For more information on this roadmap, and any of the others in our Global Compliance Roadmap series, please get in touch with the Osborne Clarke team here.
Introduction

EU and UK competition law prohibits anti-competitive agreements and abuse of position by dominant companies. It also enables scrutiny of certain mergers, joint ventures and acquisitions to ensure they are not anti-competitive or harmful to consumers.

Breaches of competition law can have serious consequences for the business concerned, including financial penalties, reputation damage, personal liability and/or disqualification for directors and rendering contracts unenforceable.

Businesses need to understand their exposure to competition law, and the extent to which their systems, policies and procedures are sufficient to address that exposure, taking into account, amongst other things, the extent to which they are active in sensitive economic sectors, have high market share, are acquisitive and/or otherwise are at higher risk of scrutiny and enforcement.

The starting point for any entity wishing to ensure that it has adequate competition compliance procedures in place is to conduct an objective and comprehensive risk assessment to identify and quantify the competition risks it faces. This risk assessment should not be viewed as a one-off exercise, and should be repeated at regular intervals, including whenever significant new business is undertaken that may alter the overall risk profile of the organisation.

Set out below is a ‘roadmap’ of questions designed to identify information and issues that will be relevant to a business in its assessment of its competition law risks. Having answered these questions, an assessment can be made of the business’s competition law exposure and the extent to which its policies and procedures adequately address those risks. Thereafter, any necessary measures can be adopted and implemented to address any shortfall or gaps in the systems, policies and procedures of the organisation.
1. Assessing your competition law enforcement risk

1.1 Assessments/audits
☐ Has your business undertaken any assessment of the competition law risks it faces and, if so, when was that assessment last undertaken?
☐ Has your business undertaken any formal competition law compliance audits and, if so, when was that audit undertaken?

1.2 Sector/business risk
☐ What sector(s) does your business operate in?
   - Does your business operate in any sectors that are perceived as particularly sensitive from a competition perspective (such as defence, medical research, AI and encryption technology)?
☐ Does your business hold any significant market share(s)? For these purposes, any share above 25% would constitute a significant market share.

1.3 Transactional strategy
☐ Does your business have an acquisitive strategy?
☐ Is your business working towards a sale/IPO in the foreseeable future?
☐ Does your business consider itself to be dominant in any market (e.g. claiming to be the market leader)?
☐ Has your business been required to notify any mergers in the last 10 years or been the subject of an enquiry letter or other review by a competition regulator (such as the Competition and Markets Authority (CMA))?

1.4 Relationship with competitors
☐ Do personnel within your business have any interaction with personnel at your competitors?
   - If yes, in what circumstances (for example, is it typical for competitors to meet and have discussions at trade events in your sector)?
☐ Does your business attend trade association meetings? If so, are minutes kept of such meetings?
☐ Is your business involved in any joint ventures or other forms of collaboration with competitors, whether formal or informal?
☐ Would employees of your business be aware of the types of information they should/should not be sharing with competitors (i.e. commercially sensitive information)?

1.5 Assessing your competition law enforcement risk
☐ Is there clear guidance in place for employees in relation to what constitutes improper communications with competitors?
   - For instance, if an employee received an email with sensitive information, would that employee know to report it to legal and not engage?

1.6 Vertical relationships
☐ Do you have any supply relationships that are critical to your business?
   - If yes, do these contain any restrictions which affect how you conduct your business?
☐ Does your business have a distribution system in place for getting its products to market?
   - If yes, does the distribution system involve any exclusivity (whether of geographic territories or customers)?
☐ Has your business entered into any exclusive supply or purchasing commitments?
☐ Is your business contractually restricted in any way from dealing with particular third parties?

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2. Assessing your current approach to competition law compliance

2.1 Policies and procedures

☐ Do you have:

(i) An up-to-date competition compliance policy?

(ii) A dawn raid policy (i.e. a policy for use in the event of an unannounced inspection by a competition regulator)?

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Regulators, like the CMA in the UK, increasingly expect senior management to take the lead in competition compliance, including in ensuring that adequate compliance policies are put in place and observed.

3. Procedures and top-down compliance

3.1 Proportionate procedures

☐ Objectively, would your organisation be viewed as having adopted competition procedures that are proportionate to the risks that you face?

3.2 Tone from the top

☐ To what extent, and in what ways, does your Board/senior management provide clear leadership to the business on the approach to competition compliance (for example, consideration of competition compliance risk assessments and policies; consideration and direction on specific issues; ensuring appropriate resourcing; firm-wide communications and so forth)?

☐ Is this message communicated externally? For example, by way of a statement on the company’s website setting out its corporate values?

☐ Is your legal team familiar with the key principles of UK competition law? Is your legal team comfortable that they have the requisite knowledge to be able to spot most competition law issues in the company’s day-to-day commercial arrangements/activities?

☐ Does your legal team monitor developments in competition law?

3.3 Communications

☐ Does your organisation provide competition compliance training to all relevant employees (particularly those with any customer or supplier-facing activities)?

(i) Is that training tailored such that appropriate staff get specific training relative to their roles?

(ii) How often is the training provided/repeated?

(iii) Does this differ for personnel who may face the most obvious competition compliance risks?

(iv) Is understanding of the training tested and/or is a pass mark required to be achieved?

(v) Are training records compiled and retained?

(vi) If so, does the company record when the training took place, what form of training was given and who took part?

3.4 Monitoring and review

☐ Do you require personnel to provide signed confirmation that they have read and understood your competition compliance policy?

☐ Other than through training and, if relevant, the provision of the competition compliance policy, does your organisation actively communicate competition compliance risks to relevant personnel (for example, through compliance reminder emails or discussion at sales team meetings)?

☐ What steps does your organisation take to monitor its exposure to competition risk (such as regularly reviewing market share/regulatory activity in your sector)?

☐ If training is provided, who is responsible for updating the training materials? How regularly is it updated?

☐ If you have a competition compliance policy in place, who is responsible for keeping it up to date? How regularly is it updated?

☐ To the extent an employee is concerned about anti-competitive behaviour (for example, an improper communication with a competitor), who would be responsible for dealing with the concern? Would a (confidential) record be kept of the report?

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4. Specific concerns

☐ Have any potential competition compliance issues or red flags been identified as part of any internal or external audits conducted within the past 5 years? If so, how were these dealt with?

☐ Have any potential competition compliance issues been raised within the past 5 years? If so, how were these dealt with?

☐ Are you aware of any allegations, inquiries, investigations, prosecutions or other actions by a competition authority or other national regulator which may indicate a competition compliance issue connected with your organisation?

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