at least mitigate the sanctions. In many jurisdictions, company executives are personally responsible for ensuring competition law compliance within their organisations. This applies – irrespective of company size – to SMEs and large corporations.

Implementing a sound competition law compliance programme provides legal certainty for your company, peace of mind for its executives and ultimately highlights your company’s commitment to corporate governance.

4.2. Uncover hidden competition law violations

Competition law compliance programmes do not only serve to prevent illegal anti-competitive conduct in the future, they also help organizations to identify possible competition law violations that happened in the past and to take the appropriate measures to deal with any such findings. The early uncovering of competition law issues within your organisation can save your company a lot of trouble and money. It often allows you to intervene in time before the situation spirals out of control. That way you have the chance to apply for leniency programmes and thus avoid the most severe sanctions. Most leniency applications originate from competition law compliance programmes/audits.

4.3. Identify violations by your trading partners or competitors

Competition law compliance programmes and in particular competition law audits can also help reveal anti-competitive conduct of your trading partners or competitors. This may result in your company being overcharged, excluded from certain commercial opportunities or otherwise penalised or discriminated against. Finding out about the anti-competitive conduct of your trading partners or competitors allows you to take the appropriate legal measures to stop such behaviour and possibly claim compensation for the losses that your company has suffered as a result of this behaviour.

4.4. Avoid over-compliance

The complexity and uncertainty surrounding competition laws combined with the severe sanctions for their violation may result in companies being over-compliant, for example by abandoning legitimate commercial practices or cooperation or platforms for fear of them being contrary to competition law provisions. This is neither required nor intended by competition laws. Compliance programmes help to identify areas in which your company can reinforce its competitive efforts and educate company employees about permissible conduct under competition laws. Without such training, companies can suffer from competitive disadvantage because employees avoid aggressive business practices they mistakenly believe are illegal.

5. HOW TO ESTABLISH A COMPETITION LAW COMPLIANCE PROGRAMME IN YOUR COMPANY

A competition law compliance programme is a systematic manner of implementing “law awareness” and risk management in your company. It consists of concrete measures and processes which help you identify, eliminate and prevent anti-competitive behaviour and its negative consequences in your organisation.

You don't have to start with a very sophisticated programme; a basic one will do to begin with. The following points are key guidance when reading this section:

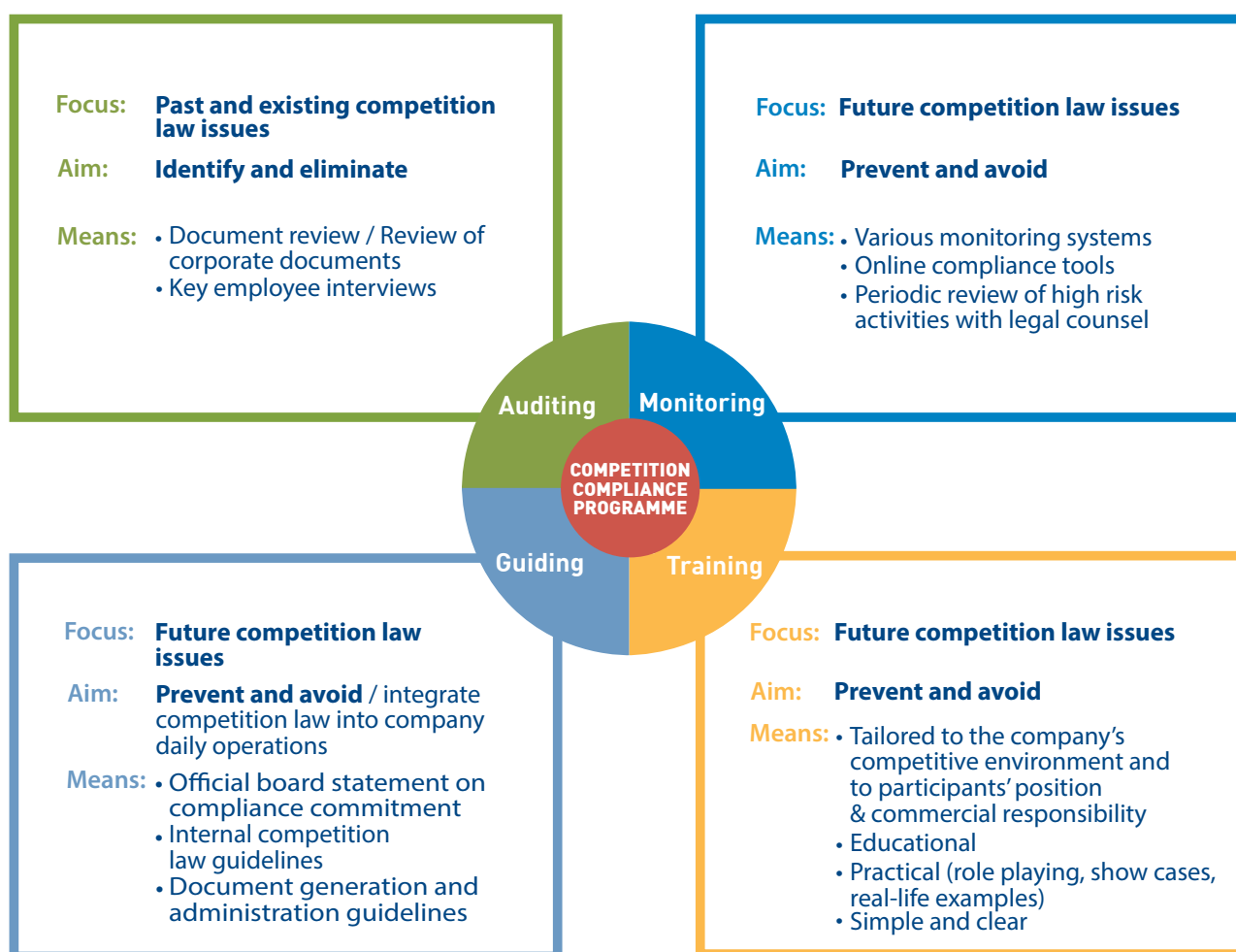
- No one is required to do everything, and everybody needs to do something
- Any compliance effort in any company requires for its success leadership and commitment from the top management. There should be a compliance statement in plain language that everybody understands.

- It is essential that the person responsible for compliance is clearly identified. Responsibility should be matched by adequate powers of intervention. In smaller organisations this task is likely to be combined with others.
- It should be clarified that certain “excuses” are not accepted. The fact that competitors allegedly are using unlawful practices is not a valid reason for doing the same, nor do sluggish sales justify breaches of competition rules.

Competition law compliance is a matter of proper corporate risk management. Therefore it is up to the management to determine how important the competition law risks are for the company and which measures are appropriate to manage these risks. These decisions need to be tailored to the specific company needs and its business operations in order for the compliance programme to be effective and efficient.

5.1. Four components of a successful programme

One size does not fit all. Therefore, boilerplate compliance programmes should be avoided. Instead, you get the best results by tailor-making your own programme based on four basic components: **auditing, training, guiding and monitoring**.



1. Risk identification and assessment (Audit)

Competition law audits aim at the identification of existing or past competition law issues within the organisation. This differentiates compliance audits from competition law training, guiding and monitoring which aim at the prevention and avoidance of future competition law pitfalls.

In practice, a first step can consist in looking (possibly with your lawyer or other expert) at your fields of activity, agreements, marketing and distribution schemes, cooperative arrangements etc. The purpose would be to map out the areas where the company is most exposed to competition law risks, and focus on those to begin with. Risks can for example be roughly assessed in a simple matrix where they are assigned points for probability and for consequence/impact (if a 1-5 scale is used, the worst case is 5 [probability] x 5 [impact] = 25).

Competition law audits enable companies to assess:

- the state of present competition law compliance
- the most relevant competition law risks
- the sources of potential competition law violations
- the necessary actions to terminate the wrongdoing
- the need for further training, guidance and monitoring is recommendable, and whether the company is the victim of any anti-competitive conduct by its competitors or trading partners.

Normally, the review of corporate documents and the interviewing of key employees are two essential elements for a sound and thorough competition law audit:

Document review

In order to achieve the above mentioned audit objectives, the document review should be made as comprehensive as possible. The more documents that can be made available for review the better the outcome of the audit will be.

The review typically covers all essential documents: acts of incorporation, by-laws, work rules, cooperation agreements, minutes of trade/industry association meetings, board meeting minutes as well as contracts with the main suppliers and customers. In addition, (email) correspondence of company decision makers and other key personnel should be made available to the largest possible extent.

The vast majority of company data and documents exists normally in electronic format and is stored on company servers. One of the most efficient ways to secure and collect the relevant data is thus to have it pulled from the company servers. Note, however, that data protection laws might restrict the manner in which data is collected and processed.

Employee interviews

Employee interviews constitute the second pillar of competition law audits. Compared to the review of documents, employee interviews have certain advantages. Whereas documents often only reflect a short clipping of a given situation, employee interviews allow to put specific facts and situations into their wider historical, commercial and legal context and hence to assess their legality more easily.

A competitor's price list found in the files of the company's sales director, for instance, might hint to an illegal exchange of information between competitors. However, the interviews may reveal that the sales director could also have received this information from a customer, which would be non-problematic from a competition law point of view.

Furthermore, it should be noted that only a small portion of the relevant facts might be reflected in documentary evidence. Asking the right questions to the right persons can reveal hidden competition law issues and is therefore crucial for the outcome of any competition law audit.

There are, however, downsides to employee interviews as compared to document reviews: whereas document reviews reveal the hard facts, information received during employee interviews can never be accepted as 100 percent true. Recollection fades over time and people normally only retain a rough and partial memory of what occurred several months earlier. Documents with questionable content retrieved during the document review process and relating to the respective interviewee should be discussed and clarified during the interview. Particular attention should also be drawn to the fact that interviewees might have personal incentives to hide the truth. In case of a competition law violation, the information obtained during an interview may be unreliable because the employees want to protect themselves, their colleagues, bosses or subordinates. Also the in-house lawyers and management may be in a position, which may affect their objectivity.

2. Training

An effective competition law compliance training is educational, practical and tailored to each individual business' operations. Its objective is to help companies prevent competition law problems for the future. Trainings should both tackle problems and provide solutions for them.

The ultimate goal is to make the employees aware to all potential competition law problems and risks that they may encounter in their daily work environment and to provide practical and straightforward solutions as to how to handle such situations. Training participants should learn to identify competition law pitfalls and how to avoid them.

A competition law training should be given at least to officers and employees who have been identified as critical in preventing competition law violations, in particular those who: (i) take pricing or marketing decisions or develop related strategies, (ii) develop marketing or promotional materials, (iii) have direct interaction with competitors, customers, suppliers or distributors and agents, or (iv) attend trade association meetings or trade shows. These officers or employees include higher level management as well as lower level field personnel.

Efficient training sessions must be tailored to the competitive environment in which the company operates as well as for the position and commercial responsibility of the participants. The presentations must address the specific competition law risks of the company's activities. Role playing, show cases, and real-life examples have proven to be a useful way of illustrating the competition law rules and compliance with them. Web-based tools can also be a helpful element in a training programme. Companies should keep a record of who has been trained and when. Prior participation in competition law training should be made a requirement for certain positions/activities within the organization, for instance for attending trade shows or industry association meetings. Training participants should receive a certificate confirming their successful participation in the competition law training. Their knowledge should be refreshed periodically.

Simplicity and clarity should be the guiding principles for all compliance trainings. The main goal of the training must be to sensitise the staff to critical situations so that they can quick to turn to professional legal experts (in house or external) if such situations arise, and not to convert participants into competition lawyers.



3. Guiding

The purpose of Guiding is to integrate competition law into the daily operations of the company. Daily guidance is an important component of an effective competition law compliance programme. Competition compliance activities are a continuous process and an expression of the company's fundamental respect and appreciation of competition rules. Management has a crucial role in underlining the vital importance of competition law compliance, setting the good example and approving the necessary measures, projects and budgets that are necessary in order to achieve a sound level of corporate compliance.

Board statement on compliance commitment

The effectiveness of competition law compliance programmes depends greatly on the degree of commitment shown by management, including senior management. No compliance programme can operate effectively unless these people, at the head of the company, fully support the programme by their actions. Management commitment can readily be reflected in the design and operation of the compliance programme.

The commitment can be demonstrated through an official board statement on compliance commitment. Such board statement could in particular emphasize following aspects:

- Competition law compliance applies to every single employee at all levels of the organisation. No one in the company has authority to give orders or directions that would result in violation of these guidelines

- Competition rules are of utmost relevance for the company's daily operations and must be unconditionally respected in the same way as all other laws
- Non-compliance entails heavy sanctions for the company and for the involved individuals
- Every employee has a professional duty to report wrongdoings of other employees
- Legal department and management are available at all times to answer any questions regarding competition law compliance
- Failure to obey competition rules will result in disciplinary action.

Internal competition law guidelines

Company management should issue detailed competition law guidelines which provide the company staff with practical and reliable rules for their daily work.

The guidelines should provide clear distinction for those situations which can / must be handled within own organisation. For all other situations, the guidelines should instruct the employees to turn to professional legal experts.

The purpose of competition law guidelines cannot be to convert business people into competition lawyers. To the contrary: too much content and complexity are likely to discourage company staff from reading, understanding and applying the guidelines. The guidelines should rather provide simple and clear rules for daily business and critical situations which can/must be handled by company staff without reverting to legal department beforehand. For situations in which competition law issues might arise, the guidelines should refer company staff to legal counsel.

Effective competition law guidelines need to be individually tailored and have to specifically address the individual risks and needs of the company. Thus, standardized "ready to wear" guidelines will not do the job.

Also, legal jargon should be avoided at all costs. Not only the content but also the format of the internal competition law guidelines is important. Appearance will actually determine whether personnel bother to turn the cover and read the guidelines.

All company staff should be required to read, sign and accept a copy of the guidelines as well as to commit to comply with them.

Document generation and administration guidelines

Issuing standard documents and administration guidelines can help to clarify certain facts or situations which might be construed as an infringement in the absence of any evidence to the contrary:

- A proper record describing the background and motivations for critical actions and decisions can also act as useful evidence when rejecting doubts of anti-competitive arrangements.
- Proper documentation should in particular be considered for price changes, (legitimate) discussions and meetings with competitors, discussions at trade association meetings or any aspects regarding the establishment, content or termination of a relation with distributors or suppliers.

- Situations where company staff has been approached by competitors or other trading partners with proposals that could constitute a violation of competition law should equally be documented comprehensively, including the company's reaction to such proposals and the measures that have been taken to avoid infringements.
- Information regarding competitors that can be considered confidential business information can be obtained legitimately, for instance from customers. Relevant documents should always keep a record of the origin of the competitor's information to avoid the impression that it has been received directly from the competitor for no legitimate reason.

4. Monitoring

The purpose of monitoring is to ensure that the company staff has not only fully understood and accepted to comply with competition law rules, but also retained them. All too frequently, it is the requirement of follow up that receives too little attention.

A monitoring system not only allows the company to detect potentially inappropriate or illegal actions in time to limit damage – it also has a deterring effect, encouraging employees to obey the rules and emphasising the company's commitment to competition compliance.

Monitoring systems can comprise for instance: (i) regular testing of the competition law awareness within the company, (ii) mock dawn raids, (iii) letter-box for anonymous reporting of inappropriate conduct, (iv) appointment of an (internal/external) ombudsman, (v) monitoring of sales and procurement processes, (vi) margin monitoring, or (vii) the obligation for group leaders to issue yearly competition law reports for their groups.

Also, high risk activities that are conducted on a routine basis should be reviewed with legal counsel initially and on a periodic basis such as (i) discussions or exchanges of information with competitors, (ii) any agreements or understandings with competitors or potential competitors, (iii) trade association activity, (iv) pricing decisions, (v) distributorship or license agreements, (vi) joint venture agreements, or (vii) refusing to supply or reducing supplies or terminating supply to customers or distributors.

Monitoring of competition law compliance within the company can be facilitated by effective online compliance tools.

6. SUCCESSFUL PREPARATION AND IMPLEMENTATION OF COMPETITION LAW COMPLIANCE PROGRAMMES

Tailoring, preparing and implementing an effective competition law compliance programme will require a considerable amount of time and effort. There is no point in adopting a competition law compliance programme which is going to be ineffective either because it is unworkable or because no serious attempt is made to encourage staff to follow it.



Initial decision by company management

Many companies invest astronomical sums to insure their assets and business operations against any conceivable type of damage, but rarely even think about competition law compliance. Such neglect is unwise. Competition law compliance deserves the highest management attention for all the reasons mentioned earlier. It is up to the company management to make the decision as to the “whether”, the “when”, and the “how” a competition law compliance programme will be developed and implemented.

It is therefore important that these decisions are well founded and thought through. For its initial kick-off decision, company management should in particular consider:

- the particular risk of competition law violations that need to be covered and prioritised,
- the choice of instructional model (audit / training / guidelines / monitoring) and the key content,
- the selection of the employees who are to be audited/trained,
- the roles and responsibilities for managing the competition law compliance activities including the role of senior management, and
- the timing and form in which the compliance programme will be presented to company staff.

Be aware that the successful implementation of a competition law compliance programme may require some changes to the company's way of doing business. This again will demand time and costs.

Changes may not always be popular within the organisation. For instance, the company's sales department might argue that compliance with competition rules will make it more difficult for the company to compete, the financial department might indicate that considerable turnover cutbacks are at stake, and employees might not be happy about the ongoing monitoring and stricter methods of supervision. These problems must be addressed satisfactorily.

Design and implementation - Who should do the job?

The design, preparation, and implementation of a competition law compliance programme should be overseen by a lawyer who has sufficient expertise in competition law.

This is often the case for in-house lawyers. In addition, in-house lawyers have the relevant industry expertise and a good sense of the relevant risks and pitfalls. Furthermore, having in-house lawyers do the job is often cheaper than hiring external experts.

Hence, in many cases there are very good reasons to let in-house lawyers take care of these compliance activities.

However, under certain circumstances there are also good reasons why companies may want to outsource their competition law compliance activities to external experts and outside counsel. The most important reason is the "legal privilege", meaning that correspondence and legal advice cannot be accessed, seized, reviewed and used as evidence by competition authorities and it is not in principle discoverable by private plaintiffs. Under EU competition law, for instance, the legal privilege only applies to communications to and from outside lawyers who are members of one of the national legal professions recognised in the Member States. Hence, advice written by in-house counsel or by a U.S. attorney e.g., for instance, even though from an office in the EU, would not be protected and could be used in the context of a competition investigation.

Other situations where seeking external legal advice might be preferable are: (i) the company's legal department itself might have been involved in anti-competitive conduct; (ii) interviewees often feel more comfortable to discuss potentially inappropriate conduct to outside counsel rather than other company employees.

Be focused: identify the relevant areas

In order to make competition law programmes workable it is necessary to focus on specific relevant areas of concern and exclude others where competition law issues are more unlikely. For instance, if there are no indications that a company could be regarded a dominant market player, no time and efforts should be wasted auditing and training the company in respect of predatory pricing issues or refusals to supply.

What are then the most relevant competition law risks? This depends on the specifics of the industry, corporate structure, international exposure, the structure of the supply & demand sides, market concentration & transparency, existing competitor contacts etc. Useful indication may be drawn from case history of your own company or the industry in general. As a rough generalization, following areas are typically included in competition law compliance programmes: “competitor contacts”, “trade association activity”, “distribution”, or “abuses of dominance”.

Identification of key personnel

In practice, only a limited number of company officers and staff can be audited, trained, guided and monitored properly. Therefore, you should carefully identify the key individuals or teams which should be included in the programme. When considering the potential candidates, no individual and no business branch within the organisation should be automatically excluded.

Even HR manager, call-centre personnel and secretaries might be able to provide valuable insights into a potentially problematic company conduct.

Obviously, however, the most relevant personnel can be found at management level and in the sales force. To a lesser extent – production, marketing and purchasing staff is also normally of interest. The final selection will depend on the most relevant areas of competition law concerns that have been identified for the company. Flexibility is also necessary, for instance in case new areas of concern arise that require further broadening the scope of the audit.

Internal marketing of the competition law compliance programme

The goodwill, understanding and support of company staff is a vital prerequisite for the success of the competition law programme. Consequently, you have to be prepared to put considerable effort to proper and careful communication within the organisation. It is vitally important that the employees understand the purpose and significance of the programme and also realise their own role in it.

Also the overall “attitude” of the programme should be as positive as possible. If company staff has the impression of being mistrusted or accused of wrongdoings, it will naturally be hesitant to support the compliance programme.

It is important to communicate that the main purpose of the law compliance programme is to defend company interests, clarify common rules and prevent negative incidents – not catching mistakes or illegal action. It should be emphasised that the programme is also in the interest of company employees, as it helps them operate professionally and properly and protects them from civil or criminal liability which can result from unknowingly violating competition rules.

Employees should also be reassured that revealing inappropriate or illegal practices will not result in any disciplinary sanctions.



7. HOW TO DEAL WITH IDENTIFIED VIOLATIONS ?

If the audit reveals unsuitable or illegal practices, the company typically wants to quickly return to the path of legality and minimise the negative impact. The best way forward is to remain calm, analyse the situation, estimate the consequences, consider options and take then a founded decision about the next steps.

REMAIN CALM

Rushing into precipitated decisions and uncontrolled actions is the worst thing to do. The decisions that need to be taken and the strategies that need to be developed are highly complex ones. Many different aspects and parameters need to be considered and balanced before the best option for the specific situation can be determined.

The most suitable strategy depends on many circumstances: the seriousness of the suspected violation, its duration, who committed it, possible other co-offenders, who the damaged parties are, scope of the damage, and whether involved company employees are likely to face criminal prosecution. Standard solutions do not exist in this respect. It is therefore vital to analyse the situation together with the legal experts.



NEVER DESTROY EVIDENCE

Under no circumstances documentary evidence should be deleted, destroyed or removed, no matter how incriminating it is. Doing so may weaken the company's position in many ways:

1st: the company will no longer have the relevant files and documents at its disposal for potential leniency applications.

2nd: deleting files or destroying documents sends a clear message of acknowledgment of guilt which will not be ignored by the competition authorities.

3rd: if the document destruction/deletion occurs in the context of an ongoing investigation, you company might be found guilty of "obstruction of justice" with severe financial penalties and even imprisonment for the individuals involved.

ANALYSE THE SITUATION AND INVESTIGATE THE FACTS

A single document found in the company files or a statement made by one employee during an interview does not necessarily require increased concern or even immediate action. Before taking any decision or action, the identified incident has to be fully investigated and clarified.

Since this analysis will constitute the basis of all future legal assessments and decisions, it has to be extensive, comprehensive, complete, and to 100 percent correct. "When did the problematic behaviour start?", "Which employees of the company are involved?", "Does the misconduct still continue?", "What other companies are involved?", "Are other products or business units involved?", "Who are the affected trading partners?", "Which products are concerned?", "Which countries are affected?", or "What is the risk that the infringement will be discovered?" are only some of the questions needing answer before taking any further decision.

Also, the company should ensure that it is fully prepared to present the uncovered competition law violation in form of a leniency application. This means that full details must not only be investigated but also all relevant documentary evidence must be located, compiled and kept readily available.



TERMINATE THE VIOLATION

Normally, terminating an ongoing violation at the earliest opportunity should be a company's first choice. However, earliest opportunity does not always mean immediately. In certain cases it can be recommendable not to intervene straight away but rather to accept a (limited) continuation of the infringement for the sake of achieving a more favourable overall outcome for the company.

Withdrawing abruptly from an illegal activity that has been going on for a while might raise the suspicion of the other companies involved. They might then rush to compete with your company in the race for the most favourable treatment under the leniency programmes.

In addition, competition authorities might even request from leniency applicants that they keep their operations unchanged for investigatory reasons. This way the authorities can continue their investigations without scaring the other cartel members to delete evidence for instance.

ESTIMATE CONSEQUENCES

Competition law violations can cause a large number of negative consequences for companies as well as for the involved executives and employees.

One of the most important consequences is normally the risk of being fined by competition authorities. In addition to that, one must be prepared to face other consequences: private damages actions, criminal sanctions for employees, exclusion from public procurement or state aids, or loss of reputation. Applying for leniency is an option that should be evaluated.

Hence, before taking a final decision as to how to proceed, the following aspects should be assessed in detail with the assistance of legal experts:



Potential fines

In most jurisdictions competition authorities can impose administrative or criminal fines whenever competition rules have been violated, intentionally or negligently. These fines might have devastating consequences for the company's financial situation. They are therefore one of the main aspects to be considered when assessing the company's best way forward.

Normally, it is not possible to anticipate the exact amount of a potential fine. However, a certain range can often be approximated on the basis of the applicable laws and regulations as well as the type, duration and gravity of the infringement.

It should be kept in mind that separate fines might be imposed in every single country which is affected by the anti-competitive conduct. The risk assessment regarding potential fines therefore needs to cover all jurisdictions in which the company does business and in which the anti-competitive conduct is likely to have had a noticeable impact.

Private damages actions

In some countries, only hours after a (potential) violation of competition law rules becomes public, class actions are being filed on behalf of allegedly damaged trading partners.

Hence, companies have to be aware that communicating their involvement in a competition law violation to the public will most likely lead to civil liability and private competition litigation. The costs may rise as high as the fines mentioned above.

Having a clear view on whether and to what extent private damages actions can be expected is therefore of vital importance for the company's strategic decisions. When evaluating this, one should take into account following aspects, among others: countries in which the anti-competitive conduct likely had an effect, the type of trading partners affected, and the amount of damages at stake.

Securities law disclosures & setting aside reserves

As outlined above, violations of competition rules expose companies to substantial financial risks. The sum of administrative / criminal fines and private damages actions can easily exceed the company's financial abilities. Therefore, under many stock corporation laws, companies have the legal duty to inform their shareholders and issue announcements once it has become evident that substantial financial consequences for the company can no longer be excluded.

Normally, the company will also have to take the appropriate preparatory measures in order to cope with the expected financial burden. Corporate laws and regulations around the globe foresee in these cases that the company has to set aside sufficient financial reserves to absorb the impact of potential fines and compensation payments.

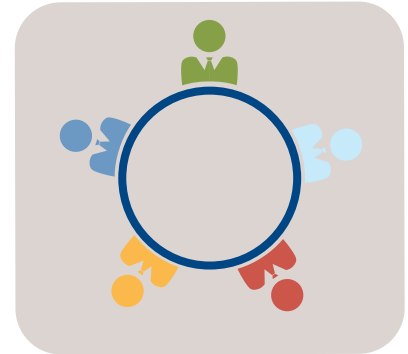
8. TRADE ASSOCIATIONS AND COMPETITION LAW COMPLIANCE

While this varies to a very high degree depending on their nature and membership, trade associations may also be exposed to potential frictions with competition law. This is not surprising, since many associations create a forum in which companies discuss business-related topics with their peers.

The responsibility for complying with competition law lies essentially with the individuals attending trade association meetings. However, also the trade associations themselves can undertake steps in order to reduce competition law risks. Even some minor adaptations to the trade association's rules and practices may be useful. Many companies nowadays require trade associations to have sound competition law compliance safeguards in place.

Again, there is no "standard" compliance programme for trade associations either.

The necessary and reasonable compliance instruments rather have to be tailor-made for each and every trade association considering in particular the relevant industry characteristics, membership structure, activities and goals. However, trade associations might want to consider the aspects below when evaluating whether and how to improve their compliance efforts.



No decisive influence on commercial decisions

According to the overarching principle, trade associations must at no time exert decisive influence on the participants' commercial considerations or course of action. Instead, they should only support their member companies to take their own, independent decisions.

Particular attention with benchmarking and information exchanges

Particular attention has to be paid where the trade association's activities involve benchmarking or information exchanges. Both features regularly involve the collection, compilation, analysis and dissemination of sensitive business information. The European Courts have found that already one single exchange of sensitive information can suffice to violate the competition laws. Therefore it is of utmost importance that benchmarking activities and information exchanges are designed, implemented and monitored with the assistance of legal counsel.



Proper rules for trade association meetings

Keep the honest people honest! It is important that trade associations support in every way the competition law compliance and commit to preventing violations in the context of association meetings. This can be generally achieved without significant costs and efforts, for example by employing (some of) the following basic features:

1. trade associations should strongly encourage their member companies to only send those representatives to association meetings that have received proper competition law training beforehand or that otherwise possess knowledge of the competition laws. This petition should be explicitly formulated in any meeting invites the association sends out.
2. no association meetings should take place without having an agenda in place which outlines in detail the topics that will be discussed during the meeting as well as the resolutions to be taken. Such agenda should be circulated to the meeting participants in a timely manner before the meeting and strictly followed to during the meeting.
3. association meetings should start with a – reasonably short –reminder to meeting participants of the utmost importance of unconditional competition law compliance.
4. detailed meeting minutes should be taken during the meeting and circulated to the meeting participants for approval afterwards. Obviously, the minutes must carefully match the agenda.
5. unofficial social events have proven to be a particularly fertile soil for anti-competitive arrangements and should therefore be reduced to a minimum.
6. if the topics are commercially sensitive, it should be considered to have a legal advisor participate in the meeting.

9. DEALING WITH DAWN RAIDS

Very closely related to competition law compliance is the issue of appropriate conduct in the context of “dawn raids” – i.e. on-the-spot investigations by competition authorities. Every company can become the target of a dawn raid without any prior warning.

It is important to properly prepare your company staff for the case of a dawn-raid. This will help avoiding neglecting important rights of defence, and will reduce the risk of fines. Hindering or sabotaging investigation might also result in jail sentences for employees who delete, destroy, or withhold evidence without being aware of the criminal nature of their behaviour.

Employees should therefore receive guidance on the appropriate behaviour in case of a dawn raid. Here are a handful of simple and clear suggested rules of thumb for such occasions.

General preparation

The course of events during a dawn raid is typically very rapid, with no time to “improvise”. In order to operate efficiently under pressure, it is important to do **preparatory home work** well. This should for example include:

- Draw up a list of all **persons who have to be informed** without delay in case of dawn raid. It should include management, legal experts and other key individuals with contact information.
- Identify appropriate (conference) rooms to host the competition authority’s officials. If possible, the rooms should be separated from the normal business operations.
- **Identify a lawyer** or law firm, which can be alerted as urgency outside counsel at short notice. One hour is normally the maximum timeframe that inspectors are willing to wait for outside counsel before they start the investigation.
- Prepare a draft for a **personnel announcement** which can be sent to the employees quickly when a dawn raid is imminent or has started. It should inform employees about the presence of the inspectors and the reason of their visit, contain clear instructions in respect of document retention, cooperation with the officials, and a description of the company’s rights of defence.
- Appoint a **team of employees to assist** with the smooth execution of the investigation. Their main task is to accompany the inspectors. They should also supervise the copying process and keep record of documents taken by the inspectors and of all questions and answers. These employees should receive a briefing in advance, as there will be no time for it on the day. This team should be led by a senior executive or legal counsel who also should act as the main point of contact for the inspectors and to coordinate the company’s team.

How to behave during a dawn raid

Upon arrival of the competition authority officials, the steps above should better be followed carefully. In order to avoid negative consequences, company staff should not in any way complicate, boycott or sabotage the legitimate investigative measures that the inspectors are allowed to undertake.

In general, competition authorities have the power to access and search all premises named in the search warrant. They also have the power to access all documents they deem relevant and make copies (e.g. meeting minutes, travel reports, handwritten notes, calendars, book-keeping documents, as well as electronic data including emails and server content).

The fact that a document is confidential or contains business secrets does not shield it from being seized or copied. One exception applies to documents that are covered by legal privilege (see page 22) i.e. in particular correspondence with outside lawyers. These documents cannot be accessed, copied or seized by competition authorities.

Under many competition law regimes, companies are only obliged to passively tolerate dawn raid but not to actively support the competition authorities in their investigations. In such case, company employees have a right to refuse being interviewed. Whether or not it is wise to refuse such interview or not, depends on the individual circumstances of the case. However, such interviews should only be given in the presence of a lawyer.



After the dawn raid, the inspectors should be asked for a copy of all documents that they have identified as being relevant to their investigation. Already at the beginning of the raid, it is useful to ask the inspectors to take two photocopies of all documents – one set for the inspectors and one set for the company records. It should also be clearly stated that all documents, copies and other information taken by the inspectors is confidential.

Finally, a record should be prepared of all areas of disagreement with the inspectors and the company should reserve the right to challenge certain doubtful acts by the inspectors.

ACKNOWLEDGEMENTS

BusinessEurope wishes to extend sincere acknowledgements to Dr. Volker Soyez (Haver & Mailänder, Brussels) for his invaluable contributions and constructive suggestions during the planning and development of this work.

BUSINESSEUROPE



BusinessEurope is the leading advocate for growth and competitiveness at the European level, standing up for companies across the continent and campaigning on the issues that most influence their performance. A recognised social partner, we speak for all-sized enterprises in 34 European countries whose national business federations are our direct members.



Austria



Belgium



Bulgaria



Croatia



Cyprus



Czech Republic



Denmark



Denmark



Estonia



Finland



France



Germany



Germany



Greece



Hungary



Iceland



Iceland



Ireland



Italy



Latvia



Lithuania



Luxembourg



Malta



Montenegro



Norway



Poland



Portugal



Portugal



Rep. of San Marino



Serbia



Slovak Republic



Slovenia



Spain



Sweden



Switzerland



Switzerland



The Netherlands



Turkey



Turkey



United Kingdom



Avenue de Cortenbergh 168
B - 1000 Brussels, Belgium
Tel: +32(0)22376511 / Fax: +32(0)22311445
E-mail: main@businesseurope.eu

WWW.BUSINESSEUROPE.EU

EU Transparency Register 3978240953-79