Competition Law Risk

A Short Guide

Version: 2.0

CMA Competition & Markets Authority

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Who is the Institute of Risk Management (IRM)

IRM is the leading professional body for risk management. We drive excellence in managing risk to ensure organisations are ready for the opportunities and threats of the future.

We do this by providing internationally recognised qualifications and training, publishing research and guidance, and setting professional standards. We are a not-for-profit body, with members working in all industries, in all risk disciplines and in all sectors around the world.

Who is the Competition and Markets Authority (CMA)

The CMA is independent from Government and its aim is to make markets work well for consumers, businesses and the economy. It acquired its powers on 1 April 2014 when it took over many of the functions of the Competition Commission (CC) and the Office of Fair Trading (OFT).

The CMA's responsibilities include:

- investigating where there may be breaches of UK or EU prohibitions against anti-competitive agreements and abuses of dominant positions and taking enforcement action where breaches are established;
- investigating mergers which could restrict competition;
- conducting market studies and investigations (as appropriate) in markets where there may be competition and consumer protection problems;
- bringing criminal proceedings against individuals who commit a cartel offence and enforcing consumer protection legislation, to tackle practices and market conditions that make it difficult for consumers to exercise choice.

A key priority for the CMA going forward is compliance with competition and consumer law.

Foreword

It is also vital that an organisation's culture, from board room to shop floor, positively supports ethical and legal behaviour.

Nicola Crawford, **CFIRM**
Chair, Institute of Risk Management

This is an update to the previous edition of Competition Law Risk: a short guide which takes into account more-up-to date examples of good practice and the first disqualification of a director in relation to a breach of competition law.

Competition benefits us all. It creates free and transparent markets in which to do business in an environment where competition is fair and honest. This guide explains the nature of competition law enforcement in the UK. It offers some powerful recent and relevant case studies to highlight both unacceptable business practices and demonstrate how easily Competition Law Risks can arise if they are not properly understood or managed.

It also provides suggestions that can help organisations approach the management of risks in a systematic and effective way.

This guide recommends that organisations should have a zero risk appetite for breaking the law. Yet to achieve this, requires not just that the right policies, processes and procedures are in place. It is also vital that an organisation's culture, from boardroom to shop floor, positively supports ethical and legal behaviour. The IRM's recent research on managing risk in the extended enterprise has also heightened a further change for managing Competition Law Risk.

That challenge is to recognise and address this risk beyond the boundaries of the immediate organisation and out into the network of customers, suppliers and partners. Having a clear understanding of these risks is a necessary first step, and one which this guide aims to support.

I would like to thank all the members of the Institute who contributed to this work. I would also like to thank the CMA for providing the information and resources needed to publish this document.

> It is the role of the CMA and businesses themselves to work together to ensure boundaries are clearly understood and respected.

Lord David Currie,
Chairman, Competition and Markets Authority

Competition law compliance is not always given the attention that it deserves. I would like to see anti-competitive behaviour taken as seriously by UK businesses and boards as the risks around bribery, fraud, health and safety and cyber crime.

Competing fairly benefits both businesses and consumers. Competition is good because it shows companies where they need to improve. It makes firms try harder, strive for greater efficiency, become more innovative, more productive, and ultimately be better businesses. There is no room for complacency or time to 'rest on your laurels' when you are being truly competitive.

The majority of businesses don't want to break the law but lines can become blurred and easily crossed. It is the role of the CMA and businesses themselves to work together to ensure boundaries are clearly understood and respected.

A clear, established and well understood compliance programme that is advocated from the 'top down' across the entirety of an organisation mitigates the very real and significant risks associated with breaking competition law – heavy fines, prison sentences, director disqualifications and reputational damage.

The CMA wants to help IRM members confidently approach and instil a culture of compliance within their organisations. Risk professionals have a key role to play in spotting unlawful anti-competitive practices, and escalating competition law as a serious risk factor on board agendas.

Competition compliance should be a standard consideration in corporate risk exercises and I hope risk professionals, helped by this guide, will make it a cultural norm in their businesses.

Our project team

This original version of the short guide was developed jointly by the IRM and the CMA, who would like to thank the following who contributed in various ways towards drafting this short guide.

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Contents

Chapter 1: Why complying with competition law is good business practice

Competition law is designed to protect businesses and consumers from anti-competitive behaviour. The law safeguards effective competition in order to deliver open, dynamic markets and enhanced productivity, innovation and value for customers.

All businesses must comply with competition law and there can be serious consequences for businesses and individuals, including directors, for non-compliance.

Increased risk of detection – cartel enforcement is a CMA priority and recent amendments to the cartel offence should mean a greater proportion of criminal investigations will result in prosecutions. This, coupled with the CMA's enhanced capabilities to detect and investigate cartels, increases the risk of detection and prosecution.

It makes business sense to comply – long-term compliance saves money by avoiding the risk of fines and significant damage to a company's reputation.

The guidance on risk management and internal controls issued in September 2014 by the UK Financial Reporting Council[1] places a clear responsibility on boards of UK listed companies to ensure that appropriate risk management and internal control systems are in place. This includes ensuring that appropriate culture and reward systems are embedded within the organisation. Compliance with competition law should be considered within the context of the board's assessment of its principal risks.

1. Guidance on Risk Management, Internal Control and Related Financial and Business Reporting, Financial Reporting Council, September 2014.

Chapter 2: What are the risks to your business if competition law is broken?

"…the CMA has an increased appetite for enforcement, coupled with a stronger ability to meet that appetite"

Lord David Currie, Chairman, Competition and Markets Authority

Financial penalties

Businesses that are found to have breached competition law can be fined up to 10 per cent of their annual worldwide turnover and ordered to change their behaviour. Businesses can be subject to damages claims by third parties and individuals can be subject to the confiscation of assets under the Proceeds of Crime Act 2002.

Prison and fines

Individuals who engage in cartel activity may be investigated for committing a criminal offence, prosecuted and sentenced to up to five years in prison and/or made to pay a fine.

Director disqualification

Company directors can be disqualified from managing a company for up to 15 years.

Reputational damage

The negative impact on a company's reputation can be significant and long lasting.

Case study

In the Marine Hose case, three UK nationals pleaded guilty to criminal cartel charges in the US and were allowed to return to the UK, to be arrested upon arrival at Heathrow by the Metropolitan Police. Sanctions imposed:

(i) Significant custodial sentences (20 to 30 months)
(ii) Director disqualification (5 to 7 years)
(iii) Confiscation orders (totalling over £1 million).

Chapter 3: How this guide can help you

"We recognise that the vast majority of businesses want to comply with the law. For these businesses we want to make it easy for them to engage with competition law compliance…"

Lord David Currie, Chairman, Competition and Markets Authority

This guide provides a basic overview of the law, outlining the steps you can take to help identify and mitigate competition law risks specific to your organisation. It is intended to help you ensure your business is compliant with competition law. It may help you to spot when others are engaging in illegal anti-competitive behaviour and it provides you with details on what to do if you think your business or a competitor is breaking competition law.

This guide is focussed on UK and EU law as applied to agreements and conduct that affect UK markets. Other territories have similar competition or anti-trust law or provisions. You can access links to international guidance via the International Competition Network (ICN)[2] and the International Chamber of Commerce (ICC)[3].

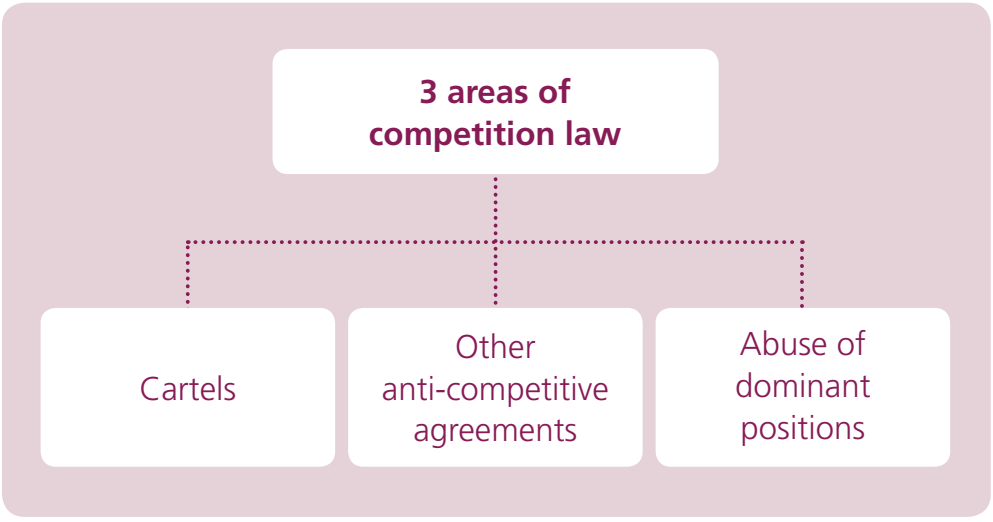
What you should watch out for

There are three key things you need to be vigilant about in business, which are:

(i) Cartel activity (see Chapter 4)

(ii) Other potentially anti-competitive agreements (see Chapter 4) and

(iii) Abuse of a dominant position (see Chapter 5)



2. http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/business.aspx
3. http://www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Competition/ICC-Antitrust-Compliance-Toolkit

Chapter 4: Anti-competitive behaviour to watch out for – cartels and other potentially anti-competitive agreements

"I was just going to a meeting to shake a few hands. It was almost a social occasion where you just said hello to your rivals in the industry. I didn't give it any real thought... Staggering stupidity with the benefit of hindsight."

From Does Prison Work for Cartelists? – The view from behind bars. An interview of Bryan Allison by Michael O'Kane (The Antitrust Bulletin: Vol 56, No. 2, summer 2011)

Cartels are the most serious types of anti-competitive agreements, where two or more businesses agree, whether in writing or otherwise, not to compete with each other.

Cartels deprive consumers and other businesses of the benefits of fair competition. In the long run, cartels undermine competitiveness in the wider economy.

Cartels include agreements to:

- fix prices
- engage in bid rigging (for example, cover pricing, (see page 14)
- limit production
- share customers or markets

A cartel may also arise where there is a unilateral exchange of information or when businesses disclose or exchange commercially sensitive information.

The scope of the law in relation to the disclosure/exchange of commercially sensitive information is broad. The key issue is whether the disclosure/exchange of information substantially reduces uncertainty around the company's future commercial behaviour in the market place. The fact that information sharing can start easily and seem relatively harmless at first makes cartels a significant risk. Organisations can easily slip into a cartel situation without realising what is happening.

Other agreements that could be anti-competitive include agreements, whether in writing or otherwise, that involve:

- joint selling or purchasing with competitors
- a retailer agreeing with its supplier not to sell below a particular retail price, or agreeing to a long exclusivity period.

> The responsibility to ensure that companies don't engage in illegal anti-competitive practices is an important one, and company directors should not shirk that responsibility. The business community should be clear that the CMA will continue to look at the conduct of directors of companies that have broken competition law…"
>
> **Michael Grenfell, CMA Executive Director for Enforcement**

Case study 1:
Amazon Marketplace sellers

In 2016, an online seller was fined £163,371 for being part of an illegal cartel relating to sales of popular posters (featuring the likes of Justin Bieber and One Direction) and frames via Amazon Marketplace.

Trod Ltd agreed with a competing seller, GB eye Ltd, that they would not undercut each other on price and used automated repricing software to help them monitor and adjust their prices accordingly. Agreements such as this mean that customers miss out on the benefits of competition and can end up paying more than they should. GB eye Ltd received immunity from fines by reporting the cartel to the CMA first. Trod Ltd also received a reduction for admitting their part in the cartel and accepting a streamlined administrative process for the CMA's investigation. Daniel Aston, managing director of Trod Ltd, was disqualified from acting as a director of any UK company for 5 years.

Lessons learnt

- **Competition law applies in online markets** as well as sales through traditional bricks-and-mortar outlets.
- **You must not agree with competing businesses not to undercut each other on price**, or agree what prices you will charge for your products or services.
- **Competition law applies to small businesses as well as large ones**. The turnover of the 2 online sellers in this case was in each case under £16 million.
- **Under the Company Directors Disqualification Act**, you can be disqualified from managing a company for up to 15 years if caught breaking competition law.

More information

- The CMA has published a 60-second summary on what online sellers need to know about price-fixing and how to comply with competition law. For more information go to: **http://bit.ly/OnlineSellers_Advice**

Suppliers must not take any action that interferes with a retailer's ability to set their own price of the supplier's goods online or through other channels.

Case study 2:
Online resale price maintenance

In May 2016 the CMA fined 2 businesses in separate cases over £3 million for restricting the prices at which retailers could sell their products online.

In the first case, a supplier of bathroom fittings threatened retailers with penalties (such as higher prices, or withdrawing rights to use the supplier's marketing images) if retailers priced below their 'recommended' online retail price. In the other case, a supplier of commercial catering equipment imposed a 'minimum advertised price' policy for dealers when selling their products online. Both of these arrangements were a type of resale price maintenance (RPM) that restricted retailers' ability to set their own prices when selling products online. The effect of RPM is to reduce competition between retailers which can lead to artificially high prices for customers.

The suppliers' fines were each reduced by 5 to 10% for setting up a comprehensive competition law compliance programme that included staff training.

Lessons learnt

- **Suppliers must not take any action that interferes with a retailer's ability to set their own price** of the supplier's goods online or through other channels. Any attempt to do so is likely to be illegal.
- **RPM can also be achieved indirectly**, for example as a result of restrictions on discounting by retailers or where there are threats or financial incentives to sell at a particular price.
- Policies that set a **minimum advertised price** for online sales can equate to RPM and are usually illegal.
- **The principles of competition law apply to all sectors**, including online retail.

More information

- The CMA has published a 60-second summary on what retailers need to know about resale price maintenance (RPM) agreements and how to comply with competition law. For more information go to: **http://bit.ly/RPM_Advice**

Membership associations should take particular care to avoid making recommendations or taking decisions which interfere with their members' commercial conduct.

Case study 3:
Eye surgeons

In August 2015 CESP Limited, a membership association of consultant eye doctors (ophthalmologists) was fined £382,500 for sharing commercially sensitive information amongst competing consultants and recommending what prices they should charge to insurers.

The eye surgeons were working together as part of different, competing groups across the UK. The membership organisation CESP Limited, broke competition law by facilitating the exchange of sensitive information between these competing groups on subjects such as their pricing and commercial intentions. These actions were taken in the interests of increasing revenue and profitability for the consultants by removing competition between them. Actions such as these can mean higher prices, which will ultimately have a knock-on effect for patients who may end up paying more through premiums or self-pay fees.

CESP Limited was originally fined £500,000 for breaking competition law but this was later reduced to £382,500 because CESP Limited co-operated with the CMA and settled the case, which allowed for a swift resolution of the investigation.

Lessons learnt

- **Continuing to work as a sole trader outside your group may mean you fall foul of competition law**. You may be competing with your group and its members and could break competition law by using the group's pricing information (which should remain confidential to the group) when setting prices as a sole trader.
- **Membership associations should take particular care to avoid making recommendations or taking decisions which interfere with their members' commercial conduct**, including how they set fees or prices.
- **If signing up to a membership association, always check that its conduct does not restrict how members can set their prices** or run their individual businesses.

"The message from this case is clear and unequivocal: make sure that you comply with the law and that you instil a culture of compliance within your business."

Stephen Blake CMA Senior Director – Cartels and Criminal Enforcement

Case study 4:
Commercial vehicles cartels

In 2013 Mercedes-Benz and five of its commercial vehicles dealers were fined over £2.8 million for unlawful cartel activity.

In this case, businesses sought to limit competition for the sale of vans or trucks. For example, in one instance two dealers agreed that they would include a 'substantial' margin in quotations to customers based in each other's area.

The fines imposed represented up to 18 months' profit after tax of the businesses involved, but one of the companies avoided a penalty altogether by being the first to apply for leniency and subsequently assisting authorities.

However, it is important to bear in mind that this case was not triggered by one company blowing the whistle – it was the result of the authority's own intelligence work.

The CMA's commitment to cartel enforcement means that the risk of getting caught is greater than ever.

Extract of evidence seized in a "dawn raid"

Hi [redacted]

To follow up our conversation earlier, I want to assure you that it is not our intention to deliberately undercut your sales guys on deals within your area.
I have instructed my guys to inform me in all instances when they are in communication with customers out of area, so that I can speak to you, or any other sales manager.
If we are asked to quote, we will ensure that a substantial margin is left in the deal in order to give you the opportunity to keep the customer in your area.

Lessons learnt

- It is **easy to cross the line** between legitimate and illegitimate contact between competitors
- Involvement in cartel activity need not be extensive to fall foul of the law – **a single meeting or informal chat may be all it takes**
- Enforcement action may be taken – **regardless of size and geographic scope** of the businesses involved
- Even if senior management is unaware of an employee's behaviour, or even if the employee is acting contrary to instructions, **the business may still be liable**

The disclosures by RBS took place through a number of contacts on the fringes of social, client or industry events or through telephone conversations.

Case study 5:

RBS and Barclays – unilateral disclosure of confidential and commercially sensitive information

Royal Bank of Scotland (RBS) and Barclays engaged in anti-competitive practices in relation to the pricing of loan products to large professional services firms. RBS was fined £28.59 million.

Individuals in RBS's Professional Practices Coverage Team disclosed generic as well as specific confidential and commercially sensitive future pricing information to their counterparts at Barclays. The disclosures by RBS took place through a number of informal contacts, for example in the context of social, client or industry events or through telephone conversations.

Under a settlement agreement between the OFT and RBS, RBS agreed to pay a fine of £28.59 million, having admitted to certain breaches of competition law between October 2007 and February/March 2008, and agreed to co-operate with the OFT's investigation. Barclays brought the matter to the attention of the OFT. It qualified for immunity under the OFT's leniency policy and was not fined.

Lessons learnt

- **This is an example of a case where there was no mutual exchange of information** – there was a one way disclosure by RBS to Barclays
- **There are substantial penalties for such practices**, even where they arise in the context of informal contacts between competitors[4]
- **All staff should be made aware of compliance rules** and what is and isn't lawful practice
- **Staff should know what the law requires them to do and what action to take** if they come into possession of sensitive competitor information

More information

- The CMA has published practical 60 second summary dos and don'ts guides to help educate your staff. For more information go to: **http://bit.ly/60-second-summaries**

4. Because the mere receipt of information may be sufficient to give rise to concerted practice, it is never safe to discuss confidential strategic information with competitors – even in social settings, even as a one-off and even if the discussion may be motivated by other reasons.

The £370,000 fine gave a clear message that market-sharing is unacceptable and merits firm action to end the practice.

Case study 6:
Care home medicines

£370,000 penalty for breach of competition law.

In March 2014 Quantum Pharmaceutical, Tomms Pharmacy and Lloyds Pharmacy were found to have breached competition law, with fines totalling £370,000 imposed on Quantum and Tomms.

The case followed an investigation into a market sharing agreement over the supply of prescription medicines to care homes between May 2011 and November 2011.

Under the market sharing agreement, the companies agreed that Tomms would not supply prescription medicines to existing Lloyds' care home customers between May 2011 and November 2011. In return, for at least some of the time, Lloyds also agreed not to supply prescription medicines to existing Tomms' care home customers.

The £370,000 fine gave a clear message that market-sharing is unacceptable and merits firm action to end the practice.

Lloyds brought the matter to the OFT's attention and, under the OFT's leniency policy, was not fined.

Lessons learnt

- **Market sharing is unlawful** – in this case it reduced competition for the supply of prescription medicines to some care homes
- **Market sharing is a serious breach of competition law** that will attract significant penalties
- **Doing the right thing can secure leniency** – by bringing the matter to the attention of the authorities, Lloyds avoided a fine under the OFT's leniency policy

Fines were imposed on construction firms in England that colluded with competitors on building contracts.

Case study 7:
Construction

One of the biggest cases ever run by a competition authority at the time resulted in infringement findings against around 100 parties in relation to nearly 200 projects. Fines of £63.6 million (after appeal) were imposed on construction firms in England that colluded with competitors on building contracts.

The firms engaged in unlawful anti-competitive bid-rigging activities on a large number of tenders, mostly in the form of 'cover pricing'.

In various tendering rounds, the lowest bidder faced no genuine competition because all other bids were cover bids, leading to an even greater risk that the client may have unknowingly paid a higher price.

There were also instances where successful bidders paid an agreed sum of money to the unsuccessful bidder (known as a 'compensation payment'). These payments were facilitated by the raising of false invoices.

The infringements affected building projects across England and included schools, universities, hospitals and numerous private projects from the construction of apartment blocks to housing refurbishments.

Lessons learnt

- **Cover pricing is where one or more bidders in a tender process collude to arrange for an artificially high price be put forward** by a competitor(s)
- **Bid rigging and Cover pricing:**
  - **reduces the number of genuine bids** in the tender process
  - **deprives the procurer of the opportunity to seek a replacement bid**
  - **deprives potentially more efficient competitors of the opportunity to bid and/or get on tender lists**
  - **gives a misleading impression** as to the real extent of competition

VAA brought the matter to the attention of the authorities and under the OFT's leniency policy, was not fined.

Case study 8:
British Airways/Virgin

£58.5 million penalty in fuel surcharge decision.

In April 2012 it was found that British Airways (BA) and Virgin Atlantic Airways (VAA) engaged in anti-competitive practices in relation to the pricing of passenger fuel surcharges. Between August 2004 and January 2006 BA and VAA co-ordinated their surcharge pricing on long-haul flights to and from the UK through the exchange of pricing and other commercially sensitive information.

BA was fined £58.5 million. VAA brought the matter to the attention of the authorities and under the OFT's leniency policy, was not fined.

Lessons learnt

- **Co-ordinating pricing, through the exchange of commercially sensitive information, is unlawful**
- **Co-operation with the authorities pays** – the fine would have been higher still but for the co-operation provided by BA throughout the investigation
- **Even if you don't report anti-competitive behaviour to the authorities, other companies may** – the incentives for being the first to bring the case to the authorities are strong

More information

- For more information about how competition law might apply to agreements please see Agreements and Concerted Practices Guidance: **http://bit.ly/CMAagreements**
- For more information on agreements between competitors see the European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. **http://ec.europa.eu/competition/antitrust/legislation/horizontal.html**
- For more information on how competition law provisions might apply to agreements between businesses at different levels of the distribution chain, such as suppliers and retailers, please see the European Commission Guidelines on Vertical Restraints. **http://ec.europa.eu/competition/antitrust/legislation/vertical.html**
- CMA 60 second summary on information exchange **http://bit.ly/60-second-summaries**

Chapter 5: Anti-competitive behaviour to watch out for – abuse of a dominant position

A business is only likely to hold a dominant position if it is able to behave independently of the normal constraints imposed by competitors, suppliers and consumers.

A business that enjoys substantial market power over a period of time might be in a dominant position. The assessment of a dominant position is not based solely on the size of the business and/or its market position. Whilst market share is important (a business is unlikely to be dominant if its market share is less than 40 per cent)[5] it does not determine on its own whether a business is dominant.

Even if your firm is not in a dominant position you might be at risk of being adversely affected by abuse of a dominant position by others (such as suppliers or competitors, for example). It is therefore important that all businesses are aware of the signs of abuse of dominance and know what to do if they suspect it is happening in their market.

To assess whether a business may occupy a dominant position, consider the following questions:

- **What is/are the relevant markets** in which the business is operating?
- **Does the business have persistently large market shares** in excess, for example, of 40 per cent, in the relevant market? Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position.
- **Are there barriers to entry or expansion** that may prevent potential competitors from entering or expanding in the market?
- **Do the customers of the business have any degree of buying power** that they can exert on the business?

To identify if a dominant business is at risk of abusing its position, consider the following questions[6]:

- Has the business **refused to supply an existing customer** without objective justification?
- Has the business **offered different prices or terms to similar customers** without objective justification?
- Has the business **granted non-cost-justified rebates or discounts to customers** that reward them for a particular form of purchasing behaviour, or accepting exclusivity provisions?
- Does the business **require customers wishing to purchase one product to purchase a different one in addition** (tying or bundling)?
- Is the business **charging prices so low that they do not cover the costs** of the product or service sold?
- Is the business **refusing to grant access to facilities that a business owns which may be essential for other competitors** to operate in a market?

5. The European Court has stated that dominance can be presumed in the absence of evidence to the contrary if an undertaking has a market share persistently above 50 per cent ('Akzo presumption').
6. This list of considerations is illustrative only and is neither definitive nor exhaustive. Although the activities carried out by a dominant business listed here will not necessarily constitute an abuse in every case, they can give rise to increased risk, or be indicative, of abuse and may warrant assessment.

Chapter 6: How to ensure your business is compliant: a risk based approach

"Compliance, including competition law compliance, is a form of 'corporate hygiene'."

Business respondent, OFT Drivers of Compliance and Non-Compliance with Competition Law Report, May 2010)

Setting the core context: commitment to compliance

At the core of this process is an awareness of the competition law landscape and a commitment to compliance throughout your organisation. Your board and senior management must take overall responsibility for instilling this commitment to compliance.

There are different ways to help ensure that your business complies with the law, but key to them all is instilling a compliance culture in your organisation. This means that managers at all levels of a business, from the top down, need to demonstrate a commitment to complying with the law.

The risk of non-compliance with competition law should complement or be integrated into the process that the organisation uses to manage all its other risks, in line with standard frameworks that may be in use such as ISO31000. Organisations should make clear that they have a zero appetite for breaching competition law, in line with a zero appetite for all other unlawful acts.

There are four steps in the risk management process.

Establish a risk based approach tailored to your organisation

An intelligent and proactive risk management approach, tailored to your organisation, rather than a 'tick box' compliance exercise, is strongly recommended.

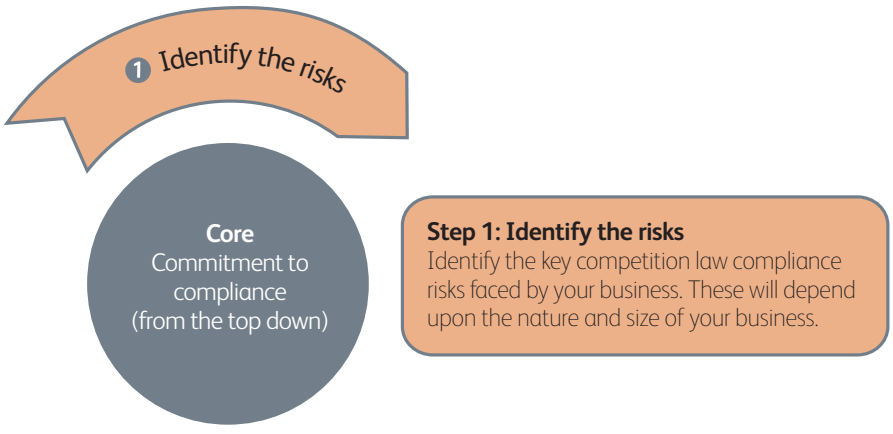
Core: Commitment to compliance (from the top down)
Senior management, especially the board, must demonstrate an unequivocal commitment to competition law compliance. Without this commitment, any competition law compliance efforts are unlikely to be successful.

"...everyone had an aura of invincibility, and I remember thinking about this, years prior, when I said, 'We are a tiny outfit, we are not involved with consumers, who are we hurting? ...who cares about us? We are so far under the radar nobody will ever take any notice of us."

From Does Prison Work for Cartelists? – The view from behind bars. An interview of Bryan Allison by Michael O'Kane (The Antitrust Bulletin: Vol 56, No. 2, summer 2011)

Step 1: Identify the risks

- Are you at risk because your employees lack awareness and knowledge about competition law, the behaviours it covers and the associated risks?
- Look carefully at your business and identify areas where you might risk breaking competition law. For example, do your employees have contact with your competitors at industry events or otherwise?
- In your market, do employees move frequently between competing businesses and do you have people who have recently joined from competing businesses?
- Do your employees seem to have information about your competitors' prices or business plans?
- Do your staff attend trade association or social events where representatives of your competitors are also present?
- Do you share the same suppliers as your competitors?
- Are your customers/suppliers also your competitors?
- Do you ever work in partnership with your competitors?
- Are you entering into exclusive contracts for long periods?
- Do your agreements contain joint selling and purchasing provisions with your competitors?
- Do your agreements contain requirements to share commercially sensitive confidential information, or to collaborate, with your competitors?
- Does your business impose resale restrictions on retailers that sell your products?
- Are you a business with a large share of any of the markets in which you operate?



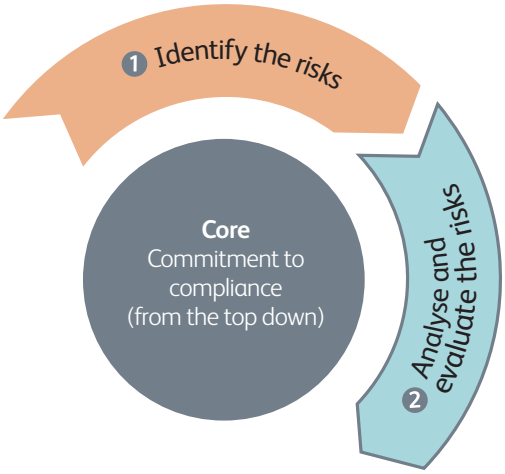
"I hadn't thought anything would happen. Why would anybody… prosecute us?"

From Does Prison Work for Cartelists? – The view from behind bars. An interview of Bryan Allison by Michael O'Kane (The Antitrust Bulletin: Vol 56, No. 2, summer 2011)

Step 2: Analyse and evaluate the risks

Once you have identified all the areas where there is a risk your business might break competition law, you can then work out how serious these risks are. Classification may be quantitative, i.e. expressed in monetary terms, or qualitative such "high/medium/low". Assessment of impact on the business should consider reputational consequences and the effect on the brand.

Businesses should consider assessing which employees are in high risk areas. These may include employees who are likely to have contact with competitors and employees in sales and marketing roles; whilst employees in some back-office functions may be classified as low risk.



Step 2: Analyse and evaluate the risks
Work out how serious the identified risks are. Often it is simplest to rate them as low, medium or high. In particular, businesses should consider assessing which employees are in high risk areas. These may include employees who are likely to have contact with competitors and employees in sales and marketing roles.

"One respondent expressed the view that compliance can be achieved '… through two routes mainly. One is behavioural, and one is what I call engineering', the latter of which referred to the implementation of risk management systems and procedures."

OFT Drivers of Compliance and Non-Compliance with Competition Law Report, May 2010

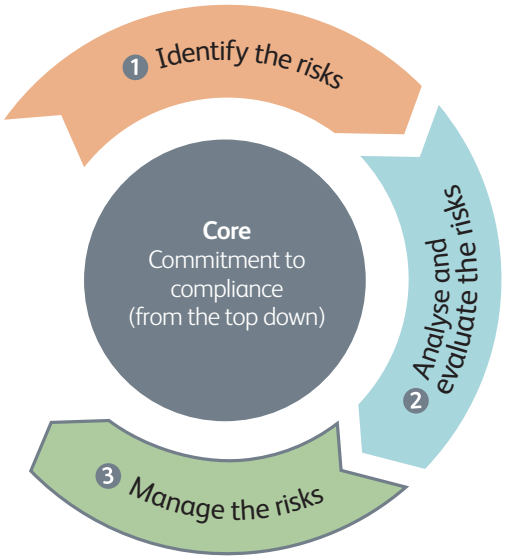
Step 3: Manage the risks

This step involves setting up policies, procedures and training to reduce the likelihood of the risks you have identified occurring and to reduce the consequent impact on your organisation. For example, if you have identified employees meeting competitors at conferences as being high risk, you could run training to make sure your teams know what they are, and are not, allowed to communicate to competitors. This training could also be supported by an employee code of conduct and/or ethics policy.

What you do will depend on the risks identified and the likelihood of the risk occurring in your particular context. By way of example, some businesses have found the following measures to be helpful:

- training employees in competition law. This might include face to face training for high risk employees and e-learning awareness training for low risk employees
- implementing an employee code of conduct
- implementing a company-wide ethics policy to underpin a healthy culture in respect of risk[8]
- making sure employees tell you if they are joining a trade association or attending events where they might be meeting with competitors
- implementing a system where all contact with competitors is logged
- producing a checklist to help employees with decision-making, particularly when under pressure
- establishing a system so that employees can get advice before action (for example, legal advice on a contract)
- establishing a system for employees to report, on a confidential basis, any competition law concerns that they might have
- making anti-competitive behaviour a disciplinary matter in employment contracts and ensuring that it is covered in the company's disciplinary policy

8. For more information see the IRM publications on Risk Culture: http://www.theirm.org/knowledge-and-resources/thought-leadership/risk-culture/



Step 3: Manage the risks
Set up policies, procedures and training to ensure that the risks you have identified do not occur, and how to detect and deal with them if they do. What is most appropriate to do will depend on the risks identified and the likelihood of the risk occurring.

"Getting the monitoring and follow-up to competition law compliance training right [is] just as important as actually delivering training."

Business respondent to OFT Drivers of Compliance and Non-Compliance with Competition Law Report, May 2010

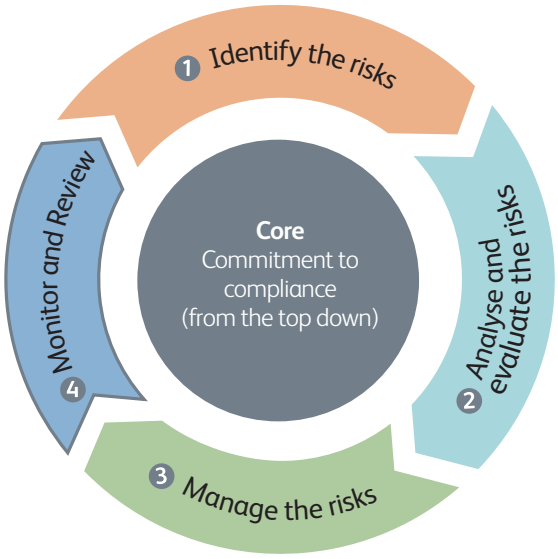
Step 4: Monitor and review

Review steps 1 to 3 and your commitment to compliance regularly, to ensure that your business has an effective compliance culture. Some businesses review their compliance efforts on an annual basis, others review more or less frequently, depending on their potential exposure. There may be occasions when you should consider a review outside the regular cycle, such as when taking over another business or if you are subject to a competition law investigation.

You should also be considering:

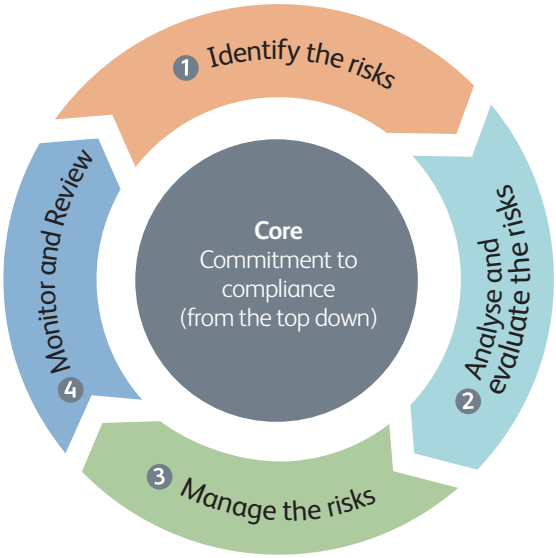
- What management information (e.g. key risk indicators and key control indicators) are needed to help management and the board monitor the risk. For example you may have targets for the percentage of staff trained
- Are you receiving adequate assurance that the measures put in place to manage this risk are effective?
- Are your assurance functions tasked to include this risk in their work and properly coordinated to ensure there are no gaps or overlaps?
- Has internal audit the necessary independence, objectivity, authority and expertise, not only to assure on your risk management and compliance functions, but also assess your risk and control culture and the effectiveness of your speaking out (internal whistleblowing) mechanisms?

Step 4: Monitor and review
Review steps 1 to 3 and your commitment to compliance regularly, to ensure that your business has an effective compliance culture. Some businesses review their compliance efforts on an annual basis, others review less frequently. There may be occasions when you should consider a review outside the regular cycle, such as when taking over another business or if you are subject to a competition law investigation.



The CMA's risk-based approach to compliance with competition law

Core: Commitment to compliance (from the top down)
Senior management, especially the board, must demonstrate an unequivocal commitment to competition law compliance. Without this commitment, any competition law compliance efforts are unlikely to be successful.



Step 1: Identify the risks
Identify the key competition law compliance risks faced by your business. These will depend upon the nature and size of your business.

Step 2: Analyse and evaluate the risks
Work out how serious the identified risks are. Often it is simplest to rate them as low, medium or high. In particular, businesses should consider assessing which employees are in high risk areas. These may include employees who are likely to have contact with competitors and employees in sales and marketing roles.

Step 3: Manage the risks
Set up policies, procedures and training to ensure that the risks you have identified do not occur, and how to detect and deal with them if they do. What is most appropriate to do will depend on the risks identified and the likelihood of the risk occurring.

Step 4: Monitor and review
Review steps 1 to 3 and your commitment to compliance regularly, to ensure that your business has an effective compliance culture. Some businesses review their compliance efforts on an annual basis, others review less frequently. There may be occasions when you should consider a review outside the regular cycle, such as when taking over another business or if you are subject to a competition law investigation.

Chapter 7: How you can help your directors to ensure your company avoids breaking competition law

> "Senior management [is] far more conscious now of their accountability to boards and to shareholders than they were in the past…"
>
> **Business respondent to OFT Drivers of Compliance and Non-Compliance with Competition Law Report, May 2010**

Bearing in mind the ultimate responsibility of the board for risk management and internal control, non-executive directors have an important role to play in challenging company executives about their compliance with competition law.

Key risk questions for directors to ask:

- What are our present competition law compliance risks?
- Which activities in our business model are likely to create situations where competition law becomes an issue?
- Do we have a healthy culture in our organisation in respect of this risk?
- What are the high, medium and low risks?
- Do we provide adequate channels for our staff to get advice on possible problems easily?
- What measures are we taking to mitigate these risks?
- When are we next reviewing the effectiveness of our risk mitigation activities?
- Have we thought about these issues in respect of risk management across our supply chains and business partners (our extended enterprise)?

It is the role of the director to ensure a company has taken sufficient measures to make sure relevant staff know, and are regularly reminded, that:

- The company must comply with competition law
- Staff must not discuss competitively sensitive information with the company's competitors, especially
  - the prices at which the company or its competitors will sell, or how it will bid for tenders
  - where or to whom the company sells
- There may be consequences for staff who do the above.
- If staff have done any of these things, or suspect someone else in the company has, they can and must report it to an independent and trustworthy person in the company (such as the company secretary or in-house lawyer). There will be serious consequences if they don't.

More information

The CMA has created a short guide for Directors on avoiding cartel infringements, which can be accessed on GOV.UK at the following link: **https://www.gov.uk/government/publications/advice-for-company-directors-on-avoiding-cartel-infringements**

Chapter 8: What do you do if you think competition law has been broken?

Businesses and individuals that come forward to report their own involvement in a cartel may have their financial penalty reduced or avoid a penalty altogether.

Leniency and informant rewards

Businesses and individuals that come forward to report their own involvement in a cartel may have their financial penalty reduced or avoid a penalty altogether (under the CMA leniency programme). To qualify for leniency, applicants must admit their involvement, co-operate fully with the CMA's investigation and stop their involvement immediately.

Provided they co-operate, the applicant's directors may also avoid disqualification and its employees and officers may be granted immunity from prosecution. The applicant must refrain from further participation in the cartel activity from the time of disclosure to the CMA of the cartel activity unless the CMA directs otherwise, which it will do only rarely.

- For information about leniency and to apply, call: **020 3738 6833**

The CMA is prepared to offer financial rewards for information about cartel activity (informant rewards). Additionally, individuals who come forward with information about their involvement in a cartel may be granted immunity from criminal prosecution (called a 'no-action' letter).

Private redress

Businesses as well as individuals can bring a claim before a court if they have suffered loss as a result of a relevant infringement of competition law and/or seek an injunction to stop such activity (private litigation). Additionally, restrictions in agreements that breach competition law may be unenforceable.

If you suspect a colleague, competitor, supplier, customer or any other business is infringing competition law:

- Call the CMA Cartels Hotline on **020 3738 6888**
- Email **cartelshotline@cma.gsi.gov.uk**

To report any other anti-competitive behaviour contact the CMA by emailing **general.enquiries@cma.gsi.gov.uk** or by phone on **020 3738 6000**.

Further information/links

- The CMA's 60-second summaries offer clear, concise guidance on steps businesses can take to comply with competition and consumer law. The summaries to date cover the following topics:
  - Advice for company directors on avoiding cartel infringements
  - Limiting risk in relation to competitors' information
  - Competition law: do's and don'ts for trade associations

  To access the CMA's 60 second summaries go to:
  http://bit.ly/60-second-summaries
- For more information on how small businesses can comply with competition law go to:
  http://bit.ly/cmasmallbizcompliance
- For more information on the CMA's approach to its new powers go to:
  http://bit.ly/CMAnewpowers
- For more information about how competition law might apply to agreements please see OFT401 Agreements and concerted practices.
  http://bit.ly/CMAagreements
- For more information on agreements between competitors see the European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.
  http://ec.europa.eu/competition/antitrust/legislation/horizontal.html
- For more information on how competition law provisions might apply to agreements between businesses at different levels of the distribution chain, such as suppliers and retailers, please see the European Commission Guidelines on Vertical Restraints.
  http://ec.europa.eu/competition/antitrust/legislation/vertical.html
- For more information on how to complain about another business, see:
  - informants rewards policy
    http://bit.ly/informantrewards
  - the CMA website at
    www.gov.uk/CMA
  - OFT451 Involving third parties in Competition Act investigations
    http://bit.ly/cmathirdparties
- For more on the CMA leniency programme and no-action letters see:
  http://bit.ly/cmaleniency
- For more information on how to bring actions before the court, see:
  - OFT1520 Quick guide to private litigation in competition cases
    http://bit.ly/privatelitigation
- For more information on international guidance via the International Competition Network (ICN) go to:
  http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/business.aspx
- For more information on international guidance via the International Chamber of Commerce (ICC) go to:
  http://www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Competition/ICC-Antitrust-Compliance-Toolkit/
- For information and tools to help small businesses understand more about unfair and illegal business practices, visit **www.gov.uk/cma/competing-fairly-in-business**

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