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.
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 to encourage the efficient allocation of economic resources
- To protect the interests of consumers and ensure that entrants have an opportunity to compete in the market
- 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.

The prohibited conducts which are most frequently found

- Exchanges of sensitive information
- Exchange of commercial secrets
- Disclosures of confidential information
- Price fixing
- Resale price maintenance
- Production shutdown agreements
- Provision of discounts to customers
- Tying arrangements
- Resale price maintenance
- Exclusivity agreements
- Exclusivity agreements
- Exclusive contracts
- Exclusive territories
- Exclusive territories
- Exclusivity agreements
- Mergers & acquisitions
- Mergers & acquisitions
- Mergers & acquisitions

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 conduct 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.
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 synthetical and make sure to leave room to receive feedback

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: the risk that the company’s products are priced below the average variable cost (this is against violation of the EU competition law 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 restrict output, fix prices or allocate customers in a way that is prohibited by EU competition law
- Diverser Substitution: the risk that the organization’s products or services are priced in a significantly lower manner than the average market price. In this case, the organization makes competition risks
- Enforceable Pricing: the risk that the organization’s products and services are priced in a significantly lower manner than the average market price. In this case, the organization makes competition risks
- Sales Propagosa: the risk that the sales team gets unethically high (this is a catch-all category for those conduct which violates the provisions of the applicable competition law)
- Undue Position: the risk that the organization engages in unfair or deceptive trade practices, taking advantage of its market share or dominance, or misleads the public as to the nature, quality, design, characteristics, price, location, or any other aspect of its products or services

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
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 areas to gain each region's perspective
Mainly target middle management, who has a better understanding of day-to-day business operations

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

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
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?

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.

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.
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 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

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

Training suggestions

Make sure employees know their rights, who to contact and how to deal at a practical level with a dawn raid. As 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
- If needed to observe the copying or seizure of electronic information and ensure that the copying does not damage the company’s computer system
- The organization should make copies of all the documents required by the investigating authority. If it is not possible to make copies of documents, then the organization should create a list of the documents seized and copies of these documents should be made and provided to the investigating authority
- The organization should consider having the investigator sign all documents to be seized and copies of such documents should be made and provided to the investigating authority

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
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 cartel which self-report and hand over evidence are offered either total immunity or a reduction of fines. The system has been described as "the equivalent of a legal loophole". Companies can benefit from this by being able to avoid a prosecution, thereby saving their reputation. In order to be considered for any leniency, the company must provide the evidence and reveal all it knows. The company may not be prosecuted or fined and the Commission is driven to the case to be brought, in full detail, by the company rather than the Commission.

Companies which do not qualify for immunity may benefit from a reduction of fines if they provide evidence that represents "special added value" to the investigation. In return, the company will receive a discount on the fine relative to the benefit conferred on the Commission. However, such benefits are generally limited to 50% and may be subject to conditions, such as prior payment of a significant proportion of the fine. For full cooperation, the Commission may even reduce the fine to zero if the company is willing to pay all the evidence it has uncovered.

**US**

- The Department’s Leniency Program allows companies and individuals involved in antitrust crimes to self-report and avoid criminal convictions and resulting fines and incarceration. The first company or individual to cooperate to expose 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 specifically requires leniency for the reported antitrust crime.
- There are two 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.
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 requires 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 organization and its reputation
- Comply with the laws requiring organizations to have compliance programs in place: monitoring and auditing are part of a compliance program
- Benchmarking: similar organizations are performing these activities
- 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

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.

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 actions
- 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 violations is found
- Manage expectations of the leaders within the organization
- Time and effort consuming
Organizing a mock dawn raid as an auditing tool. Tips and elements to consider

- 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 the top management about the impending activities.

Thank you!
Q&A