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## Competition law compliance

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### Agenda

1. How to carry out an effective risk assessment?  
Suggestions for an effective risk prioritization and management
2. How to train employees within an effective competition law compliance action plan?
3. Monitoring and auditing. Too often the effectiveness of a compliance program is tested too late, when the organization is investigated. How to timely verify whether the compliance program is working effectively?

3 April 2017 COMPETITION LAW COMPLIANCE 2

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### Ensuring compliance with competition laws: how to carry out an effective risk assessment

Competition laws are also known as Antitrust laws or Trade Practices laws; these laws are rules on how organizations should compete in the markets where they operate

An effective compliance strategy enables organizations to minimize the risk of involvement in competition law infringements and the costs resulting from anti-competitive behavior

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## Ensuring compliance with competition laws: how to carry out an effective risk assessment

More than 120 countries are adopting or have already adopted their own national competition laws. National laws vary from country to country, but have a similar purpose:

- To ensure efficiency in resource allocation: competition tends to keep costs and prices lower and encourage the efficient allocation of economic resources
- To protect the interests of consumers and ensure that entrepreneurs have an opportunity to compete in the markets
- To prevent single persons or groups from acquiring dominant economic power
- To encourage fairness in economic behavior among competitors

As a consequence, the prohibited conducts are similar in most countries. This facilitates the tasks of the Compliance Officer in a multinational organization

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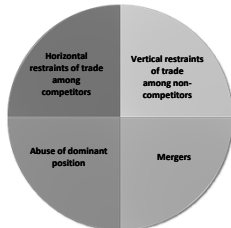
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## The prohibited conducts which are most frequently found

- Exchanges of sensitive information
- Cooperation agreements (express or implied)
- Decisions taken within/by trade associations
- Price fixing
- Boycotts and concerted refusals to deal
- Production shutdown agreements or production/output limitations

- Anticompetitive unilateral conducts / behaviors of the dominant a relevant market (e.g. price discrimination, reducing consumer choice, foreclose the access to any market by a competitor or potential competitor)



- Resale price maintenance
- Exclusive distributorships, customer and territorial restrictions (to be evaluated on a case by case basis)
- Tying arrangements

- Joint ventures
- Mergers & Acquisitions ...which substantially lessen the competition

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## Ensuring compliance with competition laws: how to carry out an effective risk assessment

A good starting point: prepare a questionnaire to be submitted within the organization

In the questionnaire, identify and list the risks of competition law violations which the organization is potentially subject to

For multinational organizations: start focusing on conducts which are similarly prohibited in most countries and, only in second instance and if specific potential risks are identified, on the peculiarities of each country

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## Ensuring compliance with competition laws: how to carry out an effective risk assessment

Be consistent with the organization's business model and market presence

- Avoid listing risks which are surely not a concern for the organization. E.g. do not list "monopoly" if it is clearly not a concern
- Tailor the list of the risks to the competition law violations to resonate with the organization's activities
- However, avoid lists of risks which are too synthetic and make sure to leave room to receive feedback

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## Ensuring compliance with competition laws: how to carry out an effective risk assessment

Phrase the risks in a simple and short manner. Some examples:

- **Below-Cost Pricing Laws:** the risk that the company's products are priced below the average variable cost (this is a potential violation of the EU competition laws regarding predatory pricing as well as of the Robinson-Patman Act)
- **Collusive Conduct:** the risk that the organization coordinates with or creates a cartel between competitors to fix prices, rig bids, or divide the market in anticompetitive ways (this is a violation of EU competition laws regarding horizontal agreements as well as of the Sherman and Clayton Acts)
- **Discriminatory Pricing:** the risk that the organization's products and/or services are priced in a significantly different way to different customers without a clear business justification and/or purpose (this is a violation of the EU competition laws regarding abuse of dominant position as well as of the Robinson-Patman Act)
- **Sales Practices:** the risk that the sales team acts unethically (this is a catch all category for those conducts which violate the provisions of the applicable competition laws)
- **Unfair Practices:** the risk that the organization engages in unfair or deceptive trade practices, taking advantage of the disparate bargaining power between businesses and consumers to influence consumers' decisions in relation to products (this is a violation of the EU Unfair Commercial Practices Directive 2005/29, as well as of the State Unfair Practices Statutes and of the Federal Trade Commission Act)

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## Ensuring compliance with competition laws: how to carry out an effective risk assessment

Identify the functions/departments within the organization which are in the position to evaluate the risks identified and ask them to evaluate, for each risk:

- **The degree of impact**, i.e. the amount of loss that will occur as a result of the risk materializing
- **The likelihood of occurrence**, i.e. the probability that the risk will materialize if no action is taken
- **The control effectiveness**, i.e. the effectiveness of the internal controls in place within the organization

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## Ensuring compliance with competition laws: how to carry out an effective risk assessment

- Submit the questionnaire to multiple functions/departments to obtain feedback from multiple perspectives
- Submit the questionnaire to employees working in different geographical area to gain each region's perspective
- Mainly target middle management, who has a better understanding of day-to-day business operations

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## Ensuring compliance with competition laws: how to carry out an effective risk assessment

- Carry out the competition law compliance risk assessment periodically, at least once a year
  - To reflect changes in the organization's structure or way of conducting business – ideally a risk assessment should be performed following every significant change
  - To verify whether the training activities have been effective and to shape the new training activities
  - To understand which areas need to be the focus of monitoring and auditing activities
  - To verify whether the competition law compliance strategy is effective

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## Assess the maturity of the competition law compliance program also within the Compliance function

Request the Compliance Officers to evaluate the maturity of the competition law compliance program:

- Broader picture, from a different perspective
- Better evaluation of the competition compliance program
- Possibility to evaluate the effectiveness of the program for different geographical areas

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## Assess the maturity of the competition law compliance program also within the Compliance function

What you want the Compliance Officers to evaluate:

- Is competition law violation risk exposure adequately monitored?
- Is the competition legal environment adequately and periodically tracked?
- Is the strategy adequate? Any risk-specific mitigation plan? Adequate?
- How is the corporate culture with respect to competition?
- Are the code of conduct and the relevant policy/ies adequate and maintained? Strongly embedded into operations?
- Is communication adequate?
- Is training periodically and adequately delivered? Effectively?
- Are the reporting channels and the investigations adequate?
- Are budget and resources adequate?

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## Training suggestions

Too often antitrust law training mainly lists activities which shall be avoided, whereas little guidance on how to lawfully perform common business tasks is provided

Walk the employees through the relevant policy

Include practical guidance to empower business action by educating on what can be done and how it has to be done, thus enabling lawful business activities

- Flowcharts
- Processes and procedures to perform activities at risk
- Pay attention, in particular, to "market intelligence" activities

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## Training suggestions

Include tests describing scenarios which the employees could face and ask the audience what the appropriate behavior would be to start a discussion

Allow considerable time for Q&A

- Not only to provide clarifications
- But also to monitor the status of the competition law compliance program

Unannounced visits by competition authorities are known as "dawn raids". Include guidance on how to behave in case of a dawn raid by a competition authority

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## Training suggestions

Make sure employees know their rights, who to contact and how to deal at a practical level with a dawn raid. At a minimum, this means having a dawn raid protocol and properly trained employees

- Selected employees need to be assigned to every inspector during the raid and must document their actions
- Right not to disclose privileged documents
- IT needs to observe the copying or seizure of electronic information and ensure that the copying does not damage the company's computer system
- The organization raided should make copies of all the documents required by the investigating authority. If it does not, the investigating authority can remove the originals. Keeping control of the copying process enables the organization to keep the originals and to make a duplicate set of documents seized by the investigating authority to have an accurate record of everything in the investigating authority's possession

Train employees not to destroy documents or send out any external communication (including SMS and emails) about the raid during or after the raid.

Employees should refer all external questions and requests for comment to a designated representative

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## Training suggestions

Training is more effective with practice. With caution (*see infra*), mock dawn raids can be a good way of testing readiness. They:

- Provide training for personnel, in case of a dawn raid by competition authorities
- Provide training for and a greater insight into the behavior of the key individuals likely to be questioned by competition authorities during a dawn raid
- Increases awareness about the importance of competition law compliance

If mock raids are combined with a competition compliance audit, they can also identify potential noncompliance risks

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## Monitoring and auditing

Definitions [*"The Complete Compliance and Ethics Manual 2016"*]:

**Monitoring** is a day-to-day activity commonly carried out by management, which evaluates the effectiveness, efficiency and consistency of the compliance program. It will determine whether the elements of a compliance program, such as dissemination of standards, training, and disciplinary action, have been satisfied

**Auditing** is a formalized process (define review scope, develop review criteria, identify sampling methodology and select sample, conduct review, document findings, and follow up on management action plans to assure observations are resolved), independent of management, without any real and/or potential vested interest in the outcome

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## Monitoring and auditing

Competition law compliance is especially difficult to monitor and audit. Too often the effectiveness of a program is tested only when there is an investigation by competition authorities

Common fears often preventing effective monitoring and auditing:

- What if anything is discovered?
- Can the investigation authority could use the results of the monitoring and auditing activities?
- Managing expectations

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## Monitoring and auditing

Overcoming common fears and “selling” competition law compliance monitoring and auditing

Chance to file a leniency application/reduction of fines

### EU

- Companies involved in a cartel which self-report and hand over evidence are offered either total immunity or a reduction from fines which the Commission would have otherwise imposed on them. In order to obtain total immunity under the leniency policy a cartel participant must be the first one to inform the Commission of an undetected cartel by providing sufficient information to allow the Commission to launch an inspection at the premises of the companies allegedly involved. If the Commission is already in possession of enough information to launch an inspection or has already undertaken one, the company must provide evidence that enables the Commission to prove the cartel infringement. In all cases, the company must also fully cooperate with the Commission, provide it with all evidence in its possession and put an end to the infringement immediately.
- Companies which do not qualify for immunity may benefit from a reduction of fines if they provide evidence that represents “significant added value” to that already in the Commission’s possession and have terminated their participation in the cartel. Evidence is considered to be of a “significant added value” for the Commission when it reinforces its ability to prove the infringement. The first company to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%.

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## Monitoring and auditing

### US

- The Antitrust Division’s Leniency Program allows corporations and individuals involved in antitrust crimes to self-report and avoid criminal convictions and resulting fines and incarceration. The first corporate or individual conspirator to confess participation in an antitrust crime, fully cooperate with the Division, and meet all other conditions that the Corporate Leniency Policy or the Leniency Policy for Individuals specifies receives leniency for the reported antitrust crime.
- 2 types of Leniency: Type A is available only before the Division has received any information about the activity being reported from any source, while Type B Leniency is available even after the Division has received information about the activity provided that the company is the first to come forward and qualify for leniency.
- Under both Type A and Type B Leniency, only the first qualifying corporation may be granted leniency for a particular antitrust conspiracy.

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## Monitoring and auditing

Traditional arguments to sell compliance programs can also be used to make the organization accept monitoring and auditing activities. No actions can be taken to remedy unknown issues: fixing a problem require the organization to spot the problem first

- Minimize the risk of involvement in competition law infringements as well as the costs resulting from anti-competitive behavior
- Avoiding compliance imposed programs
- Avoid suspension of the ability to deal with Government
- Protect the Board of Directors
- Protect the organization and its reputation
- Comply with the laws requiring organization to have compliance programs in place: monitoring and auditing are part of a compliance program
- Benchmarking: similar organizations are performing these activities
- Adding value to the organization's compliance program and, thus, to the business

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## Monitoring and auditing

Manage the expectations and do not to over promise: monitoring and auditing are no guarantee that the organization will not infringe competition laws; but they are steps in the right direction

Carefully protect the information collected during auditing and monitoring and be aware there is no going back: if found and not privileged, it may be seized by investigating authorities

The outcome of monitoring and auditing activities should be reported to senior officers, governing body and members of the compliance committee

Auditing and monitoring shall evolve with the compliance program's maturity

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## Organizing a mock dawn raid as an auditing tool. Pros and Cons

Mature competition law compliance programs increasingly organize "mock dawn raids" as auditing tools

### Pros

- Obtain the same feedback an investigating authority would obtain, thus allowing to spot potential competition law violations and take subsequent action (leniency/reduction of fines)
- Test compliance with the organization's dawn raid guidelines/contingency plan
- Facilitate having a clear understanding of where an organization's data resides and where are the risks

### Cons

- Manage outcome in case some form of competition law violation is found
- Manage documentation in case some form of competition law violation is found
- Manage expectations of the leaders within the organization
- Time and effort consuming

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## Organizing a mock dawn raid as an auditing tool. Tips and elements to consider

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Is the information collected during both the mock dawn raid covered by the attorney – client privilege?

Do labor and data privacy local laws allow performance of the mock dawn raid? Is the collection of any prior employees' consent required?

Ensure that any business information disclosed to any external service provider during the mock dawn raid will remain strictly confidential. Include specific confidentiality clauses in the agreement to engage the external service provider

Ideally only the CEO and the Compliance department should be aware that the dawn raid is "mock". Evaluate on a case by case basis pros and cons of informing in advance also the top management about the impending activities

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# Thank you ! Q&A

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