



The Competition Authority
An tUdarás Iomaíochta

Complying with Competition Law

A Guide for Businesses and
Trade Associations

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Introduction

Competition benefits everyone. It encourages businesses to compete for customers. Purchasers of goods and services – whether individual shoppers or businesses – benefit from paying less for goods and services and having more choice and better quality goods and services. Competition results in open, dynamic markets featuring increased innovation, more choice and better value.

When consumers benefit from competition, the economy does too. For example, increased competition from more suppliers results in the price of electricity coming down for consumers and businesses, meaning the cost of doing business comes down. This helps Irish businesses to be more competitive at home and abroad, which in turn supports economic growth and ultimately helps job creation.

Where there is a lack of competition, for example where there is a price-fixing cartel or a business abusing its market power, both business and consumers suffer. The cost of doing business goes up.

All businesses must comply with competition law and it is important that you make sure your business stays on the right side of the law. Penalties for infringing competition law are severe and include fines of up to €5 million or 10% of turnover, prison sentences of up to 10 years and disqualification from being a company director for five years. Therefore it makes sense to comply with the law.

A competition law compliance programme is a way your business can strive to have the right measures in place and can form part of your company's overall risk management and compliance measures.

This booklet aims to help you stay on the right side of competition law by providing some useful information on setting up a compliance programme.



What is a compliance programme and why is it important?

Businesses and trade associations can try to make sure they operate within Irish and European Union competition law by introducing and running an effective competition law compliance programme. Having an effective compliance programme in place not only reduces the risk of breaking the law but helps create a culture of compliance, which in turn gives the business a competitive edge and can lead to improved performance.

A compliance programme is a way for your business to strive for compliance with competition law and consists of a set of guidelines that help a company to monitor itself and its operations. It should be aimed at identifying and reducing the risk of breaking the law and properly addressing any breach that may have taken place.

A compliance programme normally forms part of the risk management within a business, where compliance with other legal and social obligations, such as health and safety, are managed and codes of conduct are adopted to avoid problems like bribery and corruption.

Every business needs to design a compliance programme that suits its particular needs. The type of compliance programme your business adopts will depend on the structure and conditions of the market your business is operating in and the size and structure of your business.

Large businesses operating in high risk or complex markets may wish to have a compliance programme designed by a competition law expert. The important thing is that the

programme should have full commitment from management. Proper implementation, training and constant review of the programme is just as important. The best or most expensive compliance programme is useless if it is left on a shelf to gather dust.

For smaller businesses a compliance programme does not need to be costly but does need to be implemented fully, with proper training given to staff. The compliance programme should also be reviewed regularly.

GUIDE TO COMPETITION LAW & POLICY

Who is the Competition Authority?

In Ireland the Competition Authority is the independent statutory body responsible for enforcing Irish and European Union competition law and our mission is to ensure that markets work well for Irish consumers, business and the economy. In essence, the Competition Authority polices competition law.

Healthy competition is very important for every person and business that buys goods and services and for the Irish economy overall. Competition in Irish markets will contribute to long term competitiveness and the recovery of the Irish economy.

We enforce competition law, tackling anti-competitive practices that negatively impact on the competitive landscape, thus harming consumers (which includes businesses as consumers).

- We advise Government Ministers and Departments, public authorities and other bodies involved in policy development and implementation on ways to protect and improve competition in the economy
- We evaluate mergers to make sure that mergers which benefit consumers are allowed to go ahead, while mergers that substantially reduce competition are not
- We raise awareness and understanding of competition law, the benefits of competition and our role through various activities. We have a number of information booklets available at www.tca.ie.

Why comply with competition law?

The Competition Authority has the power to investigate and take action against suspected anti-competitive behaviour. The Courts can impose severe penalties for those that break the law. Individuals and businesses can face fines of up to €5m, or 10% of turnover and, in the case of 'hardcore' infringements of the law, prison terms of up to 10 years, plus automatic disqualification from being a director for five years. A hardcore breach of the law is the most serious form of infringement. These are often referred to as cartel offences. Examples of these include price-fixing, market-sharing and bid-rigging.

The aim of competition policy, however, is to deter anti-competitive behaviour in the first place. Therefore it makes sense to comply with the law.

Apart from the criminal sanctions for cartel offences, the consequences of infringing competition law in general can be very serious. All agreements which have as their object or effect the prevention or restriction of competition in trade in any goods or services in the State are prohibited. These type of agreements can also lead to private actions for damages by individuals or businesses, who suffered a loss as a result of the behaviour. Under the Competition (Amendment) Act 2012, directors can also be disqualified from holding directorships for civil breaches of competition law.



What should businesses know?

The severity of the potential penalties and the possibility of legal action normally means that any business involved in illegal behaviour will not only have to invest a great deal of time in defending a case but may also incur high legal costs as a result of court actions.

Management will be distracted by having to defend such cases and ultimately the reputation of the business may be affected. Not only can reputational damage to any business involved in illegal conduct undo years of marketing and damage brand value but the business can also face hostility from customers who may feel cheated.

All businesses in Ireland, whether small, medium or large, are expected to comply with Irish and EU competition law and to refrain from anti-competitive behaviour.

It is important to understand what anti-competitive behaviour is. The Competition Authority has published two booklets to help businesses: *Guide to Competition Law and Policy for Businesses* and *Your Business and Competition Law*.

Agreements, decisions or concerted practices that restrict competition and are harmful to consumers are likely to be illegal. Agreements that threaten to fix or raise prices to consumers or restrict output are considered particularly harmful.

Cartels

A cartel is an illegal agreement between two or more competitors not to compete fully with each other. Cartel agreements do not need to be in writing and it is not necessary for the cartel agreement to have been carried out. Nor do they have to have been agreed in Ireland. If they have an effect (or potential effect) in Ireland they are illegal here. Simply making a cartel agreement is illegal.

Cartels include the following types of illegal activities:

- fixing or agreeing prices with competitors for goods and services, including the level of price increases or discounts
- sharing markets among competitors by dividing up territories or sharing out customers



- agreeing with competitors to limit production/supply by controlling the quantity of goods or services to be supplied in a given market
- rigging bids among competitors so that one person or company in particular wins the contract

The Competition Authority investigates cartels and prepares files for the Director of Public Prosecutions (DPP) recommending criminal prosecution. The DPP prosecutes serious criminal cases on indictment and has done so in numerous cartel cases to date.

Cartel behaviour such as that outlined previously is the most serious form of anti-competitive conduct and is often referred to as hardcore. The Government recently acknowledged this fact by increasing fines and prison sentences for those found guilty of such offences. The fines and prison sentences for serious infringements of the law are as follows:

- A business can be fined up to €5 million or 10% of the business turnover, whichever is greater, if convicted on indictment.
- An individual found guilty of an offence can be fined up to €5 million or 10% of their individual turnover, whichever is greater. An individual can also be imprisoned for up to 10 years.

Under Irish company law, a company director convicted of a criminal offence under competition law will be automatically disqualified from acting as a director in any company in the State for five years from the date of conviction.

It is the responsibility of the directors and managers of a business to ensure that the business complies with competition law but it is not only directors and managers who can be prosecuted. Employees who are involved in cartel activities can also face prosecution. It is also important to note that individual directors, managers and employees can be prosecuted for competition law offences even if the company for which they worked when committing the offence was not prosecuted.

An individual or business that assists a cartel can also be found guilty of a criminal offence. In Ireland, there have been convictions for aiding and abetting cartels where individuals did not work for the firms engaged in price-fixing but took on a co-ordinating or facilitating role in the cartel.

The Competition Authority, in conjunction with the DPP, operates a Cartel Immunity Programme which enables the Authority to make a recommendation to the DPP to grant immunity from prosecution for the first member of a cartel to come forward, confess involvement in the illegal activity and provide us with information about it. Any business or individual who wants to seek immunity can call 087 7631378.

Checklist of key items for preventing cartel behaviour

- ✓ Make all pricing decisions independently of competitors
- ✓ If you must hold meetings with competitors, do so strictly in accordance with an agenda that is pre-approved by the compliance officer in your company and keep discussions to the point. Do not encourage or engage in discussions about the general difficulty of doing business, the unreasonableness of consumers or other competitors, or behaviour by competitors.
- ✓ Keep proper records of all contact with competitors.
- ✓ Be aware that discussing pricing, customers and markets, or levels of production and supply in informal meetings can also mean you are breaking the law.
- ✓ Leave immediately if discussions arise that could be anti-competitive and make it clear at the time that your business does not want to be involved. Report the incident immediately to your compliance officer.
- ✓ Seek legal advice before entering into any agreement with a competitor.
- ✓ Be aware that any agreement with a competitor regarding price and conditions of supply, or levels of production and supply, even if unspoken, is considered a criminal cartel offence.

- ✓ Be aware that any agreement with a competitor not to compete for certain customers or in a particular product or geographic area, even if unspoken, is considered a criminal cartel offence.
- ✓ Be aware that agreeing with competitors to submit pre-arranged bids or tenders, agreeing not to submit a bid or tender or agreeing to withdraw a bid or tender, is considered a criminal cartel offence.
- ✓ Contact the Competition Authority if you suspect or have information of people rigging bids or colluding on tenders.
- ✓ If you are the first member of a cartel to admit to being involved in that cartel you may obtain immunity from criminal prosecution, subject to complying with strict conditions and providing evidence on the cartel. The Competition Authority has a Cartel Immunity Programme in conjunction with the DPP.



Other potentially anti-competitive agreements

Other agreements (written or otherwise) may also be anti-competitive depending on the circumstances. Such agreements include:

- certain agreements between firms that are not competitors but are connected through a chain of distribution, for example manufacturers and distributors, distributors and retailers, franchisors and franchisees. An example would be minimum resale price maintenance – the practice where the manufacturer or distributor dictates the retail price of items to retailers.
- agreements between competitors that reduce competition by co-ordinating behaviour, preventing new competitors entering a market or discouraging aggressive competition
- certain agreements involving exchanges of commercially sensitive information.

These agreements may have been entered into for seemingly valid business reasons but may be in breach of competition law because of their anti-competitive effect. Businesses should get their own legal advice where they are uncertain or have any concerns regarding any agreement that may potentially infringe competition law.

Abuse of dominance

Holding a dominant position in a market means that a business has the power to act independent of its competitors, customers or suppliers. Holding a dominant position is not illegal, but abusing that dominant position to stifle competition is prohibited.

Conduct which the courts have found to involve abuse of dominance can in particular circumstances include the following:

- predatory pricing – selling a product or service below cost to drive competitors out of the market or create barriers to expansion for such competitors, or to create barriers to entry for potential new competitors
- price discrimination – applying different conditions to similar transactions, putting one business customer at a competitive disadvantage to another
- exclusive dealing – requiring or inducing a supplier or customer not to deal with a competitor
- tying – making the sale of one product conditional on the purchase of another product or service that has no essential connection with the original one
- refusal to supply – refusing to supply goods or services without any objective justification for the refusal.

Checklist of key items for preventing abuse of dominance and other anti-competitive agreements

If a business holds a dominant position in a market, it should be careful when:

- ✓ implementing loyalty programmes or exclusivity agreements with customers
- ✓ applying different prices and sale conditions to business customers who are essentially the same in relation to credit worthiness and volumes purchased
- ✓ using a product as an incentive for a customer to purchase another product
- ✓ selling products or services below cost
- ✓ refusing to supply a product or service without good reason
- ✓ entering into joint buying or production agreements

In the case of anti-competitive agreements (other than hardcore cartels) and abuse of dominance cases, the Competition Authority will generally try to get the business involved to agree to stop the anti-competitive behaviour. This may involve for instance, writing a formal cease and desist letter to the business, requesting that it stop the anti-competitive behaviour. Where the anti-competitive conduct has been significant, the Authority may seek formal undertakings from one or more of the parties involved and seek to have these undertakings made an order of court. Where settlement is not possible, the Authority can apply to the High Court for a declaration that the conduct is illegal and seek an injunction requiring the business to cease the illegal conduct. If the Court finds in favour of the Authority,

competitors or customers can take a follow-on action for damages against the company or companies involved.

All businesses should in general be careful when:

- ✓ announcing prices in advance, or sharing information that could be seen as co-ordinating on price and capacity, or market and customer sharing
- ✓ making comments that could be viewed as signalling to competitors on issues such as price, production levels and trading conditions
- ✓ making threats or promises regarding price and market shares
- ✓ setting minimum resale prices
- ✓ entering into information, research and development agreements
- ✓ entering into joint buying or production agreements
- ✓ taking collective action such as group boycotts



Mergers and acquisitions

Mergers over a certain financial threshold must be notified to the Competition Authority. We have the power to block a merger if we think it will substantially reduce competition. This is likely to be the case if the merged entity's market position would enable it to raise prices after the merger. We also have the power to challenge anti-competitive mergers that have not been notified to the Authority.

Checklist of key items relating to mergers and acquisitions

- ✓ Be aware of what generally constitutes a merger or acquisition
- ✓ Be aware of the obligation to notify mergers and acquisitions above certain thresholds
- ✓ Carefully consider whether a merger below the thresholds might need to be notified
- ✓ Seek legal advice or contact the Competition Authority if you are in doubt about whether a joint venture, merger or acquisition should be notified to the Competition Authority
- ✓ Do not 'gun jump' – i.e. complete the deal in any way before the Competition Authority has approved it, where approval is needed
- ✓ Be careful about any exchange of information between the merging firms before the deal has been completed – if they are your competitors, they will still be your competitors if the deal does not go ahead

Our investigative powers

Under the Competition Act 2002, the Authority has the following powers of investigation:

- power to enter and search: authorised officers may enter and search a business premises or home with a valid warrant issued by the District Court
- power to seize documents and records: authorised officers can seize documents or records, including computer hard-drives, laptops and mobile phones with a valid warrant issued by the District Court
- power to summon witnesses: we can summon witnesses to be questioned under oath. Witnesses have the same immunities and privileges as a witness before the High Court. Failure to appear before the Competition Authority on foot of a witness summons is a criminal offence
- power to demand records and information from third parties: we have the power to require witnesses and third parties, such as telephone companies and financial institutions, on foot of a witness summons, to produce records and information.

We are also responsible for enforcing European Union competition law in Ireland. We have a duty to actively assist the European Commission in carrying out inspections in Ireland, or to carry out inspections on behalf of the Commission, if we are requested to do so. We can also use our investigative powers referred to above, to assist National Competition Agencies of other Member States with inspections in the State, or on our own initiative, to investigate alleged infringements of European Union competition law in Ireland.

Warning signs of potential problem areas

There are certain signs of potential competition law problems that businesses should watch out for. There are certain markets or sectors more prone to infringing competition law. This is more often than not due to factors characterising the particular market or the business in question. Factors such as the number of competitors and relative market shares, product characteristics and conditions for entry are important.

Some warning signs to look out for

- Is the business a leader in the market with a consistently very high market share – this may indicate a dominant position in the market and the business should be careful that it does not abuse its dominant position by engaging in anti-competitive conduct.
- Are there only a few businesses involved in the market or is a substantial portion of the market controlled by a few businesses – this can mean it is easier for those businesses to get together and form a cartel or otherwise illegally coordinate behaviour.
- Are the products mostly the same or standardised, for example, iron, steel or cement, where the number of competitors is small and competition is normally only on price and service rather than product quality and characteristics – this can also make it easier to fix prices.
- Is the pricing policy followed by competitors very similar whether in relation to price, discount or trading terms?
- Are there barriers to entering the market, such as high costs for starting up or legislation? This can facilitate anti-competitive behaviour between incumbents because

high barriers to entry make it more difficult for new competitors to enter the market.

- Has the market or sector previously been investigated for possible anti-competitive behaviour, elsewhere if not in Ireland?
- Are members of staff in regular contact with competitors – regular communication between competitors can lead to information being shared that could lead to anti-competitive behaviour?
- Do market participants have very detailed information about some of their competitors (e.g. market shares, pricing practices and future plans)

Trade associations have frequently played a role in anti-competitive conduct and for this reason the Competition Authority has published comprehensive guidance, available on our website, specifically aimed at trade associations: Guidance Notice on Activities of Trade Associations and Compliance with Competition Law. We draw your attention to the section in PART THREE of this booklet that specifically deals with trade associations. That section is headed Competition Law Compliance for Trade Associations.

What to do if you suspect anti-competitive behaviour

Now that you have an outline of the type of conduct that may infringe competition law and though it is best to get your own legal advice, it is important for you to know what to do in the event that you suspect anti-competitive conduct either within your business or by a competitor.

Make a complaint

If you suspect a competitor, supplier, customer or any other business of engaging in anti-competitive activity you should report it to the Competition Authority.

Email: complaints@tca.ie

Phone: 1890 220 224 (International: +353 1 804 5400)

Website: www.tca.ie/complaints.aspx

Write to: The Competition Authority, Parnell House,
14 Parnell Square, Dublin 1

Cartel Immunity Programme

If you or your business has been or is involved in a cartel there are steps you can take to address this situation.

The Competition Authority together with the DPP operates a Cartel Immunity Programme. This programme offers a person and/or company involved in a cartel the opportunity to seek immunity from prosecution if they are the first to come forward and admit involvement in the cartel and fully co-operate with

any subsequent investigation and prosecution.

Applying for immunity under the Cartel Immunity Programme could mean you escape prosecution, hefty fines and a possible prison sentence if you are eligible for immunity under the terms of the Immunity Programme.

If you wish to apply for immunity because you and/or your company have been involved in a cartel, call the Immunity Officer at 087 7631378.



COMPETITION LAW COMPLIANCE

Steps to consider when introducing a compliance programme

As mentioned earlier in this booklet, it makes sense to comply with competition law as the consequences of breaking the law can be disastrous for you and your business. For this reason, introducing an effective compliance programme can help you and/or your business reduce the risk of breaking the law. Remember, think compliance.

Here are some helpful steps you can follow:

- **Analyse your risks**
Go through your business agreements, processes and practices to identify areas where competition law compliance might be an issue. It might be a good idea to do an internet search on competition law/antitrust infringements in your particular industry, where you can learn from the mistakes of others and include specific countermeasures in your compliance programme to reduce the risk of making the same mistakes. Have a look at previous cases on the Competition Authority's website (<http://www.tca.ie/>) and the European Commission's website (http://ec.europa.eu/competition/index_en.html).
- **Commit to compliance**
It is a good idea to start with a resolution by senior management, declaring that the business is committed to complying with competition law and by agreeing to implement a formal programme to ensure compliance. At the same time a senior person within the organisation should be appointed as compliance officer. Such a person should also have a deputy appointed so as to provide

backup cover when (s)he is absent. Both individuals should know the business well and should preferably not be involved in the most common problem areas such as sales and marketing or trade association activities.

- **Planning and development**
The next step is to plan and develop a competition law compliance programme suitable for your business, based on the risks you have identified. This will include drawing up a written document outlining the programme and procedures for non-compliance. You may want to refer to legal advisers/specialist compliance advisers for assistance in this regard. If you discover any breach of competition law during the planning phase you should immediately seek legal advice, as you may want to avail of the Competition Authority's Cartel Immunity Programme as soon as possible.
- **Implementation and training**
When your compliance programme is ready, it needs to be rolled out to all staff. Everyone within the organisation should understand what the programme is about, who the compliance officer is, why it is good for the business and important to adhere to it and understand the implications of failing to comply. Ongoing training in this regard is important and it is a good idea to link the compliance programme to performance management and other staff/business policies. Do not be afraid to ask hard questions: e.g. "what do we need to change in our business to ensure compliance? Might our employees



Guide to drafting a competition compliance programme

risk breaching competition law to increase sales? Are our bonuses blinding our employees to the importance of competition law compliance?”

- **Monitoring and review**
Once your compliance programme is up and running it is important to continually monitor and review how it is working. It is a good idea to include it as a management function and to report on it regularly; for example, department heads should regularly sign a declaration (e.g. annually or half yearly) that they and their respective departments are operating in compliance with the law. Monitoring is important to establish whether the programme is working well and that it is properly supported within the organisation. It is also important to see if the measures you put in place are effective in preventing infringements of competition law and from time to time to make sure that the risks have not changed.

The process of introducing and running an effective competition law compliance programme can best be described as a virtuous circle, looking something as follows:



There are a number of steps that we can suggest that might help you when setting up a competition law compliance programme.

Stage 1: Analysis and risk assessment

The first step towards an effective compliance programme for any business should be a comprehensive self assessment exercise. This identifies and assesses the risk that you and or your business might breach competition law.

The basic aim is that you fully understand your business including its markets and culture and to analyse the business’ agreements, processes and practices and to identify specific aspects of competition law that may come into play.

Sometimes the activities of sales and marketing departments can give rise to problems in the area of compliance with competition law. The reason for this is that staff from sales and marketing departments often interact with competitors, either directly or indirectly (through customers or suppliers). Commercial pressure on staff such as the need to earn commission and chasing targets can at times become too important and can lead staff to sidestep compliance and to take the easier, illegal route to success by colluding with competitors on price or the allocation of customers or markets. For example, the Authority discovered in the minutes of a meeting of cartel members in the Citroen Car Dealers case, the following quote:

“The President appealed to all Dealers to work together in a spirit of communication and co-operation and trust and **to make profit for themselves and not for the customer.**”

It is therefore preferable for the person carrying out the analysis and risk assessment not to be involved in either the sales or marketing departments.

The person responsible for the review should carry out an in-depth probe of the business' competition compliance risks. They should be given full access to all of the business' relevant records (including records relating to price changes, refusals to supply and trade association activities) and interview relevant staff members and management.

Having identified the compliance risks, an assessment needs to be done to determine the extent of the risks.

A risk analysis and assessment report to senior management and directors (particularly non-executive directors) should include a summary of the process followed and the methodology used, the risks identified and a rating for each risk, e.g. high, medium or low.

The report should highlight any possible breaches of competition law that were found, as well as potential solutions. It is important to bear in mind though that at the first sign of any breach of the law, it is best to immediately seek professional legal advice.

Finally the report should propose measures and controls to limit any of the potential risks identified, as well as steps to ensure that new risks do not emerge.

The analysis and risk assessment stage typically involves:

- an examination of the business operations, including agreements and processes, as well as staff conduct and practices
- analysis of the relevant competition law rules
- analysis of market conditions
- identifying relevant compliance risks
- assessing the level of risk
- measures to remove such risks
- steps to address any potential breaches of competition law

Stage 2: Planning and development

Having identified and examined all of the potential compliance risks or concerns, the next step is to plan and develop a compliance programme that is fit for purpose for your business. It is imperative that the programme is tailored specifically to the needs of your business or association.

The compliance programme will be based on the analysis and risk assessment that you did and on the nature and size of the business.

The support of management is vital so that the necessary resources needed to plan and develop the programme are provided. A formal and continued commitment from management to the programme is essential.



A compliance officer should be chosen, ideally someone senior in the organisation. The compliance programme should be aligned with the business strategy and other policies, such as the code of conduct and disciplinary code.

The compliance officer is responsible for the planning and development of the competition law compliance programme. It is important that all management and staff know who the compliance officer is in case they have any questions about competition law or the compliance programme, or if they have any information about improper conduct.

The compliance programme should have an overarching commitment to comply fully with competition law.

It is important that the programme makes it clear to everyone in the business why compliance is important. The programme should include an overview of potential infringements of competition law, setting out the powers of the Competition Authority when investigating possible infringements and explaining what the consequences are for individuals and companies.

Compliance should form part of the business' ethos and should be supported in all of the business' codes of practice, policies and procedures. The programme should make it clear that management and employees all have a duty to comply with the law. The compliance officer should deal with questions and concerns about compliance and should be in a position to get advice on whether practices comply with competition law.

The programme should have a clear procedure for reporting non-compliance, through the compliance officer, to senior management. Ideally the person reporting the problem should be dealt with in confidence, if possible.

In addition to containing details of the legal consequences, the programme should also clearly state the disciplinary action that the company will take against staff who do not comply. Management and staff should all be clear about all of the consequences of not complying with the programme.

The planning and development stage typically involves:

- management committing to competition law compliance
- creating a culture of compliance
- appointing a senior person as compliance officer
- designing a compliance programme that will fit your business
- overarching commitment to comply with competition law
- written guide on competition law and importance of compliance procedures for non-compliance and disciplinary action for non compliance

Stage 3: Implementation and training

The compliance officer should prepare a written statement of the business' commitment to comply with competition law. Ideally it will go beyond legal compliance and include a commitment to conduct business ethically, with integrity and apply best practices. It should explain why it is good for the business to behave this way. Creating a culture of ethics and compliance will help to keep the business on the straight and narrow.

The proper functioning of a compliance programme is linked to other policies such as performance management, code of conduct and disciplinary policy and should have proper compliance measures and procedures as part of it.

It is important when implementing the compliance programme to make it explicitly clear to employees that they will be held personally responsible for any actions and decisions that infringe competition law. The business' other policies and procedures should take into account sanctions and disciplinary measures which will be imposed on employees involved in breaches of competition law. Employees who ignore the compliance programme or managers who do not report an employee for doing so should know that they will be held responsible and punished.

It is the responsibility of each and every employee to help the business to comply with the law and to help weed out bad practices. As already mentioned, it is advisable to treat reports

of transgressions in confidence where possible and consideration should be given to protection, in some form or another, to whistleblowers.

Training is a critical part of any new policy or programme and the compliance programme is no exception. Training should be aimed at fostering a culture of compliance and ethics. For the programme to work properly in practice, management and staff need to understand that the aim of the programme is to prevent breaches of competition law. They should know what acceptable behaviour is and should be able to identify prohibited conduct. They should also be aware of the consequences of not complying with the programme.

Ongoing staff compliance training should be part of an effective programme. Training should go beyond merely reciting the rules; instead it should involve explaining and applying the rules in a meaningful way to the situation in which the employees find themselves. Effective training is sometimes best delivered by experts. Depending on the size and nature of the business, this may be the compliance officer or a legal professional, or an external consultant. Engaging an external consultant might be a good idea during the initial stages of adopting a compliance programme, in order to design a proper, fit for purpose, training course and to compile a training manual for future use. A number of law firms have specialist competition law departments and some auditing firms or chartered accountants may offer risk and compliance services.





Training should relate to your specific area of business and have a practical element to it, linking the compliance programme to your daily business activities. Role-play is a good way of identifying problematic areas; bringing together staff with similar duties to discuss scenarios around the specific realities of their work. Each individual should be given his/her own copy of the compliance programme and once the initial training has been completed, each individual member of staff should sign a declaration, stating that they have read and fully understand the compliance programme and that they have received appropriate training. The compliance programme should also be included in induction and training for new staff members.

The implementation and training stage typically involves:

- a written commitment to comply with competition law and to conduct business ethically
- proper compliance measures and procedures
- linking the compliance programme to performance management, code of conduct and disciplinary policies
- punishing transgressions
- business specific training at the launch of the compliance programme, and ongoing training
- practical training on all aspects of the compliance programme
- declaration signed by each member of staff
- including compliance programme in induction and training of new staff

Stage 4: Monitoring and review

After implementing the compliance programme and training management and staff, the next step is monitoring progress. This involves monitoring of business activities and proper use of the compliance programme. As with training, monitoring is an ongoing process and it is a good idea to include it as a management function and to report on it in regular management reports.

Monitoring helps you to see if the measures put in place as part of the compliance programme are effectively preventing breaches of competition law. It also makes managers and staff aware that they are being monitored, which should increase the programme's overall uptake, effectiveness and success.

As part of the monitoring process, frequent ad hoc checks can help detect and address possible breaches of competition law. Checks should be done on both paper and computer files, including e-mail correspondence, especially of staff and management who are most likely to be involved in anti-competitive practices. If during this process something of concern is uncovered, you should immediately place all documents and electronic files to one side for safe keeping. Contact your legal adviser and consider making an application for immunity under the Cartel Immunity Programme.

At least once a year the business should review the programme to establish whether the compliance procedures and monitoring mechanisms are working well. The review should look at whether the programme is properly resourced and supported by senior management, if it is operating properly, whether compliance measures are appropriate and if the desired results are being achieved.

The review should also assess whether the risks identified in the initial risk assessment are still valid and if the programme still addresses those risks. The review should also look at the level of training and whether it is effective.

It may be useful to have the review carried out by an independent person, who was not involved in the design and implementation of the compliance programme. This could be someone other than the compliance officer, perhaps another senior manager or possibly even someone independent of the business. This person should have access to all of the relevant information and records of the business and should be in a position to actively investigate the business' compliance processes.

The monitoring and review stage typically involves:

- monitoring business activities and proper use of the compliance programme on an ongoing basis as a management activity
- checking whether the compliance measures are effectively preventing infringements
- making management and staff aware of the fact that they are being monitored for compliance
- auditing to detect possible breaches of competition law
- annual review of compliance programme to establish whether:
 - the procedures and monitoring mechanisms are working
 - the programme is properly resourced and supported by senior management
 - the programme is operating well and the compliance measures are appropriate, with the required results
 - the risks identified in the initial risk assessment are still valid
 - whether those risks are addressed properly
 - review by person outside the compliance function
 - access to all relevant information and records to actively investigate the business' compliance processes





Compliance checklist

Finally, here is a quick checklist of many of the key items to help you with your compliance programme. This checklist is intended as an aid and is not exhaustive. Legal advice is always the best and safest route to follow for total certainty.

General

- ✓ Ensure that the identity of the compliance officer is known to all staff
- ✓ Ensure that the compliance officer has an 'open door policy'
- ✓ Design the compliance programme to suit your business
- ✓ Ensure that all staff have access to the compliance programme
- ✓ Give training to all staff on the compliance programme
- ✓ Have all members of management and staff sign declarations on a regular basis, stating that they have read and fully understand the competition law compliance programme and have been adequately trained
- ✓ Training and monitoring of compliance should be ongoing and the compliance programme regularly reviewed
- ✓ Report any suspected anti-competitive behaviour immediately
- ✓ Seek legal advice if there is any uncertainty

Competition law compliance for trade associations

Trade associations or 'associations of undertakings' are specifically mentioned in both the Irish Competition Act 2002 and in European Union competition legislation, the Treaty on the Functioning of the European Union.

The word 'undertaking' is used in both the Irish and European Union competition legislation to describe a business, whether it is an individual person, a body corporate or an unincorporated body of persons engaged for (economic) gain in the production, supply and distribution of goods or the provision of a service.

For the purposes of this discussion on compliance, we are going to refer to associations of undertakings broadly as trade associations and this will include trade associations themselves, chambers of commerce, professional associations and industry federations.

As the name suggests, a trade association is normally made up of businesses involved in a particular sector, industry or profession. The purpose of a trade association is usually to represent the views of its members and to promote its members and their collective business interests, for example in lobbying government bodies for changes to laws and regulations.

Belonging to a trade association also brings the benefit of providing businesses in the same or similar line of business, a forum to discuss common problems and legitimate issues and to learn from one another's experience.

All of the general principles of compliance by business are applicable to trade associations. There is no special competition law regime for trade associations. However, as these are in essence fora for discussion between various businesses, mostly competitors, special care should be taken on what is discussed and what is agreed.

For this reason the Authority has published comprehensive guidance specifically aimed at trade associations: Guidance Notice on Activities of Trade Associations and Compliance with Competition Law. This is available on our website.

Experience shows, both locally and internationally, that anti-competitive conduct between competitors can often be organised by or through trade associations. This can happen in two ways:

- where the trade association itself serves as a tool to co-ordinate the business activities of its members or is used as a platform where market information such as price, production volumes and sales conditions is shared between members, and
- where members of a trade association use the opportunity of contact and co-operation provided by the trade association to facilitate anti-competitive conduct between themselves.

Specific areas of concern which trade associations should be especially careful to avoid (even threats of):

- co-ordinated conduct by members of a trade association, such as fixing or 'freezing' prices or agreeing on trading conditions, and
- co-ordinated measures, for example to bring a 'rogue competitor' who is offering reduced prices into line, or group boycotts against suppliers or buyers.

Practical tips for trade associations and members

The Competition Authority has compiled a list of practical tips to assist trade associations and their members in complying with competition law. Again this list is merely an aid and is not exhaustive. Legal advice is still the best and safest route to follow where there is any uncertainty.

Trade associations

- ✓ Ensure that all members are well informed of the fact that the trade association supports and requires strict compliance by its officers and members with competition law
- ✓ Include a commitment to compliance with competition law in the trade association's constitution and perhaps even introduce a competition law compliance programme
- ✓ Make sure that the trade association's constitution or charter does not include any anti-competitive aims or provisions
- ✓ Ensure that membership criteria are clear, objective and impartially applied
- ✓ Be careful that the trade association's powers over its members can not be used as a method of restricting competition between members
- ✓ Avoid any exchange of current and specific information on price, capacity, costs and other commercially sensitive information
- ✓ Avoid any exchange of information regarding sales and volumes or future pricing or quantities

- ✓ Stipulate clearly in the rules of the trade association or code of conduct that no exchanges or discussions around competitively sensitive issues such as pricing, volumes of production or sales should take place at meetings
- ✓ Make it clear at the beginning of every meeting that discussion around price, discounts or sales conditions and volumes will not be tolerated, whether before or after the meeting
- ✓ Ensure that each and every meeting has a proper agenda prepared and circulated beforehand and that discussion at the meeting is strictly limited to the points on the agenda
- ✓ Keep proper minutes of all discussions and ensure that minutes are properly signed off at the next meeting
- ✓ Highlight any areas of concern in the minutes and immediately rectify any mistakes
- ✓ Avoid any co-ordinated action that can constitute anti-competitive conduct such as group boycotts, or even threats of that nature
- ✓ Regularly review internal documentation, policies and procedures and all publications, including website, magazines and newsletters for compliance with competition law
- ✓ Carefully consider whether any suggestion about a suspension, expulsion or refusal of membership has a competition law dimension to it
- ✓ Most importantly, immediately seek legal advice should a particular situation give rise to a competition law concern



Members

Members of trade associations can ultimately be held responsible if the trade association they belong to acts in an anti-competitive way (i.e. members may have to pay damages and fines for the conduct of the trade association) and as such they should:

- ✓ Ensure that there is a proper agenda before any meeting
- ✓ Check that discussions are properly recorded and that any omissions or mistakes in minutes are corrected at the next meeting
- ✓ Keep proper records of all agendas, minutes and other relevant documentation circulated
- ✓ Be careful when entering into discussions with other members during or after meetings and avoid any discussion on sensitive competition issues such as pricing, volumes, markets and customers
- ✓ Avoid any exchanges of commercially sensitive information
- ✓ Seek legal advice before making any commitments or entering into any agreements on what appear to be sensitive issues that might raise competition concerns
- ✓ When attending meetings of the trade association:
 - report any members involved in anti-competitive discussions
 - object immediately to any discussion of pricing, volumes and illegal co-ordinated conduct

- leave the meeting if the discussion continues, reiterating your objection
- make sure that your objection is noted
- distance your company from the discussion in writing immediately afterwards
- make sure that you and your company do not implement anything that was discussed

More Information

More information on the Competition Authority is available on our website: www.tca.ie.

To contact us

- Email: info@tca.ie
- Phone: 1890 220 224 (international: + 353 1 8045400)
- Cartel Immunity hotline: 087 763 1378
- Fax: + 353 1 8045401
- Write to: The Competition Authority, Parnell House, 14 Parnell Square, Dublin 1.
- Tweet us [@CompetitionIrl](https://twitter.com/CompetitionIrl)

Disclaimer: This booklet does not give legal advice. It is intended as a guide. Individuals and businesses should refer to the competition legislation and seek independent legal advice.



