

THE ICC ANTITRUST COMPLIANCE TOOLKIT



Practical antitrust compliance tools for SMEs and larger companies



International Chamber of Commerce
The world business organization

Prepared by the
ICC Commission on Competition

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Preface

This ICC Antitrust Compliance Toolkit (the Toolkit) comes at a critical time. Over the past years, legal and compliance requirements affecting companies (both small and large) have shown a steep increase across the globe. This phenomenon reflects the rapid development of the normative values underlying the regulation and governance of business conduct, and the increasing ethical expectations of society at large. This has become apparent in a wide variety of areas: from anti-bribery and corruption, to environmental, health and safety, to data privacy and competition (in this Toolkit referred to as “antitrust”) law. Managing the steady growth of these legal compliance requirements creates increasing challenges to business. By promoting open international trade and investment across frontiers and helping all businesses (whether small or larger) meet the demands and opportunities of globalisation, the International Chamber of Commerce (ICC) seeks to play a key role in assisting a growing understanding between business and antitrust agencies in relation to antitrust compliance, and is uniquely positioned to do so.

Compliance with the law has become particularly important in the field of antitrust law, where the proliferation of laws across the globe has been unprecedented. Existing antitrust laws are constantly evolving and new laws are being adopted. Sanctions for antitrust violations are often substantial and reputational damage to companies as a result of an adverse antitrust finding is massive.

The issue of antitrust compliance is particularly fraught at the moment, since (to date) there is no international consensus among antitrust enforcement agencies on how best to support (or even encourage) business in their genuine antitrust compliance efforts. Moreover, while many companies already have antitrust compliance programmes in place to help protect themselves (and their shareholders) by reducing the scope for future infringements through suitable training and uncovering potential infringements early, ICC feels strongly that it is now appropriate to develop practical tips, guidance and advice to assist companies in building and reinforcing credible antitrust compliance programmes, taking into account both the risks these companies face and the resources available to them.

This is precisely what the ICC Antitrust Compliance Toolkit does.

The strongest driver for compliance with antitrust law is the desire to conduct business ethically and to be recognized as doing so. While the penalties for non-compliance can be very significant, a company’s reputation is seriously damaged by the adverse publicity attracted by a decision that it has violated the law.

Therefore, the point of any antitrust compliance programme is (ultimately) to reduce the risk of an antitrust violation occurring at all. However, as a fear of violating the law (particularly where individual criminal penalties are in play) can frighten employees and sometimes unwittingly chill perfectly legitimate competition, a well-designed programme will empower employees to act confidently within the scope of the law.

The elements in the ICC Antitrust Compliance Toolkit are not intended to represent a comprehensive or prescriptive list of what an antitrust compliance programme must include, but seek to reflect what is commonly regarded as good practice in the field. Indeed, antitrust agencies themselves recognize that there can be no “one-size-fits-all” approach, and that each compliance programme has to be designed to meet the specific antitrust risks faced by the company in question.

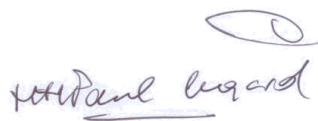
Given that antitrust compliance is relevant to all players on the market, small and large, the ICC Antitrust Compliance Toolkit endeavours in particular to recognize the challenges and resource constraints felt by small and medium-sized enterprises (SMEs), and gives practical tips throughout on

how SMEs can have an antitrust compliance “programme” within their organizations.

One key feature of this Toolkit is that it is designed by business for business. It draws on considerable expertise from in-house antitrust lawyers in larger companies, and from the expertise of the private Bar experienced in advising both SMEs and larger companies. ICC recognizes the work done by the ICC Commission on Competition and, in particular, the ICC Task Force on Antitrust Compliance and Advocacy, chaired by Anne Riley of Royal Dutch Shell plc, and co-chaired by Anny Tubbs of Unilever and Boris Kasten of Schindler. Particular thanks go to the diligence of the ICC Secretariat, especially Caroline Inthavisay, Zoé Smoke and Claire Labergerie. Further thanks and acknowledgements go to all members of the working group, as listed at the end of the Toolkit.



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Notes

International Chamber of Commerce

Introduction

The ICC Antitrust¹ Compliance Toolkit is intended to provide **practical tools for companies**² wishing to build a **robust antitrust compliance programme**. It seeks to complement materials produced by antitrust agencies and other sources of guidance, by focusing on practical steps companies can take internally to embed a successful compliance culture.

This Toolkit reflects contributions from antitrust specialists closely associated with in-house compliance efforts in both small and larger companies around the world. The Toolkit does not delve into the complexity of the laws in each jurisdiction, but sets out a proposed approach to antitrust compliance that you can use globally in any country, whether that jurisdiction has sophisticated or less sophisticated antitrust laws. It is hoped that it will assist your company whatever sector you are in and whatever the size of your company, whether you are in a small or medium-sized enterprise (SME) or in a larger company, to establish an antitrust compliance programme suited to your company's needs, risk profile and resources.

The topics covered in its eleven chapters follow the approach of the *Blue Print* developed by ICC and the Chief Legal Officers (CLO) compliance working group, a document which was prepared in 2011 to provide a comparative analysis of agency statements on antitrust compliance programmes and map key components of corporate compliance programmes (see **Annex 1**).

Each Toolkit chapter begins with a **Quick Summary**. This is intended to provide a synopsis of steps covered: you can refer to these summaries to get an overview of issues before you set out on your compliance journey, to decide what you wish to focus on, especially if time and resources are limited. In addition, the illustrative **Starter Kit** at the end of this Introduction aims to provide a recap (tailored for SME readers) on the overall approach to clarify which chapters may be of most immediate interest.

Each chapter sets out general considerations that may be relevant to the particular compliance component it covers. There follows an outline of practical steps to be tackled, with examples and insights into different possible approaches. Since there is no one-size-fits-all approach to compliance, the Toolkit is not intended to be prescriptive; rather, it offers you a **modular “menu” of options** from which to draw inspiration. This should allow use by SMEs and large corporate groups alike, whether you wish to introduce a compliance programme or are considering how to refine your approach.

There are **many possible triggers** for your decision to develop an antitrust compliance programme:

- At one end of the spectrum, unexpected antitrust investigations by antitrust agencies may spur your company into rolling out a dedicated new programme as a matter of urgency, perhaps in tandem with assurance work to clarify outstanding exposure, while tackling ongoing proceedings;
- At the other end of the spectrum, your business leaders may operate successfully based on strong awareness that all relevant corporate risks must be assessed and managed effectively - and actively sponsor a coherent ongoing strategy to develop risk management capability;

¹ In this document, the term “antitrust” is used for the laws (in all jurisdictions) relating to the control of anticompetitive agreements and practices, whether these are known in some countries as “competition” laws or as “trade practices” law. Where relevant this term also includes the antitrust compliance elements relating to M&A transactions.

² The term “company” is used in this document to mean any entity engaged in any commercial activity - ranging from multinational companies through to small and medium-sized enterprises (SMEs). The use of the word “company” does not suggest any particular corporate structure, and this document is intended for all types of entity, whether incorporated, unincorporated, partnership or consortium.

- In other situations your antitrust compliance focus may be driven by informed parts of the company, such as your Legal, Audit, or Finance teams, or by new recruits with higher awareness of antitrust compliance considerations. A fresh approach may be needed in countries where antitrust laws or regulators have evolved in ways your business needs to acknowledge and act upon.

At the end of the day, processes and systems alone will not manage risks, **individuals** will. Employees can have very different personal tolerance to risk (and differing personal motivations), hence the need for structured antitrust compliance processes to give your business the skills it needs to develop a **common position** and secure **consistent ongoing commitment from employees and management**.

The Toolkit therefore begins by addressing (in Chapter 1: “Compliance embedded as company culture and policy”) what lies at the heart of a company’s culture to support antitrust compliance, before looking at organizational and resourcing issues (Chapter 2: “Compliance organization and resources”). It then outlines different ways you can seek to identify relevant operational risks and control points that address them (Chapter 3: “Risk identification and assessment”).

Although you can always start with generic antitrust compliance training to raise awareness of applicable laws, undertaking a **comprehensive antitrust risk assessment** can help clarify what sort of substantive know-how needs to be disseminated internally and how best to present it (Chapter 4: “Antitrust compliance know-how”) to make the most efficient use of your resources.

Beyond prevention, but still as a means of proactively tackling suspected or actual concerns, your company may be keen to equip itself with antitrust concerns-handling systems (Chapter 5: “Antitrust concerns-handling systems”), the means to investigate issues internally (Chapter 6: “Handling of internal investigations”) and, where necessary, take disciplinary action and impose sanctions on individuals who fail to live up to corporate expectations (Chapter 7: “Disciplinary action”). The issue is important in a number of ways to your company’s ongoing business, including day-to-day due diligence and compliance assurance, due diligence in respect of trade associations, and due diligence in an M&A context (Chapter 8: “Antitrust due diligence”).

In more developed and mature antitrust compliance programmes, the enduring nature of a compliance culture may also depend on the extent to which a company builds assurance mechanisms, such as certification (Chapters 9: “Antitrust compliance certification”) and incentives (Chapter 10: “Compliance incentives”), into its model.

Finally, a commitment to ongoing monitoring and continuous improvement is an essential feature of any good antitrust compliance programme (Chapter 11: “Monitoring and continuous improvement”).

Starter Kit

(for SMEs and others starting to introduce a compliance programme)

- Are you short of time and resources?
- Do you want to know how to apply this to your business?

Foundation elements of the programme:

1. **Embedding an antitrust compliance culture and policy** (see Chapter 1)
 - Recognize that your company faces antitrust risks associated with its activities and objectives;
 - Consider how your company can set out antitrust standards all employees must meet when doing business;
 - Get business leaders to show personal support actively for ethical business practices.
2. **Compliance organization and resources** (see Chapter 2)
 - Nominate a suitably senior individual to oversee the implementation of the antitrust compliance programme;
 - Make sure they can and will report to highest levels of management;
 - Decide how to involve subject matter experts (including antitrust lawyers) to develop policies and/or guidance.
3. **Risk identification and assessment** (see Chapter 3)
 - Decide how to identify antitrust risks and trends, ideally as part of your general risk management process;
 - Consider what controls are needed to manage, minimize or eliminate the risks identified;
 - Share insights on the assurance process and scope for improvements with senior management.
4. **Antitrust compliance know-how** (see Chapter 4)
 - Tailor antitrust know-how guidance to the risk profile and needs of the company;
 - Decide on the best way to deploy interactive training and updates.

Reinforcement of an existing programme:

5. **Antitrust concerns-handling systems and investigations** (see Chapters 5 and 6)
 - Embed a successful reporting culture that supports timely reactions and fair outcomes;
 - Consider the merits of appointing an external provider to act as a "hotline".
6. **Internal investigations/due diligence and disciplinary action** (see Chapters 6, 7 and 8)
 - Consider the most efficient way of investigating potential concerns (time may be of the essence);
 - Devise a simple but effective way of dealing with individuals who violate company policy.
7. **Antitrust certification or incentives** (see Chapters 9 and 10)
 - Think about asking employees to certify their understanding and commitment to compliance requirements;
 - Consider compliance incentives (in reward structures or promotion processes) to reinforce engagement.
8. **Monitoring and continuous improvement** (see Chapter 11)
 - Decide how you will monitor the effectiveness of your controls (e.g. periodically run targeted in-depth reviews);
 - Introduce a compliance improvement plan if necessary (e.g. if concerns arise or the company risk profile changes).

1. Compliance embedded as company culture and policy

Quick summary - The options that might be considered include:

- Recognising that your company (whatever its size) faces some degree of risk if it does not comply with antitrust laws;
- Adopting a Code of Conduct (or similar statement of company policy) to articulate clearly the standards all employees must meet when doing business;
- Getting your business leaders to show personal active support for ethical business practices;
- Recognising that antitrust risk is just one of the risks your company may face, and integrating the antitrust programme with other compliance programmes, controls and governance policies.

The key to any successful compliance programme, whether it relates to antitrust or another topic, is to reach the stage where the behaviour required under the programme is an **indistinguishable part of your company culture**.

However, creating a culture of compliance and integrity is not a simple accomplishment which can be achieved through a single training session or e-mail message from your CEO.³ Success will require a great amount of time and effort at different levels, although the amount of effort and resources that need to be devoted to embedding a compliance culture may differ depending on whether your company is an SME or larger company. Your antitrust compliance programme must be designed to **foster a continuous ethical culture** of antitrust integrity that promotes free and fair competition and compliance with the law.

The ethical element of antitrust compliance can be understood as the creation of a “positive” business culture going beyond the need to comply merely to avoid sanctions. It implies a value-based business culture or philosophy that fosters **consensus on the need to “do the right thing”** as well as stressing that knowing and adhering to antitrust laws creates important opportunities for your company (see Chapter 1, para.(d)). For these reasons, the implementation of your antitrust compliance programme should not be purely process-driven.

Your company’s challenge is to ensure that applicable antitrust rules are both **understood and upheld** by management and employees, so avoiding unnecessary and inappropriate risks. If no consideration is given to the **psychology of compliance** there is a clear danger that even if a compliance programme is known about internally, it will not be followed in situations where employees are under pressure or face an ethical dilemma.

The leadership of your company has a key role to play in persuading all employees to behave pro-competitively in all their commercial and other external engagements. **Actions speak louder than words**. Where the culture and **tone at the top** are clear and successfully embedded, employees will generally comply, not out of the fear of getting caught, but because they believe that this is the right thing to do and that such behaviour is both welcomed and expected of them. They will also be comfortable “speaking up” when improper conduct is suggested or spotted, so that prompt corrective action can be taken.

This chapter sets out practical steps your company can take to achieve the important goal of antitrust compliance becoming embedded as part of your company’s culture and policy.

³ The term CEO is used to mean the company’s Chief Executive Officer or similar most senior corporate officer.

a. Recognizing antitrust as a risk that your company needs to address

The **first practical step** in establishing your compliance programme is to ensure that your company recognizes that antitrust law compliance is relevant to its operations. Most major companies have a Legal function which should identify (and in most major companies will already have identified) antitrust compliance as something the company needs to address. If you work in an SME and even if there is no Legal function, you should have a Finance manager or similar company officer who can raise these points.

It should not be too difficult for you to identify antitrust as a risk relevant to your company since headline news regularly includes reports of major fines on big and small companies. However, antitrust agencies also have a role to play in engaging in advocacy to educate companies, particularly SMEs, on the risks they face.

Once the risk has been recognized, someone in your company needs to **take ownership of the compliance effort**: the compliance risk will always remain a business risk, but an individual in the company needs to be asked to take ownership of the antitrust compliance programme and oversee the development of the tools that will be necessary to embed a compliance culture.

b. Obtaining management commitment

Another key practical step in building a compliance culture is to get buy-in and **commitment from your senior management**, as the culture of your company is almost always driven by senior management. If the most senior management in your company sees antitrust compliance as a necessary business imperative, their support will shape your company's culture.

If a company does not have management commitment as the essential foundation of its compliance structure, the compliance programme simply will not work. The starting point in any good compliance programme is to obtain genuine management commitment and visible management support as this will drive culture.

Successful compliance programmes are also **critically dependent upon the engagement and support** of employees and management at all levels of your company. Simply rolling out a training programme will never lead to full or sustainable compliance. This is why the OECD, in its policy roundtable document *Promoting Compliance with Competition Law*, identifies a "Culture of compliance" - where "playing by the rules" becomes business as usual - as one of the five key components (also described as "5Cs") of a successful compliance programme.⁴

Other agencies have also recognized the importance of management commitment. For example, the European Commission, in its *Compliance Matters* publication,⁵ provides that "unequivocal senior management support is vital" and "is an essential element of creating a culture of respect for the law within the company". The United Kingdom Office of Fair Trading likewise lists at the core of its four-step competition law compliance process a "commitment to compliance (from the top down)", stating:

⁴ OECD Policy document DAF/COMP(2011)20 *Promoting Compliance with Competition Law* 2011 at page 13 – see <http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf>.

⁵ *Compliance matters: What companies can do better to respect EU competition rules* published by the European Union (ISBN: 978-92-79-22094-4) at http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD3211985.

“Senior management, especially the Board, must demonstrate a clear and unambiguous commitment to competition law compliance. Without this commitment, any competition law compliance efforts are unlikely to be successful”.⁶

The **means of drawing management’s attention to antitrust as a business risk** and securing their commitment to compliance will differ from company to company, but might include:

- Using examples from the press/media on damage to companies’ reputations from non-compliance (antitrust violations or other compliance topics such as anti-bribery and corruption);
- Using statistics about antitrust violations (fines, personal penalties);
- Learning from experience of compliance issues (including the value of detecting these early);
- Using videos or other tools that have been produced by individuals or companies that have experienced compliance problems and have learned from their experience;
- Setting out a realistic plan for management of the steps required to roll out an antitrust compliance programme, and the resources that will be needed to achieve this, including timing for the introduction of controls and the required budget.

Establishing wider management commitment is a long-term process: in deciding how to roll out your compliance programme, it is helpful to consider how best to balance the need to move quickly on key components (and raise awareness of the most important risks) and the fact that more can (and will have to) be done over the long-term to repeat and refine your internal messages on compliance. An overly complex initial proposal may be counter-productive. On the other hand, an overly simple proposal (not directly targeted at specific antitrust risks faced by your company) may not produce credible or sustainable compliance efforts.

c. Code of Conduct and/or Statement of Business Principles

There has been a **dramatic increase in the ethical expectations of businesses and professions** over recent years, as well as growing pressures in terms of good corporate governance expectations. This has led many companies - both SMEs and larger businesses - to adopt a Code of Conduct/Statement of Core Values/Statement of Business Principles.

A Code of Conduct (or similar document) is intended to be a **central guide and reference for all individuals** in your company in support of day-to-day decision making. It is meant to articulate your company’s mission, values and principles, linking them with standards of ethical conduct. A Code of Conduct is an open (and often publicly available) disclosure of the way your company intends to operate. It provides visible guidelines for behaviour. A Code is also a tool to encourage discussions of ethics and compliance, and to improve how your company’s employees deal with ethical dilemmas and grey areas that are encountered in everyday work. Codes of Conduct seldom relate exclusively to antitrust: they generally cover all conduct relevant to the activities of a company, so while your Code should always cover antitrust, it would normally include other topics such as fighting corrupt practices, ensuring safety, avoiding harassment, protecting company assets against misuse and fraud, etc.

Additional ways you could help your company develop a strong and long-term commitment to antitrust compliance include:

⁶ United Kingdom Office of Fair Trading Guidance document 1341 *How your business can achieve compliance with competition law* at http://oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1341.pdf.

- Setting globally consistent standards, for instance by your company prohibiting all employees from engaging in cartel activity, regardless of whether or not the countries in which they operate have antitrust laws;
- Maintaining high internal visibility in ways that presents the Code as an integral part of your corporate culture;
- Publishing the Code and/or providing copies to third parties with whom one conducts business. Examples of Codes of Conduct are often publicly available on company websites;
- Updating the Code of Conduct if necessary.

Examples:⁷

- *The Code or equivalent materials are accessible via any page of your company's intranet;*
- *Internal communications about the materials are cascaded as part of an ongoing and recognized global plan to reinforce your company's corporate identity;*
- *Your company's Code of Conduct and other policies have a preface by your CEO and are visibly endorsed by senior management at country level;*
- *You use a (regularly updated) recorded message from your CEO or other senior executives/team leaders at the beginning of compliance training sessions (both face-to-face and online);*
- *Further internal communications are issued in different business areas/divisions to ensure compliance related messages come not only from your CEO but also from functional/mid-level management in your company.*

d. Integrate into other programmes and controls

Ideally, your antitrust compliance programme need not (and indeed arguably should not) be developed in isolation. From the start, therefore, it is important that you give some thought to how you might **link** your antitrust compliance programme to your company's other programmes (for example the anti-bribery and corruption programme) and into your company's controls and governance systems.

Although some antitrust agencies may be concerned that if coupled with other compliance focus areas (such as anti-bribery or health and safety), antitrust will no longer be a key focus of employees' attention, the reality is that **a holistic approach is important and has many potential benefits:**

- All companies from SMEs to the very large will have a Finance function/Finance manager who will consider all the material risks that the company faces. If antitrust features in your central list of corporate risks (or at least is understood as a business risk), it becomes easier for appropriate controls to be designed at corporate/group level and to be rolled out consistently across your company;

⁷ It is not suggested that a company needs to adopt all the listed examples to demonstrate that it has a robust and credible programme.

- This approach should involve the application of a consistent risk assessment methodology that recognizes the very negative potential impact of antitrust issues (notably the occurrence of cartels) and allow for a commensurate allocation of resources to mitigate risks;
- It should allow for a discussion on the relative complexity of antitrust rules and recognize the need for specialist legal input to devise and implement an approach that is sufficiently robust and versatile to catch potential genuine concerns, yet without being overly restrictive.⁸

It is **important that antitrust gets sufficient dedicated resources** as part of your company's wider programmes and controls. Only a proper understanding of relative risks (between antitrust and other risks) will allow your company to determine why certain aspects of antitrust compliance programmes need further, dedicated attention. Inevitably, a strong tone from the top is also reflected in the level of resources allocated.

e. Ongoing and sustained senior management commitment

Once you have secured initial commitment from your senior management, this **needs to be sustained** on an ongoing basis. Tone from the top should ideally be demonstrated not just by initial management commitment and by issuing a company Code of Conduct, but also by senior leaders and managers showing a day-to-day commitment to compliance.

Statements **when senior managers are appointed**, proactively reaffirming their own commitment to antitrust compliance (through messages to employees or in meetings chaired or attended by them) can have a more profound and enduring impact than any written document, however formal.⁹ Equally recruiting and promoting leaders who have a track record of showing a similar commitment to compliance may influence those eager to progress within your company.

To avoid the impression that compliance is only communicated by your CEO and the Board (or that it is viewed in any way as a "tick-the-box" exercise), your company could arrange for regular e-mail and other direct communication by other senior management to their teams (building on communications demonstrating tone at the very top), underlining the importance of antitrust compliance, referring to the compliance policy and expectations and indicating what individuals should do if they have any compliance concerns.

Involving senior, middle and lower management levels in the compliance effort helps ensure that there is "Tone at the Top, Tone in the Middle and Tone right down to the most junior levels of the company".

⁸ An overly restrictive or conservative approach to antitrust compliance that is not appropriately risk based can be counterproductive as it may chill genuine and legitimate competition if employees fear to act.

⁹ For further insights into the critical role of leadership in supporting responsible business, see Dan Ostergaard's feature on Sustainable Leadership in *Handbuch Compliance-Management* 2010 (Wieland Steinmeyer Grüninger, Editor Schmidt, ISBN-10: 3503120572).

Examples:

- *Attendance of your company's senior management at training sessions with lower level employees - an introduction from business leaders at the start of such a session is an immediate and effective way of showing commitment;*
- *Compliance Awareness Days at regular intervals (e.g. annually) in which messages from your company's senior management are circulated, and all internal meetings include a compliance item (update or scenario for discussion);*
- *Senior managers in your company consistently asking about compliance in meetings/business briefings - where it becomes known that your company's senior management will check whether timely legal/compliance advice has been obtained on projects or proposals it will encourage employees to seek and follow the advice from your company's legal or compliance teams;*
- *Senior managers in your company making clear statements that your company's business targets are subject to living by the Code of Conduct - and even making explicit references to more specific legal guidance relevant to business issues/projects on which they communicate;*
- *A request by your company's senior managers that their teams embed relevant compliance messages into their strategy documents, so that business objectives and legal parameters are directly reconciled with ongoing projects to provide clarity on actual ways of working.*

2. Compliance organization and resources

Quick summary - The options that might be considered include:

- Nominating a suitably senior individual in your company to oversee the implementation of your compliance programme and report to senior management at Board/Executive level;
- In larger companies, appointing individual business/country compliance officers reporting to the individual responsible for the overall compliance programme, so they can help ensure the programme is embedded by the business at operational levels;
- Recruiting subject matter experts (including antitrust lawyers) to assist in establishing policies, drafting guidelines and to counsel employees on compliance issues;
- In SMEs, using free guidance from Internet sites to build a compliance programme.

While the organization and resourcing of an antitrust compliance programme will differ from company to company (if you work in an SME you will not have the same resources as a multinational company) it makes sense for your company to have a clear internal reporting structure for its programme, so that effective governance of your programme can be ensured and explained.

The organization and structure of any programme would generally cover the following key elements:

a. *Compliance leadership and organization*

Although **senior management in the company should be accountable** for sponsoring and promoting a sustainable compliance culture, the day-to-day implementation of an effective and credible programme may be delegated to a **designated person** (compliance officer or other appropriate officer).

Whether a **dedicated compliance team** is required will depend on the size, scale and the nature of your business. Clearly, if you work in a small company operating in a single country and face limited compliance risks, you would not need to incur the expense of establishing a dedicated antitrust compliance team, whereas a multinational company with significant potential compliance exposures in many disciplines may feel that this is a prudent thing to do.

Ideally, a senior individual either on or **reporting to the company Board/management committee** should be responsible for your company's compliance programme (including the antitrust programme). This will be seen as demonstrating proper interest and oversight of compliance topics¹⁰ at a very senior level in your company.

In the case of large companies or corporate groups, the **General Counsel/Chief Legal Officer** may have formal responsibility for devising and rolling out an antitrust compliance programme. Some companies have a Chief Compliance Officer/Chief Compliance and Ethics Officer (CCO) who may be within the Legal function or independent from the Legal function.

Whoever takes overall leadership of the programme, it will be essential that this individual has **direct access** not only to the Board/Executive management committee but also to other relevant internal committees such as the Audit Committee and Corporate/Social Responsibility Committee.

¹⁰ *US Federal Sentencing Guidelines*, Chapter 8: "Sentencing of Organizations" provides at §8B2.1.b.2A: "The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program".

Different **reporting lines** may be appropriate to different industries. For example, in the financial services sector, the CCO often reports to the Chief Risk Officer (who generally reports to the Board). Some other businesses favour embedding the compliance function (or its auditing/investigative tasks) within Internal Audit, usually based on the assumption that internal checks can take place more effectively if there is no actual or perceived tension with the Legal function's role as an objective advisor to the business. This perception is not universally shared: many companies believe the Legal function can readily reconcile its advisory role with that of guardian of compliance, and that proximity to the business enhances scope for effective prevention.

There is no set model for what a **compliance team** might look like. It is important to establish a compliance team that is suited to your company's needs and risks. It should be designed to reflect both the risks that your company faces and your company's internal business and organizational structure. For example, consistent with where overall accountability lies, some companies (where there is an in-house Legal function) deal with antitrust compliance risk in their Legal team, while other companies prefer to rely on a separate compliance function with dedicated business compliance officers. Some companies integrate their entire compliance team within the Legal department. Some multinationals now also have an in-house "business integrity function" staffed by individuals with forensic investigations experience, who can undertake internal compliance investigations.

Whatever the chosen approach and degree of resource, there is merit in giving the accountable position holder **unambiguous authority** for content and roll-out of the compliance programme. This does not mean there will be no overlap with responsibilities of other individuals who may be accountable for the company's operational, reporting and broader compliance objectives respectively. **Constructive interaction** will always be a prerequisite to success.

Whatever the size of your company you will also want to establish **governance around the organization of compliance activities**, mapping more granular deliverables and how the compliance function (whether that means just one person in an SME or a whole team within larger companies) will interact with the operational parts of the business and with other support functions or activities such as Finance, Legal, Human Resources, Internal Audit etc. You may find it useful to involve the in-house Communications team to help establish an internal communications strategy that helps ensure that the compliance organization (and focus) is clear at all levels.

Whatever way your company decides to organize itself, it is most efficient to ensure that its antitrust compliance efforts are harmonized with its compliance efforts generally in other areas, for example, with anti-bribery and corruption efforts. In all cases your compliance team should be designed to address the specific needs and compliance risks of the company concerned.

Compliance teams in larger companies

Large companies are likely to have one or more in-house lawyers, and there is a trend towards recruiting **dedicated antitrust counsel** to contribute key substantive knowledge. In companies that have an in-house antitrust lawyer, that lawyer would normally play a key role and **report either to the CLO or to the CCO**.

Larger companies typically have to decide whether to opt for **centralized or country/regional compliance structures**, taking into account the overall business and organizational structure of the company. The **pros and cons** of each option include the following:

- **Centralized compliance systems** help foster uniform - or at least consistent - standards and policies across your entire company and provide for a direct line to central decision-making functions as well as for effective monitoring and responses;

- Local systems allow your company to develop “tailor-made” solutions for national or business unit-specific compliance requirements and may foster a compliance culture that meets local business needs rather than being perceived as imposed by head office or from “abroad” without regard for local specificities;
- Centralized and decentralized models can be combined, e.g. your company’s head office could roll out company-wide applicable antitrust compliance standards, policies and processes, such as those enshrined in the Code of Conduct, while additional local implementation materials (that tend to be more granular) may allow for local antitrust law considerations (e.g. relating to vertical restraints) and/or specific products, services and business requirements to be factored in.

Very large companies with multiple business lines may appoint a number of Business Compliance Officers (by business line or by country/region), to track compliance metrics (training completion numbers, incident reporting, investigation management etc.) within the business line.

Example: Integrated forestry and paper multinational company

The overall responsibility for the Company’s ethics and compliance is assigned to the Head of Group Ethics and Compliance/General Counsel who reports directly to the CEO. This effectively means that the Head of Legal takes responsibility for compliance areas covered by the Company’s Business Practice Policy (Code of Conduct), i.e. fraud, antitrust, anti-bribery, conflict of interest, insider dealing, accounting and safeguarding company assets.

A “first line of defence” to mitigating antitrust compliance risks lies with the Company’s lawyers who provide the support in day-to-day compliance related issues. The Legal Department’s tasks and responsibilities also include related policy setting, development of antitrust training and information, and investigations.

A “second line of defence” is the Company’s Compliance Board, made up of the CEO, CFO, General Counsel, Head of HR and Head of Internal Audit (with a Coordinating Counsel for Ethics and Compliance as secretary to the Compliance Board) which meets regularly to:

- *Supervise related policy setting relevant to business practices, plus roll out and implementation;*
- *Supervise the introduction and maintenance of compliance related processes and tools; and*
- *Monitor concrete compliance related issues and cases, ensuring these are handled in a consistent manner, sufficiently resourced and that disciplinary actions are taken when needed.*

Finally, regular interaction between Group Ethics and Compliance and Internal Audit is fundamental to secure a consistent and professionally appraised approach to risk assessment, monitoring and review, and investigations.

Compliance organization in SMEs

Since, as stated above, it is important to establish a compliance team that is suited to your company's needs and risks, the team should be designed to reflect both the risks that your company faces and your company's internal business and organizational structure. If you work in an SME you may not need or have the resources to establish a complex organization with individual compliance officers for different businesses or countries. You could decide to **give a single (senior) person responsibility** for identifying risk and obtaining appropriate training courses and materials from external third party providers.

A free guide produced by the Society of Corporate Compliance and Ethics for small businesses on how to establish a compliance programme is available online (in four languages).¹¹ This includes tips on setting up a compliance organization within very small organizations. Although SMEs are unlikely to have resources for a separate compliance function and may not even have an in-house lawyer, most of them are likely to have a **Finance Director or Manager**: that person could take overall responsibility for the operation of the compliance programme (including antitrust compliance) as part of their usual job. Obviously, if your company does have an in-house lawyer, the compliance role would often fall to that person. In any event, in an SME, the individual with responsibility for the compliance programme would likely cover this part-time and "cross-functionally" in addition to his or her other functions.

b. Regular reporting to senior management

Senior management engagement depends on **management following and understanding** how a compliance programme is being implemented, which in turn requires **regular reporting opportunities**. In many companies with well-developed compliance programmes, **an annual report** on the antitrust compliance programme and other compliance programmes (highlighting past deliverables and further plans) is often presented to the Board, non-executive directors, and to the Audit committee (and/or Group Risk committee).

In addition, to ensure that your company's Board (or other responsible body) is appropriately informed of - and can react to - all relevant antitrust law risks, **regular updates** should be made to the CEO, business leadership teams and other key stakeholders at all levels of the management chain. In the case of large corporations - particularly those which are publicly listed, this may take place on a **quarterly basis** (in accordance with other quarterly reporting requirements), but there should also be a **process that allows for urgent reporting of developments** that create additional material risk for the company, as well as regular dialogue on compliance with management teams.

A similar reporting mechanism is also essential if you work in an SME, but can be adapted to the size and resources of your company. For example, whoever in the SME takes the role of CCO can give a regular report on compliance activities (compliance training/incidents) to senior management in management meetings. This may be easier to achieve than in larger companies, since the individual who has responsibility for the compliance programme in an SME is likely to be a member of senior management.

¹¹ *A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs*. Author Joseph Murphy, published by Society of Corporate Compliance and Ethics: <http://www.corporatecompliance.org/Resources/View/ArticleId/349/-A-Compliance-Ethics-Program-on-a-Dollar-a-Day-How-Small-Companies-Can-Have-Effective-Programs-Free.aspx>.

Example: Medium-sized aircraft manufacturer

The Company's Ethics Committee informs the Director and Vice-President of the relevant areas about issues and eventual recommendations that the Committee considers relevant. It regularly informs Management about the cases being analysed by the Committee. Antitrust Law Compliance is a standing item on the Agenda for a certain number of Board meetings per year.

c. Adequate resourcing

The European Commission stated in its 2011 *Compliance Matters*¹² publication that:

“[w]hilst the Commission does not wish to be prescriptive, a company should devote sufficient resources - appropriate to its size and the risks it faces - to ensure it has a credible programme.”

The resources dedicated to the antitrust compliance programme will clearly depend both on the size of your company and the risks your company faces. SMEs do not have the same resources as larger companies. It also has to be recognized that **even within very large companies, resources are constrained** with significant competing demands, both from other high profile risk and related compliance areas such as anti-bribery and corruption, and from the company's own operational/investment needs, especially where senior executives see a tangible benefit in dedicating significant “adequate” resources to a given area because having done so can provide a **complete defence to the company**.¹³

As noted above, many large companies (particularly those that may have had compliance issues in the past) may wish to recruit **specialist in-house antitrust lawyers** or at least a generalist senior lawyer who has significant practical experience advising on antitrust issues.

While it remains unlikely (if you work in a smaller company) that your company would have sufficient resources to hire a specialist in-house antitrust lawyer, most of the larger **private practice law firms** and many medium-sized law firms now have specialist antitrust departments that your company could turn to for advice in establishing its compliance programme.

In addition, several of the **larger accountancy firms and several Ethics and Compliance bodies** are able to assist with setting up a programme (although they may not be in a position to offer tailored, ongoing, day-to-day antitrust advice). As can be seen from the free brochure referred to above,¹⁴ ethics and compliance is not just the domain of multinational companies, and a credible programme can most definitely be run by SMEs on more limited resources.

Ultimately, **funding antitrust compliance should not be viewed as a “sunk cost”**. You can encourage your company to reflect on strategic and long-term benefits of investing in compliance by reference to the following:

¹² See footnote 5 above.

¹³ See the “Adequate Procedures” defence in Section 7 of the UK Bribery Act, and guidance on what constitutes “Adequate Procedures” issued by the UK Ministry of Justice *Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing* available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> and the US DOJ's Guidelines on FCPA compliance: *A Resource Guide to the U.S. Foreign Corrupt Practices Act* available at www.justice.gov/criminal/fraud/fcpa and www.sec.gov/spotlight/fcpa.shtml.

¹⁴ See footnote 11.

- Antitrust arguments are increasingly raised in commercial negotiations: well tailored compliance programmes can empower employees to respond and do business with increased confidence;
- Access to antitrust specialists helps companies clarify how to implement legitimate initiatives with the right level of safeguards in place - they can compete aggressively (but lawfully) on the merits as a result;
- The robustness of initiatives that benefit from early antitrust legal input allows these to be deployed on a more sustainable basis, given improved awareness of risks and how to prevent specific concerns from arising;
- Corporate cultures are stronger and employee commitment is higher in ethical workplaces;
- Some reports suggest improved shareholder returns for companies with the highest ethical cultures.

3. Risk identification and assessment

Quick summary - The options that might be considered include:

- Developing a methodology for mapping internal and external antitrust compliance risks, as part of or linked to your company's general risk management and controls systems;
- Consistently evaluating the effectiveness of control activities developed and deployed;
- Running regular checks/"deep dives" to test your company's assumptions about residual risk;
- Reporting on your assurance process and scope for improvements to senior management.

The **effectiveness** of your company's antitrust compliance programme and related allocation of resources will depend on whether **resources are deployed in the right areas**. Understanding the **operational risks** your company faces will not only help focus on relevant activities, it will also help clarify the relevance and enhance the credibility of the compliance programme at all levels of your company. It also allows your company to justify why limited resources are used to tackle higher risks as a matter of priority.

To give a couple of simple examples, it may not be relevant to raise awareness of the dangers of bid-rigging within businesses that do not operate in a procurement/tender context; similarly it may not be an efficient use of resources to train employees about the risks of abuse of dominance/market power if the company operates in very highly fragmented markets where players all have low market shares.

The 2011 *Blue Print* developed by ICC and the Chief Legal Officers' compliance working group,¹⁵ as well as antitrust agency statements on antitrust compliance programmes suggest that companies should **define a risk assessment methodology and process**, so they can tailor their compliance programme (and related "control points") to their specific risk profile. While there is no firmly established methodology or one-size-fits-all approach to antitrust risk assessment (and many agencies are reluctant to be overly prescriptive), risk management is an established business practice, and certain **best practices** have evolved. Approaches applied in other risk areas provide extremely useful learnings in the absence of compelling "off the shelf" materials to get started in assessing and addressing antitrust risk.

This chapter covers general considerations about **risk identification and risk control**, and provides examples of generic risk assessment options currently used by a number of companies. The fact that some companies may opt for a very sophisticated approach does not invalidate a relatively simple, more intuitive approach - which may be sufficient if your company is in the initial stage of establishing an antitrust compliance programme, and may indeed be more suitable if you work in an SME.

However there is a general expectation that a **credible compliance programme** depends, ultimately, on being able convincingly to justify the rationale for your company's chosen approach to risk management. While there are various concepts in understanding "antitrust risk", your company may want to base its risk mitigation activities on a **reasonably thorough analysis** of the following:

- The possible activities/behaviour that may carry a **risk** of infringing applicable antitrust laws;
- The **likelihood** or probability of such activity or behaviour occurring; and
- The estimated **impact** upon such occurrence.

¹⁵ See Annex 1.

a. Understanding the company's overall approach to risk management

There is significant merit in aligning your company's overall approach to (and methodology for) risk management and the risk assessment approach your company decides to use as part of an antitrust compliance programme. The level of alignment may depend on your company's compliance team and structure, as well as levels of operational autonomy and expertise of those involved.

Dialogue on this topic - at its most basic perhaps between your Finance function (e.g. Group Controllers, Risk and Assurance or the Audit function) and a specialist antitrust lawyer - can significantly improve ways in which your company tackles antitrust risks. This is so as resources and experiences are constructively shared, and a "mutually reinforcing" framework emerges. It is worth considering how you might take steps to develop this over time if there are few links between these two risk management work streams.

Optimal overall risk management capability is generally shaped to cover (on an ongoing and proactive basis):

- Identifying and reporting on actual risks inherent in meeting the company's legitimate and lawful business objectives;
- Evaluating respective risks to determine the appropriate response to each of these to mitigate the identified risks;
- Determining a risk management strategy (e.g. to accept, avoid, reduce or share risk, or such other risk management methodology as your company uses);
- Managing the risks by establishing and monitoring appropriate controls where relevant.

An **integrated framework for internal controls** was developed in 1992 in the United Kingdom by the Committee of Sponsoring Organisations of the Treadway Commission (COSO).¹⁶ This document (and subsequent updates) is widely recognized as providing a leading framework for the design, implementation and evaluation of internal controls and has been used by businesses and their advisors around the world.

The general **starting point** for any company is an overall focus on **corporate risk identification**. This is aimed at all risk identification, and is not specific to antitrust. It ties in with the need periodically to assess the internal and external factors relevant to business operations and strategies such as:

- Economic and geopolitical developments;
- Supply shocks;
- Laws and regulations, whether new or existing;
- Changing customer needs and expectations;
- Technological developments;
- Employee performance and motivations.

¹⁶ *Internal Control – Integrated Framework* published by the Committee of Sponsoring Organisations of the Treadway Commission and 2011 revised versions available at http://www.coso.org/documents/coso_framework_body_v6.pdf.

As indicated above, these factors will have a dynamic influence on which specific corporate activities may carry risks of corporate compliance issues arising. Relevant risks, once identified, need to be evaluated further to determine the **likelihood** of each risk occurring and its estimated **impact**.

Although language used may differ, the concepts of “likelihood” and “impact” are fairly universal; in some cases a **timing dimension** is also factored into the risk assessment process.

A **matrix-driven approach** is fairly common. Most companies use this to map risks on a High/Low grid to determine, based on estimated likelihood and impact levels, which risks must be addressed as a matter of priority and what degree of effort and resource must go into mitigating avoidable risks.

Example: Basic risk matrix

| | | | |
|---|---|----|----|
| 4 | 8 | 12 | 16 |
| 3 | 6 | 9 | 12 |
| 2 | 4 | 6 | 8 |
| 1 | 2 | 3 | 4 |

The horizontal and vertical axes refer to likelihood and impact respectively. Risk scores (likelihood x impact, in this case from 1 to 16) can be used to evaluate whether an activity presents a low, medium or high-risk.

Colour coding can also be used to indicate different risk types and/or level of risk mitigation through appropriate controls (i.e. whether roll-out is not started, ongoing or completed).

Planning practical ways to undertake a risk identification exercise will involve **careful scoping** from the outset: your company’s management need to buy into the process and ensure that appropriate resources are available. In addition, your company will need to take a decision on **how to present data**, in ways that best reflect your company’s business and operational structures (e.g. along geographic or functional lines, or looking separately at regulated and other markets).

The more **comparative data** that is available for the above exercises, the more useful they become. It will be useful for you to involve representatives from operational parts of the business and other subject matter experts (e.g. in workshops involving compliance, risk and assurance, controllers and audit, etc.). This can help bridge the gap between theoretical risks and your company’s actual exposure. If you work in an SME, you may prefer to adopt a simpler approach by relying on the reasonable views and honest feedback of experienced colleagues and advisors.

Finding a meaningful way of **taking account of the “human factor”** in compliance can be challenging; it may be worth considering what indicators you can use to estimate compliance maturity, looking at data/metrics such as:

- Proportion of employees who attend/complete training when first requested (assume high level of compliance maturity if 50% or more of the target population do not need reminders or chasers);
- The “churn” rate within your company, especially if there is a risk that new employees will take time to adjust to the company’s compliance culture and become familiar with relevant guidance;
- Other indicators of cultural factors such as international corruption index publications, if relevant.

Your risk analysis will feed into documentation that captures and preserves records of the elements consistently taken into account, and ideally allows for the **estimated inherent risks** (or “gross risk”) identified to be measured against **residual risk** (or “net risk”), *i.e.* risk that remains after mitigating steps - usually referred to as **internal controls** - have been taken to avoid or reduce these.

Decisions on which controls to implement as a matter of priority, or what further checks to run (see Chapter 8: “Antitrust due diligence”), will also reflect the perceived level of risk.

b. Applying the same methodology to antitrust

The validity of taking a risk-based approach in establishing internal compliance standards and procedures for antitrust compliance is acknowledged by a number of agencies: they recognize that companies will want (and indeed need) to design programmes that reflect their understanding of key risks faced in their line of business.

In other words, it should be understood that your company cannot operate on the expectation of the “worst case scenario” (e.g. the mistaken assumption that all contacts with competitors inevitably lead to cartels) but that you can legitimately approach antitrust compliance by managing antitrust risks as these are likely to occur in the real world.

As explained more generally above, risk assessments may vary depending on external and internal factors such as (i) the overall environment that might potentially make a market more susceptible to illegal conduct (e.g. market concentration levels, commoditized nature of product, market stability) and (ii) the nature and effectiveness of controls already in place within your company.

Typical antitrust risks that it is prudent to consider include:

- Potential cartel activity between competitors, including price-fixing, market sharing, bid-rigging, collective boycotts and production limitation agreement;
- Other anticompetitive agreements;
- Resale price maintenance in jurisdictions where this is prohibited;
- Exchanges of commercially/competitively sensitive information that could potentially result in cartel activity;
- Exclusionary conduct by companies with significant market power (e.g. abuses of a dominant position and other prohibited unilateral conduct).

There is, in the field of antitrust, a **distinction to be made** between managing risk around (i) outright prohibitions/illegal practices and (ii) “grey areas” in respect of which companies may legitimately seek specialist antitrust advice on the feasibility/legality of contemplated commercial options (e.g. of potential foreclosure effects of trade terms or joint venture arrangements).

In addressing risks around hard core/clear violations, meaningful corporate commitment to compliance must include a clear ban on manifestly illegal conduct: the “likelihood” of enforcement action should never be viewed as a relevant factor in determining risk (*i.e.* **there should be no “cost-benefit” analysis** of compliance where a certain activity is clearly illegal).

A further layer of complexity needs to be addressed if your company operates internationally, given possible differences in national antitrust regimes (and, in very few countries, the absence of any local antitrust law).

Quantifying the likelihood of any of the above activities or risks can be challenging, hence it will be important for you to involve subject matter experts (experienced in risk methodologies and risk assessments, as well as specialists in the antitrust field) in the risk management process. There is some **theoretical and empirical literature** available that lists factors which may make a business more susceptible to cartel activity/collusion and how to identify or predict problematic conduct.¹⁷

Relevant considerations might include:

- The applicable legal and enforcement framework (as this varies across countries);
- Levels of antitrust regulatory focus on specific types of conduct or industries;
- Past antitrust compliance, skill level and industry standards;
- Sensitive markets that may be higher risk due to characteristics such as concentration levels;
- Key strategies of the company;
- Staff turnover or recruitment from competing businesses;
- Time spent meeting competitors (such as at trade associations or through joint ventures).

¹⁷ UK Office of Fair Trading economic discussion paper OFT 773 *Predicting cartels* available at: http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft773.pdf.

Example: OFT guidance on “How your business can achieve compliance with competition law” (2011)¹⁸

*The OFT, in its guidance, provides that the first step for any business is to **identify its key competition (antitrust) law compliance risk** (“Risk identification”). The goal is to identify in particular those risks the company faces in its market environment. A business identified as “high-risk” should reflect the challenges employees face in their daily business. The OFT indicates, for illustrative purposes, the most common antitrust risks that should be considered to determine whether they are relevant to a given business, namely:*

- *Cartels;*
- *Other potentially anticompetitive agreements;*
- *Scope for abuses of a dominant position.*

Such an approach, in addition to being aligned with a broader and well-established methodology, allows your company to focus on preventing the most problematic antitrust risks first - notably cartel activity/unlawful collusion.

Example: Antitrust risk mapping by a large utility and power company

The complexity of the Group required an effort to systematize relevant data from an antitrust standpoint to make easy the assessment of exposure to antitrust risk. Analysis starts with market shares but also involves a review of antitrust agencies’ enforcement activities and related precedents, the level of liberalization of relevant markets, the aggressiveness of competitors etc.

The Company’s Antitrust Unit repeats the assessment yearly to take into account evolutions in the liberalization process and the development in market shares. Moreover, it has implemented a database with key decisions and case law relating to antitrust, not only in the energy sector, constantly updated and used by lawyers to assess and advise on potential antitrust issues.

The antitrust compliance programme is the main tool for the prevention of violations of laws protecting antitrust. The Group decided to develop a global compliance programme that will be completed by the end of 2013 and refreshed on a rolling three-four year basis.

The impact of relevant risks will need to be assessed by reference to scope for:

- Negative reputational impact;
- Corporate fines, which may increase with instances of recidivism;
- Damages claims;
- Distraction from core business activities;

¹⁸ See footnote 6 above.

- Legal fees;
- Nullity of agreements and/or anticompetitive clauses;
- Fines and in some cases professional disqualifications and criminal liability for managers and employees;
- Loss of employees in the event of internal disciplinary proceedings.

Two **examples of Risk Registers** that capture findings in respect of risks, their impact and likelihood are available for reference in **Annex 2**. A recognized challenge in completing a Risk Register is how you would rate and rank levels of likelihood and impact. The following thresholds could be applied - although what qualifies as marginal, material or critical impact may vary significantly from one company to another, and again **there is no one-size-fits-all methodology**.¹⁹ Additionally, in assessing and documenting antitrust risk, your company may wish to give some thought to the potential discoverability of the document, and consider the need to protect documents by ensuring they benefit from Legal Professional Privilege.

| | NEGLIGIBLE | MARGINAL | MATERIAL | CRITICAL |
|------------|---|--|--|---|
| SCORE | 1 | 2 | 3 | 4 |
| IMPACT | No, or no material fines, potential for damages awards or reputational impact | Local fine and/or potential for damages awards (not exceeding a certain monetary threshold ("A")) or reputational impact | Material fines and potential for damages awards (exceeding monetary threshold "A" but total exposure below monetary threshold "B") and reputational impact | Fines, settlements, damages in excess of monetary threshold "B" and reputational impact |
| LIKELIHOOD | Unlikely hazard/risk will occur (below 10% chance) | Hazard/risk may occur (10-25%) | Likely hazard/risk may occur (25-50%) | Highly likely hazard/risk will occur (over 50%) |

Not all companies apply such a sophisticated approach (or may apply a sophisticated approach but use a different methodology). In some cases - particularly if your company is an SME - you may prefer to opt for a more basic framework. The process may be more intuitive, and allow your company to focus directly on obvious risks, such as:

- Risks associated with industry contacts, notably to avoid inferences of cartel/collusive activity;
- If your company has a strong position in a given market, clarifying which manifestly exclusionary practices must be avoided.

¹⁹ Consistent with your company's general governance, "critical" might refer to thresholds where CEO or Board needs to be aware of the potential size of fine or other amounts payable in the event that an issue arises. There may also be merit in aligning with thresholds set in the International Financial Reporting Standards (see: www.ifrs.org) insofar as these are more generally applied by your company.

If your company is in a situation where antitrust risks were not successfully managed and issues have arisen, there will likely be a strong emphasis on immediate practices and learnings that have come to light.

c. Introducing or improving control points

Internal controls are processes designed to provide **reasonable assurance** for risk mitigation regarding the achievement of various objectives, including compliance with applicable antitrust laws. They involve **ongoing tasks and activities (controls)**, implemented by a company's employees at various levels and designed meaningfully to reduce the likelihood of problematic conduct, but are unlikely to eliminate risks completely. COSO's framework publication provides:

"Absolute assurance is not possible. Reasonable assurance does not imply that an entity will always achieve its objectives. The cumulative effect of internal controls increases the likelihood of an entity achieving its objectives. However, the likelihood of achievement is affected by limitations inherent in all internal control systems, such as human error and the uncertainty inherent in judgment. Additionally, a system of internal control can be circumvented if two or more people collude. Further, if management is able to override controls, the entire system may fail. In other words, even an effective system of internal control can experience a failure."²⁰

A different **approach to risk management** and the application of controls may be justified depending on whether your company needs to engage specialist external advisors on a one-off basis, or has in-house antitrust capability available to manage internal matters proactively and on an ongoing basis. Whether or not internally generated, controls forming part of an antitrust compliance programme usually **combine substantive guidance and a communications strategy**, so employees are exposed to a combination of compliance handbooks, training courses, awareness actions for top management and employees, business alerts, internal checks or registers and other business partnering activities of consultancy in direct contact with the business.

For example, if your company wishes to introduce **controls specifically designed** to address risks associated with **taking part in industry events** (such as trade associations, industry conferences and other events), these may involve:

- Guidance materials in the form of antitrust policies, standards, training leaflets or e-learning;
- Specific procedures and controls such as requirements to secure prior line manager approval (and perhaps even to register attendance in an internal database);
- Record-keeping duties around meetings (for example, keeping records of agendas and minutes, if relevant).

The way your company decides to prioritize resources and to identify appropriate antitrust controls would generally reflect the outcome of your company's most recent antitrust risk assessment. To ensure a high level of coherence you may want to set out your **general approach to antitrust risk control points by reference to your risk matrix**: for instance, face-to-face antitrust training may be targeted as a matter of priority at "high-risk employees".²¹

²⁰ See footnote 16 above.

²¹ Examples (generic and not specific to antitrust) can be found in an article entitled *Regulatory and Corporate Liability: From Due Diligence to Risk Management* - Todd L. Archibald, Kent Roach, Kenneth Edgar Jull (ISBN: 9780888044594).

d. Effectiveness of control points

A robust antitrust compliance programme that successfully embeds a strong company culture to “do the right thing” should significantly reduce or mitigate antitrust risks through:

- Raised awareness of unacceptable behaviour;
- Early detection and resolution of antitrust issues;
- Potentially lower fines and reduced adverse reputational impact (bad publicity) in the event of non-compliance; and
- Increased opportunities to benefit from antitrust (agency) leniency programmes.

The evaluation of residual or “net” risk will rest on a critical evaluation of the effectiveness of your controls. To measure this and take stock of residual risk, you can consider the following:

- Does a control exist?
- How is the control documented?
- How is the control articulated (is it clear and unambiguous)?
- Is control documentation readily available and regularly updated?
- How are individuals made aware of the control?
- What is the “hit rate” (for example the percentage of target audience successfully trained)?
- What structure exists to track awareness and compliance with control?
- What sanctions exist for failure to operate the control?

Your evaluation of the above considerations can help your company revise risk estimates based on learnings and determine the opportunity/need for additional risk responses/controls. Sometimes the solutions/risk responses are quite simple and reflect the fact that repetition is often required: you can usually rapidly re-deploy/reissue/take steps to embed existing guidance to reinforce antitrust compliance awareness.

4. Antitrust compliance know-how

Quick summary - The options that might be considered include:

- Producing antitrust know-how guidance tailored to the risk profile and needs of your company;
- Providing (or arranging for) interactive antitrust training and updates to relevant employee groups at regular intervals;
- Considering the format and delivery of training (face-to-face, online, virtual or a combination);
- Devising formats that stimulate ongoing employee engagement.

Having identified the antitrust risks that your company faces and the geographic spread of those risks, the next step is to determine what antitrust training should be given in your company, and what supporting documentation is required to **increase employee awareness**.

The purpose of training your company's employees and providing antitrust compliance guidance materials is to keep the awareness of employees at a high level and "front of mind". Raising antitrust awareness helps minimize the risk of violations occurring. Ideally, it also empowers employees **to do business confidently** insofar as they are clearer on what is and is not permissible, and can resist pressures more effectively (whether these are internal or external).

However, no matter how good the antitrust compliance training is, it can never completely eliminate the possibility that some individuals in your company may simply ignore company policy and guidance. This is why the way in which antitrust know-how is presented is in many ways just as important as the substantive guidance provided. In particular, the sharing of antitrust compliance know-how in your company must encourage employees to seek clarifications whenever they are unclear on how to proceed, in order to find and share the correct (lawful) ways of reconciling antitrust compliance and business strategies.

Your antitrust compliance programme should encourage employees to discuss compliance issues proactively on an ongoing basis and to involve your company's legal advisers in projects and in their day-to-day business decisions, rather than viewing know-how and related training as a standalone process (or even worse as a "tick-the-box exercise") to be endured periodically.

Consideration is sometimes given (particularly in larger companies) not only to training the company's own employees, but also to training third parties such as joint ventures, distributors and trade associations. While there are certain expectations in some compliance areas (for example in anti-bribery and corruption) that some third party training should occur,²² there are also liability issues that would need to be considered. At a minimum, however, you should consider training your own company employees.

²² See the UK Ministry of Justice guidelines on the Bribery Act referred to at footnote 13 above, in particular principle 5.7 relating to the (possible) need to train "associated persons" about anti-bribery compliance.

Example: External antitrust advocacy by a large fast moving consumer goods (FMCG) company

Company employees were given internal training to ensure that their involvement in legitimate industry initiatives, through trade association projects or other fora, was subject to a high level of antitrust compliance safeguards. The company made it a prerequisite for all associations it remained involved in to adopt their own compliance guidelines: a “pro forma” model was made available on request. As a result of company employees referring to their internal “e-learning” course, some external interest for access to similar training became apparent, prompting the company to work with a third party provider to develop and launch affordable generic online training for SMEs on this topic. This approach recognizes the value of taking steps to educate others on the importance of compliance.

a. Antitrust know-how: manuals, handbooks, guides

Whatever the size of your company (multinational to SME) it is unreasonable to expect your company’s employees to understand what constitutes antitrust-compliant and ethical behaviour if they have not received some guidance or “Do’s and Don’ts” on antitrust.

If you work for a larger company, you may already have in-house lawyers (and increasingly your own in-house antitrust specialists) who can write these documents. If you work for an SME, you may not have your own in-house legal advisers, but you can always obtain helpful materials from external law firms, from antitrust agency websites and also (and in many cases free of charge) via the Internet.

However, in all cases you should try to ensure that all antitrust training materials and guides that you are going to use in your company are designed to be as relevant as possible to your company’s activities and to the specific antitrust risks your company faces. Any written guidance ideally should reiterate your company’s high level policy on antitrust compliance, should explain what employees should do (and not do) in order to comply and set out the individual (internal and external) consequences of compliance failures.

Some **key concepts and issues** that you may wish to consider include.²³

- Have clear and simple rules - these can be ‘Do’s and Don’ts’ or any other format that is suitable for use in your company. The key is to use plain business language - not legalistic jargon or detailed references to laws - if you have in-house communications experts, it is useful to turn to them for input on the most effective way to express the rules so that they can be clearly understood by employees at all levels of your company;
- The antitrust guidance notes should not be too lengthy. Make it easy for people to understand and follow the rules;
- Tailor guidelines to the specific needs of different business units and in different situations;

²³ See Riley and Bloom “Antitrust Compliance Programmes – can companies and Antitrust Agencies do more?” *Competition Law Journal* 2011 published by (and copyright of) Jordan’s Publishing.

- Consider using short (1-2 pages maximum) notes on specific topics of particular relevance to (or presenting particular risks for) the business (e.g. benchmarking, attending trade associations);
- Present the guidance in ways that makes sense from a business perspective - confirm what is possible, perhaps where necessary subject to certain limits or thresholds (reflecting “safe harbours”);
- Think about what languages materials should be translated into and the method of delivery to get maximum reach (e.g. having all materials easily accessible on a company intranet site);
- Launch the materials within your company’s businesses, using compliance “champions” to help them take ownership.

Example: Multinational energy company has simple “Do’s and Don’ts” in its Code of Conduct

- *Do not agree, even informally, with competitors on pricing, production, customers or markets without a lawful reason. Always get legal advice on whether a practice is lawful;*
- *Decisions on the Company’s pricing, production, customers and markets must be made by the Company alone:*
- *Do not discuss with competitors:*
 - *which suppliers, customers or contractors the Company deals and will deal with; or*
 - *which markets the Company intends to sell into or on what terms the Company will deal;*
- *Leave industry meetings if competitively sensitive issues arise, and ensure your departure is noticed and recorded. Report the matter to the Company’s Legal Department and to your Business or Function Compliance Officer;*
- *Tell the Company if you know of any potentially anticompetitive practices or if you are uncertain whether practices are legal or not.*

In addition, **some companies have a stand-alone antitrust policy** (“control framework”) document covering process and assurance issues such as:

- Key requirements of the antitrust compliance programme/key rules to follow;
- Processes to follow to ensure that all legitimate contacts with competitors are clearly evidenced as being legitimate;
- Antitrust training requirements for identified high-risk employees;
- Where to go for antitrust advice if in doubt as to whether a particular course of conduct raises potential concerns.

b. Antitrust training

Antitrust training is a fundamental part of an effective antitrust compliance programme since it is the moment when your company's employees have the **opportunity to meet lawyers in person** (or at least "live" using "virtual" meeting facilities such as video conferencing or more up-to-date technologies), ask questions about antitrust risk, and gain a deeper understanding of the danger areas facing your company.

In some larger companies, your company's Human Resources (HR) department or even a dedicated training group may be available to advise on and (if appropriate) facilitate optimal training delivery methods.

You should ensure that your company's antitrust training is designed to provide practical (business-specific) examples. It should explain the aims and reasons for your company's antitrust compliance policies and procedures and the consequences if these are not followed.

Practical considerations you may wish to take into account when setting up antitrust training include:²⁴

- **Identifying employees to be trained.** The requirement to be trained, as well as the method (and frequency) of antitrust training should be suitable to the antitrust risk profile of the business activities of your company's employees who are identified as needing antitrust training. For example, employees in jobs that are exposed to a higher degree of antitrust risk (sometimes also called "higher risk employees") such as people in a sales function or who attend trade or industry meetings and business networks with competitors may benefit from more frequent, intensive face-to-face (FTF) training than those whose role represents a lower antitrust risk;
- Ensuring that the induction/**on-boarding of new employees** (or movement of employees from a lower risk job into a higher risk job) includes antitrust training as required by their job's antitrust risk profile;
- Ensuring the **style of training** reflects your company's antitrust needs and risk profile. Consider whether your company needs online training, FTF training, "virtual" training (a mixture of computer-based training and a webcast/conference call with an antitrust trainer), or a combination:
 - Online and virtual training is good for global reach (or where your company's employees are based in a number of different countries or are widely dispersed within a single country). You should also be able to arrange for computer-based parts of antitrust training to be translated into any relevant languages. However, online training on its own is probably not adequate for higher risk employees who need to be able to ask questions and get on the spot answers. In such cases you may want to consider a "virtual" antitrust training module, as it combines the reach of online training with the ability to ask questions;

²⁴ See Riley and Bloom (see footnote 23 above).

- There are many online training products available off-the-shelf from third party providers; however, some are very high level and generic. Others can be legalistic and tend to cover all antitrust issues (some of which may not be relevant to your company's business). Hence, some multinational companies have developed their own specific online (or virtual computer-based) antitrust training.
- **Identifying appropriate trainers** for FTF antitrust training (and to conduct the webcasts/conference calls as part of the virtual antitrust training):
 - Ideally the trainers you select to conduct your company's antitrust compliance training (whether these are from internal or external sources) should be knowledgeable in antitrust law. However (depending on the resources available) this may not always be the case and your company may need to consider developing a "train the trainer" course. This is particularly suitable if you are in a larger company with a sizeable legal department, but may not be suitable if you work in an SME, where you may have to rely on external trainers;
 - In a larger company, it may also be useful to consider developing (or seeking) additional guidance for those of your company's in-house lawyers who are not proficient in antitrust, as part of an internal ongoing professional education programme. There is a profusion of specialist antitrust newsletters, publications and webinars hosted by external counsel that are available free of charge and provide all lawyers with high-quality updates on recent developments. Conferences are also a useful way of finding out more about topical antitrust issues and trends;
 - If you work in an SME, your company may not have in-house legal resources to rely on. In such cases, external law firms with antitrust expertise can deliver antitrust FTF training. However, it can be costly, and external counsel - while understanding the law - may not fully comprehend your company's business model and therefore may provide generic rather than tailored training. If you do not have an in-house lawyer and are concerned about the cost (and inefficiency) of all compliance training being conducted by external counsel, you may like to consider providing/obtaining suitable training for individuals in your company's compliance, finance or other functions (so that they then can provide antitrust or other compliance training in-house), or you could consider conducting compliance training jointly with external counsel so sessions meet the needs of (and address the specific antitrust risks faced by) your company.
- Deciding on the **size of the group to be trained** in FTF training is of critical importance:
 - There may be short-term cost savings in "training" a large group in a lecture-style format. However, this may be less effective in getting employee engagement since large groups are less likely to be interactive and lively;
 - Obviously it is easier to ensure lively interaction with a small group of people (say 20-30), but there may be a cost involved in running a larger number of training sessions with smaller groups of people.

- Ensuring the format and content of the training (whether FTF, online or virtual) is best suited and adapted to the antitrust compliance needs of your business:
 - Various forms of training have been tried and tested, including teaching by giving examples (scenarios) and case studies, using quizzes, Q&A sessions and other interactive styles involving role playing such as mock trials;
 - The purpose of these different training formats is not to trivialize the topic but to ensure that the training fully engages the employees to be trained. Using different methods of training also helps overcome or minimize compliance fatigue or resistance to training;
 - Ensuring (as far as possible) that the training focuses on specific audiences (senior managers, in-house lawyers, employees representatives in trade associations, etc.).
- Ensuring your company's **senior management or team leaders play an active role** in antitrust training will help reinforce the messages given on the corporate culture of ethics and compliance your company expects employees to embrace and demonstrate;
- Ensuring **suitable records** are made and retained of attendance at all trainings is important when it comes to measuring the effectiveness of controls and improving the programme (see Chapter 11: "Monitoring and continuous improvement").

c. Find ways to stimulate positive employee engagement

To be effective, mechanisms for raising awareness of antitrust compliance guidance may include the following **reminders and easy reference materials** that communicate clear messages in ways that stimulate employee engagement (and do not present antitrust compliance as a "poor relation" when compared to your company's other internal communications):

- Wallet cards;
- Posters;
- Newsletters and brochures;
- Intranet and Internet (such as a dedicated antitrust - or at least an ethics and compliance - internal website);
- Promotional giveaways (*i.e.* pens, memo pads, calendars, mugs).

Positive employee engagement may be more effectively secured if an antitrust compliance programme focuses as much on empowering employees as on providing clarity on "no-go areas". It is therefore important to look for ways to unlock legitimate and lawful business opportunities by providing clarity on which activities do not raise antitrust concerns (as well as the activities that do raise concerns), and celebrating successful projects or business opportunities in which clear antitrust advice had a positive impact.

Some companies celebrate "compliance heroes" as a means of encouraging a positive image for compliance (see Chapter 10: "Compliance incentives").

Example: Efforts to empower employees

Companies may not have the resources to review all contracts and other terms between themselves, their suppliers and customers. Template agreements may be unrealistic but in general guidance can be rolled out to those in the business involved in procurement and sales negotiations that (i) identifies areas to watch out for, but also (ii) makes clear what can legitimately be agreed without the need to involve (in-house or external) lawyers.

In addition, attention can be drawn to further “opportunities” i.e. areas where more favourable or different terms can validly be agreed subject to prior legal review.

When in-house lawyers or others responsible for your company’s compliance efforts are not familiar with relevant antitrust laws there may be merit in developing and deploying separate (potentially more detailed) guidance on points to check with their business counterparts in order confidently to agree terms that stretch beyond “safe harbours”.

Both overly simplistic guidance and overly complex instructions risk being counterproductive and unduly limiting business. A classic example is viewing all forms of exclusivity as illegal.

d. Information about antitrust investigations

It is obviously important for your company’s employees and management to **understand what happens in an antitrust investigation** (and in particular to understand the duty of co-operation where relevant). Training employees about what happens in antitrust investigations or “dawn raids” - when the aim is to prepare individuals (and in particular to impress on them the duty to cooperate where relevant) in the event that a real antitrust investigation takes place may be useful in certain cases, for example:

- For **employees on reception/in security** in your company’s facilities, to understand how to handle investigators courteously and appropriately, in order to minimize the risk that an antitrust agency alleges obstruction or a failure to cooperate by your company;
- To brief **IT colleagues** on the likely reliance of external investigators on forensic IT tools as well as the company’s duties of cooperation (where relevant);
- To ensure all employees understand (where relevant to the applicable local law) the **duty to cooperate**²⁵ in the event of an inspection and that any form of obstruction during the investigation (whether it involves seal breaking or otherwise) will be treated seriously by the company and may result in disciplinary action (up to and including dismissal).²⁶

Some companies also use “mock” dawn raids that mimic surprise inspections, although opinion is divided on the merits and the problems associated with employing “mock” raids.

²⁵ The requirement to cooperate may differ from country to country, and may also differ depending on whether the proceedings in question are criminal or civil/administrative in nature. Depending upon the applicable law, a company will also have certain legitimate rights of defence (even where there is a duty to cooperate).

²⁶ See Riley “ Seal Breaking Practical Compliance Lessons from Recent Cases” *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 2.

5. Antitrust concerns-handling systems

Quick summary - The options that might be considered include:

- Maintaining a successful culture of reporting (and dealing with) compliance concerns including ensuring timely responses and visibly fair outcomes;
- Having a clear and well publicized policy on how compliance concerns will be handled to support a culture of speaking up;
- Managing operational issues in your company to encourage confidential and anonymous reporting of compliance concerns;
- Introducing a suitably managed “helpline” or “hotline” to deal with compliance concerns;
- Ensuring that non-retaliation is guaranteed.

When your company has a strong tone from the top that actively encourages and stimulates employees to behave in ways that are consistent with your company’s Code of Conduct (or equivalent statement of ethical business), your company’s employees may be more vigilant and willing to raise concerns when they are uncomfortable about certain forms of conduct.

To facilitate this, it is important to have well-publicized mechanisms that allow employees to “speak up”, outside normal reporting lines, and be protected against possible retaliation.

As corporate social responsibility and business ethics continue to attract attention, increasingly sophisticated compliance strategies are being developed. A key practice that anchors many modern corporate social responsibility programs and compliance initiatives is the adoption and use of an **internal whistleblower procedure**, reporting channel, or other “hotline” that allows individuals to report compliance concerns so management can uncover and deal with corporate crimes, antitrust violations, corruption and other compliance problems.

“Hotline” reporting systems (also known in some companies as a “helpline” or “whistleblower line”) have been used for more than two decades, and are seen as a useful tool that can help to detect workplace fraud and compliance failures. The existence of such concerns-handling mechanisms may also serve as a deterrent for employees who are tempted, for whatever reason, to circumvent applicable controls and violate your company’s Code of Conduct.

a. *Recognition of the value of antitrust concerns-handling systems*

An environment in your company that encourages employees to speak up or ask for advice when confronted with questionable situations can contribute to the effectiveness of your company’s antitrust compliance programme. As stated in the European Commission’s 2011 *Compliance Matters* publication:

“An essential feature of a successful compliance programme is the inclusion of clear reporting mechanisms. Staff must not only be aware of potential conflicts with competition law, but also need to know who to contact and in what form when concrete issues arise”.²⁷

Several compliance publications encourage companies to “offer confidential channels to raise concerns, to seek advice or report violations without fear of retaliation”.²⁸ There are a variety of

²⁷ See footnote 5 above (at page 17 of the EU Commission’s publication).

²⁸ *ICC Guidelines on Whistleblowing* 2008 (prepared by the ICC Commission on Corporate Responsibility and Anti-corruption) at <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/corporate-responsibility-and-anti-corruption/whistleblowing/>.

methods you could consider for employees and company officers to raise compliance concerns or report suspected compliance misconduct. Whatever system you choose, if it proves successful it can yield **important benefits**, including:

- Improved insight into your company's compliance behaviour and culture;
- Enhanced ability of your company's employees (and even potentially external stakeholders) to "speak up";
- The ability rapidly to detect and investigate potential issues that may expose your company to financial, legal and reputational risk;
- Metrics that can be obtained from the operation of the reporting line can help your company to:
 - Identify (and resolve) breakdowns of your company's internal controls, and to isolate/identify specific regional or managerial issues that may need additional compliance efforts or resources;
 - Identify larger systemic concerns in your company that need to be addressed in order successfully to prevent and deter future potential violations.

b. *Different kinds of internal reporting systems*

There are **a variety of internal reporting systems** that you can choose from to enable your company's employees to raise compliance concerns or report suspected misconduct:

- At one end of the scale there is an informal "open door" approach, where compliance concerns can be raised at any time directly with your company's management. While this approach has the appeal of simplicity, it does not provide anonymity and is reliant on there already being an environment in your company where employees feel comfortable to "speak up". This becomes problematic if the line manager him/herself is involved in the allegation the employee wishes to discuss.
- At a minimum, it is recommended that you consider how your company's compliance programme could encourage all managers and employees to ask for help. Depending whether you work for a large company or an SME, help and advice could be obtained from in-house Legal, the Compliance Officer or another appropriate function (Finance, Audit, HR).
- Reporting and advice on specific activities: for monitoring and control purposes, you might wish to consider whether your programme might usefully require company employees to obtain prior approval (or other forms of control, such as registration in an internal database) of certain business activities which are sensitive from an antitrust compliance point of view. A typical example of an activity that benefits from this kind of monitoring from an antitrust point of view is attendance at trade association meetings and industry conferences. Companies may rely on web solutions (e.g. a web based register for obtaining approval to attend trade associations) or other kinds of reporting lines.
- At the other end of the scale from informal "open door" feedback is a formal whistleblower weblink or telephone line (in some companies, this is also known as a "helpline", "hotline" or Code of Conduct reporting line). You should consider whether your company needs a formal

helpline based on risks your company faces (as well as your business operational requirements) and related to your company's size, scope and geographic reach.

Many companies operate some form of **internal helpline system** designed to answer employees' questions about ethics, company policies and compliance matters. Such compliance "help lines" are often resourced internally and are designed to help employees by providing answers to everyday compliance dilemmas. If your company runs such an internal helpline, you would need to consider very carefully the pros and cons of extending the existing system to handle whistleblower complaints about compliance violations, since this might risk suppressing reports of non-compliant activity. For that reason many companies now consider having a formal whistleblower line in addition to internal advisory help lines.

c. Whistleblowing

Implementing a **confidential and anonymous reporting system** is an important step for companies of all types and sizes that are committed to enacting stronger and more effective governance practices. Increasing recognition that whistleblowers play a critical role in disclosing corporate misconduct has led to considerable legislative activity in many countries to protect whistleblowers and encourage them to raise concerns.

Whistleblowers receive significant media attention in high profile cases. They are sometimes portrayed as a lone voice willing to report corporate malfeasance at significant personal cost. In reality, if your company's internal compliance concerns-handling systems function well, they should allow you to identify and tackle potential concerns early on: reaching a stage where genuinely problematic conduct is reported externally first could imply that, in effect, nobody inside your company listened or was willing to act.

Certain antitrust agencies now encourage individuals to contact them directly when they become aware of problematic conduct: in some cases financial rewards are offered.²⁹ As companies with a "zero tolerance" approach to antitrust breaches are unlikely to offer similar incentives internally, this creates a tension between your company's internal efforts to prevent and detect non-compliance and the antitrust agencies' focus on effective deterrence. For this reason also, it is in your company's interest to foster an environment where concerns are raised internally first, early on, so they can be addressed promptly to investigate matters and (if appropriate) in a worst case scenario, used to prepare a corporate leniency application (to be submitted to relevant antitrust agencies).

Workplace whistleblower hotlines/help lines take many forms:

- Some antitrust hotlines are run on a standalone basis while others form part of a broader corporate Code of Conduct, Code of Ethics, compliance or social responsibility programme;
- Some companies run their hotline in-house while others are outsourced. Some combine in-house resourcing (for investigations purposes) and external (independent) management and recording of the complaint to ensure anonymity;
- Some companies use a single global whistleblower/hotline and separate aligned reporting channels for local affiliates;

²⁹ For example, at the date of publication of this Toolkit, the UK Office of Fair Trading was considering offering financial rewards of up to £100,000 (in exceptional circumstances) to individuals for information about cartel activity. See: <http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/cartels/rewards>.

- Some company hotlines are closed to employees in certain countries (for local legal reasons).

Although many multinational companies operate global help lines/hotlines, these are not without challenges:

- In some countries, the operation of hotlines or whistleblower lines to report potential compliance violations can give rise to data protection, employees' (staff/works) council or even employment law issues;
- Having reporting lines in more than one country implies further operational challenges (for example language translation requirements);
- Systems that do not facilitate confidential and anonymous follow-up by/with the individual reporting the concern may yield incomplete information that does not form a good basis for further enquiry by the company (or the company's advisers);
- If the system is not run by an independent third party (for cost or other reasons) and the individual reporting the concern is required to record their message (and voice) on an automated system or speak to a co-worker assigned to take reports, the "confidential and anonymous" nature of the report is likely to be significantly undermined/compromised.

If you work in a large company, operating an internal reporting system may present significant practical hurdles, such as increased staffing due to time zones, sourcing translation work, understanding cultural nuances and facilitating/managing international calls.

A decision to administer your company's reporting line through an external supplier or to develop your own in-house procedures is very much dependent on the availability of resources. Your company may choose to outsource its whistleblower reporting activities from international locations to a provider with worldwide experience, while maintaining an internal system for domestic workers (although there are downsides of managing a compliance concerns-handling system internally, as mentioned above).

Practical steps that you should consider in establishing a compliance concerns reporting system include:

- Whether your company is a large company or an SME, the reporting system should reflect potential risks and violations associated with your company's business;
- The reporting system should ensure the confidentiality and anonymity (where requested) of the individual reporting the concern is protected and preserved;
- Incident reports may need to be prepared (and distributed) in a way that protects the report from litigation discovery, for example by ensuring it benefits from Legal Professional Privilege; other relevant factors you should consider in deciding how reports should be distributed will be the need to preserve confidentiality (see above) and avoid potential conflicts of interest;
- Ideally (if resources permit) the hotline/whistleblower line should be available to employees and other third parties (although this might be more realistic if you work for a larger company rather than an SME);

- If you work for a multinational/larger company, you should consider making the reporting system universally accessible (24/7, 365 days a year) and offering reporting via the web, telephone, fax, or mail;
- If resources allow, you should consider using trained interviewers to help the individual reporting the concern feel comfortable with the process (this may be easier to achieve for larger companies and/or where a third party provider is being used to manage the helpline);
- If you work in a multinational company, you may wish to consider making the reporting system accessible in all relevant languages (and the system should demonstrate sensitivity to linguistic and cultural differences);
- Whatever the size of your company, you should consider how to ensure the reporting system facilitates follow-up by the individual reporting the concern, enabling ongoing two-way communication while maintaining confidentiality and anonymity;
- It will also be important to design (or ensure that any third party provider has in place) suitably robust policies for storing and handling sensitive data and the IT expertise to fully secure servers from internal and external attacks.

Decisions will have to be taken generally on **line management and reporting procedures**:

- What types of calls will the hotline/whistleblower line take (potential violation categories)?
- What questions will be asked to solicit information?
- Who will manage the hotline/whistleblower line on a daily basis?
- Who will be designated in other company departments (for example Internal Audit, HR, or Legal if your company has these) to assist in the investigation and resolution of issues?
- How will reports be managed and tracked?
- How will your company protect confidentiality and anonymity?
- How secure is information contained in the reports?
- How will the line be answered on behalf of your company?
- How and to whom will reports be made?
- What case management tools will be used?

If your company has access to robust case management tools, it can reduce the time and effort required to resolve matters. Another critical success factor in the operation of the hotline/whistleblower line will be the confidence of your company's employees that reports will be treated confidentially and that there will be no retaliation or other negative consequences for a good faith anonymous or non-anonymous reporting of (potential) compliance violations.

Where genuinely problematic conduct is uncovered, it is usually necessary to involve specialist (antitrust) external legal advisors without delay, to assist with follow-on investigations and provide advice on a legally-privileged basis.

To be effective, a **hotline/whistleblower line system should not be static**. As compliance requirements evolve over time and your company grows and changes, it is essential that your compliance concerns reporting system evolves to meet new needs. This takes the form of adding risk categories to the system as new areas of the business emerge, adding locations, business units and report recipients as your company grows, and providing reports or capturing new data points from individuals reporting compliance concerns as compliance requirements dictate.

d. Communicate, educate and create a culture of speaking up

Whatever the size of your company, it is important to recognize that it is not enough to establish a compliance concerns-handling system and expect employees to start asking questions or making reports. To be effective, employees need to know the hotline/whistleblower line is available and why and when they should use it. You should determine how to communicate that message regularly and effectively within your company in order for the hotline/whistleblower line to be used.³⁰

You should consider promoting the use of the hotline/whistleblower line through a broad communication and education programme throughout your company. This may be combined with the launch (or relaunch) of your company's Code of Conduct, the launch of a compliance programme or as part of employee education and training, and may include more or less innovative communications mechanisms (see Chapter 4: "Antitrust compliance know-how").

Cultural sensitivities may be relevant in this context: in some countries, for historic or other reasons, employees react emotively and negatively to the concept of whistleblowing as this is sometimes associated with "spying" on colleagues. There may also be a general reticence to report issues using lines that are associated with head office as opposed to local operations. You should be sensitive to these considerations and avoid rolling out an ineffective structure that generates more scepticism and acrimony than support.

Ultimately, the goal is for all your company's employees to know that they are encouraged to speak up (secure in the knowledge that their report will be treated in confidence and that they will not suffer retaliation), that there is a way to report compliance concerns and how they can access any hotline/whistleblower line (or any other compliance concerns-handling system your company decides to adopt).

e. Non-retaliation and confidentiality

Maybe even more important than communicating the availability of different concerns-handling systems are measures taken within your company to create a non-retaliatory work environment in which employees feel comfortable and are encouraged to raise concerns.

A key step in creating this environment is ensuring that your company's compliance expectations and culture are well understood by all employees, and that employees and managers understand the roles that they are expected (and encouraged) to play in reporting and escalating compliance concerns:

"The most important reporting system is an open door, and the best reporting system is one where the employees feel comfortable approaching his or her supervisor and openly discussing any potential problem".³¹

³⁰ Deloitte Financial Advisory Services LLP, *Guidance Regarding the Implementation of a Helpline*.

³¹ *Compliance 101: How to build and maintain an effective compliance and ethics program*. Published by the Society of Corporate Compliance and Ethics 2008, and available from bookstores or as an electronic book.

Your company's compliance concerns-handling system should include appropriate whistleblower protection safeguards, to protect your company's employees who raise compliance concerns. All employees should be in a position to report serious occurrences without fear of retaliation or of discriminatory or disciplinary action. Therefore, the whistleblower's employment, remuneration and career opportunities should be protected by your company.³²

You should try to maintain, to the fullest extent possible and at all times, the confidentiality of the data revealed through whistleblowing and the identity of the whistleblower, subject to overriding legal requirements necessitating disclosure, and should protect such data with the most appropriate means.³³

f. The company's prompt and fair response to a concern

A non-existent or slow response to a compliance concern raised by an employee will rapidly undermine the employee's trust in your company's compliance concerns-handling system. It is therefore very important that your company provides enough resources to react appropriately to concerns raised through the system. When it comes to reports about compliance concerns, your antitrust compliance programme should make it clear that:

- Managers have an obligation to take seriously any compliance concerns that are raised with them;
- The company will investigate any *bona fide* report of rules being broken;
- Appropriate action will be taken to prevent similar incidents again (if the rules have been broken);
- The investigation process will be full and fair for everyone involved (see Chapter 6: "Handling internal investigations");
- Action will not be taken against anyone before an accusation/concern has been appropriately investigated; and
- Non-retaliation and confidentiality will be guaranteed (see above).

Your company's employees will be interested to know and to have confirmation that your company's compliance concerns-handling system is effective and produces fair results, so you should also consider what you can communicate about the effectiveness of your company's chosen approach.

g. Measuring effectiveness

Actual use of the compliance concerns reporting line will provide valuable learnings on the effectiveness of the system(s) in place. To bolster the effectiveness of your company's compliance programme you may wish to review processes,³⁴ for instance by:

- Testing how much consultation takes place sufficiently early to minimize actual issues arising;

³² Of course, if the reporting employees are themselves in breach of the Code of Conduct/company policy, disciplinary action can be taken against them for that breach, but it should be very clear that it is totally unrelated to the act of whistleblowing.

³³ See footnote 28 above.

³⁴ See also Chapter 11: "Monitoring and continuous improvement".

- Running a test claim (a fictitious event) through the external hotline/whistleblower line to see how it is processed, including how rapidly it is dealt with;
- Reviewing actual statistics of calls reported to see what proportion relate to antitrust issues;
- Using learnings about situations where reporting lines have been effective and where they have not.

6. Handling of internal investigations

Quick summary - The options that might be considered include:

- Considering ways of undertaking internal compliance investigations (use of internal/external lawyers, audit or special Board committees);
- Establishing “Investigations Principles” to identify how investigations will be conducted;
- Assessing and addressing legal issues around documentation and evidence preservation, and the protection of Legal Professional Privilege;
- Considering the legal options in dealing with the results of the investigation.

Throughout the world, companies today are often challenged by the need to conduct internal compliance investigations to examine allegations of wrongdoing.

In order to investigate any allegation of non-compliance (whether the allegation is made externally, internally or through the hotline/whistleblower line or internal helpline), you should consider putting in place an efficient, reliable, and properly-funded process for investigating the allegation and documenting your company’s response, including any disciplinary or remediation measures taken.

You will want to consider taking “lessons learned” from any reported compliance violations or concerns and the outcome of any resulting investigation, and updating your company’s internal controls and your antitrust compliance programme (see Chapter 11: “Monitoring and continuous improvement”).

a. *Types of internal investigations*

There are many types of internal compliance investigation, some of which may be (and often are) triggered by external events such as an investigation by an external agency. Internal investigations help your company understand what has taken place and decide upon appropriate courses of action (and help you update and improve your company’s antitrust compliance programme).

The **types of internal compliance investigation** that you could consider include:

- In-depth legal assessments (using a combination of internal and external legal resources);
- Internal compliance process audits and substantive forensic compliance investigations³⁵ to address whistleblower allegations or other compliance concerns or complaints;
- Due diligence investigations to detect inappropriate conduct by officers, directors or employees;³⁶
- Special litigation and other Board committees designed to investigate and address allegations of potential wrongdoing.

In most cases, and especially in light of the Sarbanes-Oxley Act, Federal Sentencing Guidelines, and Department of Justice (and other compliance/antitrust agency) practices relating to leniency and immunity, a frank assessment of the scope and nature of the conduct and evaluation of the possible

³⁵ Some companies also use “mock” dawn raids that mimic surprise inspections by antitrust agencies, although opinion is divided as to the merits of undertaking such exercises as a means to uncover substantive problems (see Chapters 5: “Antitrust concerns-handling systems”).

³⁶ See Chapter 8: “Antitrust due diligence”.

advantages and disadvantages of self-disclosure to relevant Government (or supra-national) agencies of wrongdoing are essential to achieve the best outcome for the company.

b. *Things to consider/practical tools and tips*

Depending on the country and the allegation investigated, an internal compliance investigation might involve a consideration of, for example, local laws on employment/data privacy/criminal procedure (and liability), litigation risk, and trade/sanctions controls as well as laws on exporting state secrets.

Whether or not actual misconduct is discovered, such internal investigations can pose serious risks to companies and your employees, damaging your company's reputation, interfering with your company's business operations and exposing your company to heightened antitrust agency and public scrutiny, as well as to potential criminal, civil and regulatory liability.

The range of considerations that you may wish to bear in mind includes:

- Formulating the best possible defence to accusations of antitrust misconduct;
- Deciding whether and how to disclose criminal antitrust conduct voluntarily to relevant antitrust agencies;
- Deciding whether to discipline those responsible in your company;
- Deciding whether to waive or retain any Legal Professional Privilege with respect to antitrust matters under investigation;
- Determining how to conduct interviews of your company's management and employees as well as who to interview;
- Determining how to investigate former employees (if legally and practically possible);
- Determining how to treat whistleblowers (your company should have a clear policy of non-retaliation - see Chapter 5: "Antitrust concerns-handling systems") and cooperating witnesses;
- Determining how to document the internal antitrust investigation;
- Assessing learnings and identifying measures to be implemented to prevent (or at least reduce the chances of) a recurrence.

In the rest of this chapter we highlight some specific matters that you should consider in conducting an internal antitrust investigation.

Overall responsibility for the investigation

Generally, if your company has a Chief Compliance Officer (CCO), operation of the investigation would usually be delegated to that person or to other functions working with the CCO (particularly if you work in very large companies, where your company may have its own in-house forensic investigatory capability). If your company does not have this capability in-house, you may wish to outsource all or part of the investigation.

If you work in an SME, your company will not usually have the resources to conduct a comprehensive antitrust investigation internally, and (as a general rule) you may want to consider outsourcing all or

most of the antitrust compliance investigation, and consider relying heavily on resources provided by suitably qualified (*i.e.* specialist antitrust) external legal counsel.

Even if you work in a very large company with your own in-house forensic capability, you may still choose to outsource all or part of the internal antitrust investigation, either for Legal Professional Privilege reasons or to demonstrate the impartiality of the investigatory methods.

However, whatever the size of your company, it would be common for the CCO (or similar person with overall responsibility for the compliance programme) to retain ultimate supervision and responsibility for compliance/Code of Conduct investigations.

Establishing investigation principles

It is important - for the sake of transparency - for your company to establish and make available to your company's employees the principles that your company (and its advisers) will observe when undertaking internal Code of Conduct/Compliance investigations (including into alleged antitrust violations). These principles would commonly include rules on:

- Confidentiality;
- Impartiality and objectivity of all investigators;
- Personal integrity and competence of the investigators;
- Timelines;
- Protection from retaliation.

See a typical example of corporate investigations principles in **Annex 3**.

Specialist antitrust investigations (substantive antitrust assessments)³⁷

In addition to general "investigation principles" that could apply to the investigation of any potential Code of Conduct/compliance violation, depending on the risks faced by your company (in particular if your company has had previous antitrust investigations), you may like to consider preparing specific antitrust investigation principles. The purpose of these is to account for the peculiarity of antitrust investigations, where one issue that may need to be considered is an application for immunity/leniency. These principles would generally be addressed to the individual employee under investigation and would relate to the specificities of the particular antitrust investigation in question.

These antitrust investigation principles could cover an explanation of:

- Who will be on the investigations team (in-house Legal, external counsel, others who may need to be involved);
- The roles of other internal functions which may be involved in the investigation (e.g. internal/external forensic investigators, IT, Audit, HR, External Affairs as applicable, and if you have these functions in your company);
- Confidentiality and the need for/importance of Legal Professional Privilege (if relevant in the jurisdiction);

³⁷ See also Chapter 8: "Antitrust due diligence".

- The importance of the preservation of documents and electronic records (as well as the integrity of the chain of evidence);
- The point in time when the individuals being investigated are informed about the investigation (a delay in informing employees might be desirable - if legally possible - to avoid the possible risk of destruction of evidence. However, it is also important to avoid employees hearing about the investigation through internal leaks or rumours - see below);
- How (in what manner) interviews will be conducted and who will be present;
- The opportunity (if appropriate) for the interviewees to express their own views on the possible problematic issues/documents;
- How electronic searches will be conducted and by whom, including addressing data privacy concerns;
- The individual's right to separate counsel (in the event of a potential conflict, and in particular in jurisdictions with individual criminal liability) and your company's policy on paying legal fees;
- The next steps in the investigation and (insofar as it is possible to predict) the likely future timeline of the investigation.

Other items to manage during an antitrust investigation

- If your company is conducting an antitrust investigation, it would be wise to consider (with the assistance of external antitrust counsel as appropriate) your company's approach to applying for immunity/leniency (including liabilities that may arise in relation to follow-on damages claims).
- Equally important will be controlling rumours/leaks within all your company's business teams, and ensuring that business continues during the antitrust investigation without tipping off third parties (the risk is that other parties may apply for immunity/leniency before your company and/or that the antitrust agencies conclude that your company is actively trying to obstruct their investigation).
- All documents obtained during the investigation must be appropriately itemised and controlled indicating the provenance of the document, and the identity of the person in the company (or within your external advisers) who has taken and is keeping control of the document(s). These steps are essential in order to preserve the chain of evidence.
- Depending upon the outcome of the investigation, if your company is listed on any Stock Exchange you will need to consider (with your advisers) whether a disclosure will need to be made to any relevant Stock Exchange or to any other relevant body (e.g. US Securities and Exchange Commission).

7. Disciplinary action

Quick summary - The options that might be considered include:

- Introducing an internal disciplinary/“consequence management” policy for Code of Conduct violations;
- Establishing what aggravating and mitigating factors your company may wish to consider in assessing the appropriate disciplinary action;
- Determining a means of suspending disciplinary action during antitrust cases if required for the purposes of an immunity/leniency application;
- Assessing how disciplinary action will be applied (when, in what manner and by whom).

It is important for your company to develop an **internal disciplinary code** or policy addressing employees (or company officers) who initiate or participate in conduct that is in breach of your company’s Code of Conduct (including antitrust compliance). This is important not only for deterrence purposes, but also as a reflection of your company’s real commitment to embedding and fostering a compliance culture.

A credible antitrust compliance programme should make clear that disciplinary action (up to and including suspension, demotion, dismissal or even legal action against an employee or former employee) will be taken if anyone in your company (however senior) contravenes antitrust law. It is important that the disciplinary policy is applied consistently throughout your company and, in particular, that senior employees/managers are not shielded from disciplinary action in the event that they violate the rules. The US Department of Justice’s guidance on FCPA compliance states that:³⁸

“The compliance program should apply from the Board room to the supply room - no one should be beyond its reach. DOJ and SEC will thus consider whether, when enforcing a compliance program, a company has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation ... No executive should be above compliance, no employee below compliance, and no person within an organization deemed too valuable to be disciplined, if warranted. Rewarding good behaviour and sanctioning bad behaviour reinforces a culture of compliance and ethics throughout an organization.”

Enforcement agencies (including antitrust agencies) increasingly expect companies to show they are serious about compliance by building antitrust compliance programmes that include provisions for appropriate disciplinary action or “Consequence Management” as this is seen as fundamental to the programme’s effectiveness. Some examples that you could consider are given below.

³⁸ While this guidance is written for anti-bribery and corruption compliance purposes, it is also important to understand the guidance if you are seeking to integrate your company’s various Code of Conduct compliance programmes. The DOJ’s FCPA guidance can be found at: <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

Example: Integrated forestry and paper multinational company

Code of Conduct (excerpt): We will not accept rules being broken. The Company will enforce this Code of Conduct by investigating any reports of rules being broken. Where infringements are proven, actions will be taken to prevent this happening again. This process will apply to everyone involved. We will ensure confidentiality for anyone reporting violations. Whistle-blowers will not be discriminated against. Correspondingly, action will not be taken against anyone accused of wrongdoing before an accusation has been duly investigated. If it is established that the Code of Conduct has been broken, the Company may take disciplinary action, and in serious cases even terminate employment agreements.

Example: Electronics and electrical engineering multinational

“Compliance is a binding obligation for all employees. Therefore, the Business Conduct Guidelines stipulate that any employee guilty of a violation will be subject to disciplinary measures due to the breach of obligations under the employment contract, regardless of the penalty prescribed by law. An internal guideline defines the procedural principles and provides a catalogue of disciplinary measures applicable throughout the Company”.

Example: US pharmaceutical company

“Failure to comply with our established policies, procedures and the overall Company’s Compliance Program will be treated as a breach of company policy and will result in appropriate disciplinary action, up to and including termination for Company employees. Although each situation is considered on a case-by-case basis, we will consistently undertake appropriate disciplinary action to address non-compliance and deter future violations.”

a. General requirements for disciplinary proceedings

Your company will need to develop your own **disciplinary policy** in a way that is best suited to your company’s needs and takes into account all applicable employment laws (*i.e.* the employment laws in every country in which your company has employees) and other fairness and human rights considerations. It is equally important that your company applies the disciplinary rules in practice, and on a consistent basis (subject to applicable law).

In preparing your company’s disciplinary policy, you may wish to address various general points,³⁹ such as:

- **Who in your company will make the decision** about whether to impose disciplinary measures and which measures to impose? As a general recommendation, it is suggested that disciplinary measures for Code of Conduct violations (and in particular for serious Code

³⁹ Note that your company will need to obtain specific employment law advice in the relevant country or countries.

violations such as a breach of antitrust laws or anti-bribery and corruption laws) should not be left to one individual (such as the line manager). Disciplinary decisions would be better taken (for consistency reasons) by a panel of individuals, including from Compliance, Legal and HR, as well as senior management in the business line concerned. It will be very important for the credibility of your company's compliance programme that the disciplinary measures taken are appropriate to the violation, and that your company is not perceived as "turning a blind eye" to Code of Conduct violations.

- If a panel in your company will take the decision on disciplinary measures, how will the panel be structured?
- What notice of concerns and rights of defence/representation should affected employees be given?
- What potential aggravating or mitigating circumstances should you take into account?
- What action should your company take against line managers who fail to take reasonable steps to prevent (or even worse, who encourage or tolerate) misconduct?
- How will you balance the desire/need for confidentiality (and in some situations Legal Professional Privilege around the circumstances of the case) and the need to document disciplinary actions and procedures fully against employees who violate antitrust laws?

Some disciplinary actions and factors that your company may wish to consider when determining the appropriate sanction in each case (subject to local employment law advice) could include:⁴⁰

- Use of an internal "compliance score"/tracker as part of performance evaluations;
- Informal warning plus a required course of antitrust training and counselling;
- Formal written warning plus a required course of antitrust training and counselling;
- Demotion or non-promotion plus a required course of antitrust training and counselling;
- Forfeiture of compensation components (loss of bonus, stock options or other pay elements);
- Dismissal with or without notice;
- Other actions may be considered in appropriate cases (action for damages/withdrawal of bonus/pension benefits) subject to local legal considerations.

Your company's disciplinary policy for Code of Conduct violations should be clearly articulated and should be distributed to/made known to all your company's employees. However, it will be important not to suggest a pre-determined outcome to disciplinary proceedings that would interfere with a full and fair review of available facts relating to the employee's involvement in conduct prohibited under the Code.

⁴⁰ These potential sanctions are listed in increasing order of severity, but without suggesting any preference for a more lenient approach - indeed, depending on the seriousness of the infringement and the seniority of the employee, your company may wish to consider more serious sanctions first.

b. Potential aggravating and mitigating factors

All circumstances differ and you should make sure that your company's internal sanctions are applied fairly and consistently. You may wish to decide, when developing your company's policy, whether a progressive approach to disciplinary sanctions is needed. If your company previously has had a culture of not taking drastic action against employees, a fair amount of warning (perhaps coupled with an opportunity for employees to come forward voluntarily)⁴¹ might offer a less dramatic transition towards "zero tolerance".

Much may depend on what Code of Conduct violation cases your company needs to review: an obvious case of a manifest and highly prejudicial failure to comply with the Code (for example, an employee engaging in a price-fixing cartel) may mean your company should consider imposing more severe sanctions such as dismissal with or without notice. Anything falling short of that might be interpreted as being "soft" on non-compliance, and a publicized dismissal may have a powerful deterrent effect for other employees.

More generally, the **mitigating factors** that may be considered in the course of disciplinary proceedings for antitrust violations include the following:

- Full co-operation of the employee with the internal investigation;
- The employee holds a non-managerial role;
- The employee was not required to take relevant antitrust training;⁴²
- The employee acted in good faith (and followed legal advice);⁴³
- The activity was sanctioned or encouraged by the employee's line manager.⁴⁴

Aggravating factors (suggesting more severe disciplinary sanctions should be considered) may include the following:

- Failure to co-operate or disclose fully matters known to be important to the investigation;
- The employee holds a managerial role (see further considerations below in relation to senior employees);
- The employee was given antitrust training and was on notice about standards of conduct required;
- The employee has not taken antitrust training despite your company requiring it;⁴⁵

⁴¹ See Chapter 8: "Antitrust due diligence": Any internal (within company) "amnesty" to employees would have to be strictly internal, and could only relate to the company's intention to discipline the individual - no guarantees can be given in relation to the actions of external agencies and/or prosecutors towards the individual.

⁴² If employees have not been identified properly for the purpose of ensuring the right people attended antitrust training, this would be an issue with the effectiveness of the compliance programme itself, and would suggest (as part of the continuous monitoring and improvement - See Chapter 11: "Monitoring and continuous improvement") that a review of training nominations should be undertaken urgently.

⁴³ Note, incorrect legal advice may not protect the company from being fined if an antitrust violation occurs, although if an individual employee relies on credible legal advice, they may have a defence to any individual criminal liability - however this is a matter of local law applying in the relevant jurisdiction.

⁴⁴ This would be an aggravating factor to take into account when considering disciplinary action in relation to the line manager.

⁴⁵ If employees are regularly failing to take required training, this is a matter that should be addressed in a review of your antitrust programme (See Chapter 11: "Monitoring and continuous improvement").

- The employee was involved in a previous infringement in the same area ("repeat offender");
- The employee encouraged other employees to take part in the infringement;⁴⁶
- The employee ignored or failed to take legal advice before engaging in the activity that violated antitrust law.

With a **senior person** (e.g. a line manager) who is not clearly directly involved in the unlawful discussions, your company may wish to consider whether that line manager actively encouraged the violation, "turned a blind eye" to it - or negligently failed to ensure proper control over the business concerned. In this context, when looking at whether a line manager "knew or ought to have known" of the activity the relevant factors you may wish to consider are:

- The line manager's role, responsibility and authority in your company (for example, a very senior manager would be expected to show more control and ethical leadership than someone more junior);
- The line manager's relationship to those who committed the violation (for example, a direct line manager should have a much clearer understanding of the actual acts of his/her line reports than an indirect manager);
- The knowledge and understanding that a person in that position and of that job group would be expected to possess (so a line manager would be expected to have a clear knowledge and understanding of your company's Code of Conduct and should be expected to be an "ethical leader" to his/her team);
- The antitrust training that the leader himself/herself has had (or should have had);
- If the line manager encouraged or approved of the violation (or knowingly created a situation where an employee understood or reasonably believed that financial results and business targets were to be delivered at any cost), this would be a clear aggravating factor which would suggest that some disciplinary action in relation to that line manager is warranted.

c. *Specific considerations in antitrust cases*

Antitrust related disciplinary proceedings have specific features that may affect how employees are treated.

The credibility of your antitrust compliance programme will be tested when it comes to determining how your company deals with employees involved in grave antitrust violations such as cartels or other hard core antitrust infringements.

If your company's Code of Conduct and related policies place a clear ban on participation in cartels, and your company's disciplinary policy envisages dismissal as a sanction for the most serious forms of Code of Conduct breaches, disciplinary sanctions should logically apply to clear Code of Conduct violations by the employee.

However, a decision to discipline (and when to discipline) an employee for a very serious antitrust infringement (such as engaging in a cartel) is complicated if the company needs to apply for immunity/leniency. In such cases it will be important for your company to secure the ongoing

⁴⁶ As noted, if the employee is himself/herself a line manager who approved of or encouraged the violation, this is a clear aggravating factor.

cooperation of the employees involved in the violation in order to meet your company's own obligations (as part of the conditional grant of immunity or leniency) to assist and fully cooperate with relevant antitrust agencies in their investigations. This means your company will need to keep employees available for the purposes of the external antitrust investigation and any subsequent antitrust proceedings. Dismissal (however much your company may wish to discipline the offending employee) may therefore not be an option for the duration of the antitrust proceedings, or until such time as the antitrust agencies no longer require the employee's input.⁴⁷

Your company may therefore want to decide how "deferred sanctions" might apply in antitrust investigations. A decision to postpone the application of a sanction must not generate false expectations on the part of the employee: for instance, where your company must satisfy cooperation obligations towards investigating antitrust agencies (which is usually a precondition for immunity from antitrust fines or leniency), your company may need to retain the employee on paid leave/absence (in some countries now known euphemistically as "gardening leave") until a final resolution of the antitrust case against the company.⁴⁸

In such cases, your company's decision in relation to the ultimate disciplinary action should be communicated to the employee at the same time as your company informs the employee being put on paid leave. It may be useful for your company to consider entering into an agreement with the employee to the effect that payment for the leave of absence is dependent on the employee cooperating fully with your company and with all relevant antitrust agencies.

You may need to reconsider your company's general position in relation to funding/refunding employees' personal legal fees and or personal fines in the event of an antitrust investigation, in particular if the employee is found personally criminally liable in any jurisdiction. It is important to seek local legal advice in each relevant country, as legal and public policy considerations often prevent the payment of individual fines and in some cases also require the recovery of legal fees associated with a criminal case.⁴⁹ Even if your company is not actually prohibited from making such payments, you might wish to consider the message that such payment might give to employees (and agencies) about your company's genuine commitment to ethical behaviour and compliance.

Your company may also want to consider the employment law consequences of disciplinary action. Unless the antitrust breach justifies dismissal without notice, your company may find that there are costs associated with dismissing certain employees. However the overriding importance of upholding the credibility of the antitrust compliance programme will usually mean that your company would be willing to bear the employment related costs to ensure that the integrity of the compliance programme is not compromised.

⁴⁷ You should also bear in mind that the increase in civil litigation and "follow-on" damages claims may even further extend the need to ensure that "guilty" employees continue to be available to your company during any follow-on litigation.

⁴⁸ You should note that a decision to defer sanctions and to send an employee on "gardening leave" will be complicated (and may indeed not be possible) if the individual is subject to personal criminal sanctions in any jurisdictions. In any event, whether or not the employee is subject to criminal sanctions, you will need to ensure that you seek employment law advice in the relevant country.

⁴⁹ If the relevant employee is a director or an officer of your company, you should also check your company's insurance policy, since many directors' and officers' insurance policies will not cover criminal acts by your company's directors and officers.

8. Antitrust due diligence

Quick summary - The options that might be considered include:

- Conducting due diligence in hiring new employees;
- Assessing substantive antitrust compliance through selective “deep dives” into business practices;
- Conducting due diligence on trade associations;
- Conducting due diligence in M&A situations.

Antitrust due diligence takes many forms. It encompasses day-to-day checking of substantive antitrust compliance within your company as part of the operation of your antitrust compliance programme, it includes more structured “deep dives” and audits on particular businesses if areas for concern have been flagged (or are suspected). It also covers more specific legal due diligence exercises, such as due diligence around trade associations and in an M&A (mergers, acquisitions and joint ventures) context.

Antitrust due diligence is not only important as part of the operation of your company’s compliance programme (to ensure that the programme is adequately monitored and that antitrust risk assessments are kept up to date),⁵⁰ but a number of agencies also expect companies to undertake appropriate due diligence to prevent and detect criminal conduct (or other non-criminal violations of antitrust law) and to promote a corporate culture that encourages ethical conduct and a commitment to compliance.⁵¹

a. Due diligence in hiring new employees

To demonstrate a commitment to compliance, your company should endeavour to **exercise due diligence in hiring new employees**. If at all possible, it is important not to recruit or allocate responsibilities to executives or employees who are known to have violated antitrust laws or who are reasonably (objectively) suspected of having done so.⁵² Knowledge of a prospective employee’s compliance record might be achieved (if appropriate and permissible under local law) through a background check on the job applicant’s possible involvement in anticompetitive activities.

Even if a background check is not possible, your company should have a clear on-boarding process where new recruits are instructed in your company’s expectations regarding compliance with your Code of Conduct and with antitrust laws. Where new employees are recruited from competitors, line managers in your company should be instructed to exercise due diligence in terms of the contacts the new employee is keeping with his/her former employer or others in the industry. Line managers in your company should also be alert to the type of information that appears to be in the possession of the employee (how did the employee get that information? was it by legitimate and lawful means, or was it through his/her contacts at his/her former employer?).

⁵⁰ See Chapter 3: “Risk identification and assessment” and Chapter 11: “Monitoring and continuous improvement”.

⁵¹ See the US Federal Sentencing Guidelines, §8B2.1(a)(1), available at <http://www.ussc.gov> (“an organization shall exercise due diligence to prevent and detect criminal conduct”, and the disclosure obligations under the US Sarbanes-Oxley Act (available at <http://www.law.cornell.edu/uscode/text/15/chapter-98>).

⁵² While not specifically requiring pre-employment due diligence, the US Federal Sentencing Guidelines state at §8B2.1(b)(3): “The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program”.

b. Due diligence in assessing substantive compliance

Due diligence of substantive antitrust compliance (i.e. checking compliance with the law in practice) can range from light touch self-assessment through to checklists,⁵³ antitrust counselling and antitrust training follow up, selective “deep dives” into particular areas of the business and, at the other end of the scale, comprehensive forensic antitrust “audits”.

Some companies choose to include as part of their antitrust programme materials⁵⁴ an “Antitrust Due Diligence” self-assessment toolkit (ADD Kit), which is essentially a list of questions/checklist to allow employees to check whether something is likely to be problematical under antitrust laws. The purpose of the ADD Kit is not to replace the need for specialist antitrust advice or other legal advice, but rather to provide practical tools to allow your employees to identify “red flags” or antitrust danger areas.

The level of detail of the ADD Kit/checklist can vary from company to company, and some fairly sophisticated companies choose to have very simple due diligence checklists/decision guidelines, with the aim that employees who have concerns or more detailed questions can raise those with the in-house Legal or Compliance departments.

Such simple decision guidelines may also be quite suitable if you work in an SME and wish to establish an antitrust compliance programme.

Example: Integrated oil and gas multinational

“Decision Guidelines on information sharing:

- **WHY** am I sharing this information (do I have a lawful reason for sharing it?)
- **WHO** am I sharing it with (is it with a competitor or potential competitor?)
- **WHAT** am I sharing? (is it competitively sensitive?)
- **COULD** this information affect another competitor’s market behaviour? (if it could, do not share)
- **WHAT** does it look and feel like?
 - How would it look in the Press or on the News?
 - Does it feel “right”?
 - If I was in the customer’s place, would I feel cheated?
- **CAN** I prove that the Company has taken its decisions unilaterally?
- **AM I SURE** this is legal? If not, contact the antitrust team or your usual Company lawyer.

If in doubt JUST ASK – a manager, Legal or a Compliance Officer.

⁵³ See the Antitrust Due Diligence checklists produced by the Competition Bureau of Canada, *Bulletin on Corporate Compliance Programs*, 27 September 2010, pages 28 et seq., [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf).

⁵⁴ See Chapter 4: “Antitrust compliance know-how”.

c. Antitrust assessments (audits) or selective deep dives

This section considers **antitrust assessments** (or selective “deep dives”) involving a legal review of business activities and practices to detect whether actual or potential violations of antitrust laws have occurred or may be likely to occur. Substantive antitrust assessments are generally conducted by an in-house or external lawyer (and not by Internal Audit or by external auditors). It may therefore be more appropriate to refer to them as legal “assessments” rather than “audits”. It will be important that any antitrust legal assessments or deep dives are conducted consistently with the company’s Investigation Principles.⁵⁵

It is important to distinguish a substantive legal assessment of antitrust compliance from a compliance programme process or controls audit. A process/controls audit examines whether your company has in place and has implemented best practices, controls and procedures to monitor, escalate, and take action on actual or potential compliance violations. A substantive antitrust assessment focuses on whether, in fact, an actual violation of substantive antitrust law has occurred or is likely to have occurred. It aims to:

- Identify actual or potential antitrust violations before a company faces an investigation or challenge by a third party or an antitrust agency;
- Determine or confirm the nature and extent of an antitrust violation where there is already a specific allegation or suspicion;
- Identify business practices which present risks of potential antitrust violations;
- Assess the effectiveness of your company’s antitrust compliance programme and antitrust training in avoiding antitrust violations.

Given the fact that a substantive antitrust compliance assessment (or deep dive) may uncover actual violations of antitrust law, it will be very important to conduct the legal assessment appropriately (and consistently with your company’s own investigations rules/principles). It will also be important to consider whether the assessment should be conducted with the assistance of external legal counsel to secure the benefit of Legal Professional Privilege.

d. Due diligence in relation to trade associations

Attendance of your company’s employees at **trade associations** (or similar events such as industry “roundtables”) gives rise to specific antitrust risks. Trade associations can perform many useful and perfectly legal functions, and often perform a pro-competitive and useful role in the economy, or at least act in a way that is competitively neutral. If managed carefully and with full regard to antitrust advice, the worthy and legitimate goals of most trade associations can be accomplished without undue antitrust risk.

However, trade associations are by their nature a place where competitors meet to discuss matters of interest and importance to the industry. If your company’s employees who attend trade associations are not constantly on their guard to ensure that no competitively sensitive information is disclosed, there is a significant risk that discussions at the association meetings could encounter serious antitrust risk, and possibly even violate antitrust law.

⁵⁵ See Chapter 6: “Handling of internal investigations”.

If trade associations (and their members) fail to take account of antitrust concerns, they could end up engaging in anticompetitive or even illegal collusive conduct, involving liability both for the trade association members and for the trade association itself (as well as, potentially, individual personal liability for those involved).

Due diligence around trade associations typically takes a couple of forms:

- Due diligence before attending trade association meetings by ensuring that your company's employees are fully trained and aware of the antitrust risks of inappropriate information exchange;
- Due diligence on the activities of the trade associations themselves.

If your company's employees attend trade association meetings or events, it will be important to ensure they are appropriately **trained**. To ensure that the right employees get the right antitrust training, you will need to understand who in your company attends trade associations and similar events. Some larger companies with several hundred (or even several thousand) employees track trade association membership in the company by the use of an online "registration tool",⁵⁶ where the employee registers membership of the association, giving management an opportunity to check on the activities of the employee in the association and intervene if appropriate. Such an online tool may not be necessary for SMEs or even for larger companies where relatively few employees attend trade associations. However it can be a useful tool where the numbers are sufficiently large, since it enables the company to target antitrust training at higher risk employees.

In addition to antitrust training, you could give employees attending trade association events certain "**self-assessment**" tools, such as the Decision Guidelines given in the example (in para. (b) of this chapter) above, or a checklist of things to look out for, such as the one produced by the Canadian Competition Bureau (reproduced below):⁵⁷

Example: Trade Associations - Antitrust Checklist

- *Ensure that legal advice is sought before joining or renewing membership in a trade association;*
- *Ensure that a clear copy of the agenda for all trade association meetings is obtained prior to a meeting. Competing firms should not participate in a meeting where such an agenda is not provided;*
- *Ensure that the trade association minutes are reviewed and that mistakes are reported;*
- *Ensure that representatives use caution when participating in trade association events;*
- *Ensure that representatives are alert to the types of discussions that may raise concerns;*
- *If improper discussions arise, he/she should leave and have his/her departure recognized;*
- *The incident should immediately be reported to the compliance officer, legal counsel or any other individual identified in the business' corporate compliance program;*
- *Ensure that legal advice is sought if a particular situation gives rise to concerns;*
- *Be aware that discussing sensitive competition issues with other members that relate to pricing, markets, production levels, customers and other competitive information may be anticompetitive;*
- *Ensure to seek legal advice before reaching agreements on sensitive competition issues.*

⁵⁶ OFT, *Drivers of Compliance and Non-compliance with Competition Law*, May 2010 at para. 4.3.57, http://www.of.gov.uk/shared_of/reports/comp_policy/oft1227.pdf.

⁵⁷ Competition Bureau Canada, *Bulletin on Corporate Compliance Programs*, 27 September 2010, page 32, [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf).

Because of the antitrust risks inherent in trade associations, you may choose to undertake due diligence (from time to time, as appropriate) on the **activities of trade associations** of which your company is a member. There is no fixed format for such an exercise, but some questions that could be asked are set out in **Annex 4**.

e. Due diligence in M&A situations

If your company does not perform adequate antitrust due diligence prior to a merger or acquisition your company may face both legal and business risks. Inadequate due diligence can allow a course of anticompetitive conduct to continue undetected after the acquisition, in violation of your Code of Conduct, with all the attendant harms to your company's reputation, as well as potential civil and criminal liability. In contrast, if you conduct effective antitrust due diligence on an acquisition target you will be able to evaluate more accurately the target's value and negotiate for the costs of the antitrust compliance violation to be borne by the seller. However, even a thorough due diligence exercise may not succeed in uncovering hard core cartels, as these are covert by their nature.

It is becoming more common, before approaching a potential target/vendor/purchaser or Joint Venture (JV) counterparty, to pay close attention to potential compliance risk (in particular in relation to antitrust and bribery & corruption, but other compliance risks may be relevant too).

You might consider using a *pro forma* compliance risk matrix/checklist to evaluate the risk profile of the seller and the target (or the compliance risk of a business being sold, in the case of a divestment) in relation to antitrust risk. Such a *pro forma* compliance risk matrix (or "**Red Flags**" checklist) could, for example, ask the deal team to identify the core assets of a business and then highlight the anticompetitive acts frequently associated with such an asset/business/geography.

In an acquisition or JV, such a risk matrix would normally include questions to help identify antitrust risks in relation to a particular target or JV counterparty (for example, does the target or business have a previous history of collusion?). The purpose of the risk matrix is to enable focussed due diligence questions, as well as to highlight factors such as the risk associated with partnering with certain actors who may be less concerned about the application of antitrust and other laws. In confidential projects (pre-announcement), the small number of individuals that are signed up to confidentiality in the early stages may, however, limit the reliability of such a risk matrix.

There are certain key issues that should be looked at in conducting due diligence in M&A situations to avoid compliance surprises and understand weaknesses that will need to be corrected in the future.

- **Is the antitrust compliance programme (and the controls in other compliance areas) state-of-the-art and up-to-date?** Look carefully at the target's compliance programme. Are there sufficient resources, and a sufficiently senior person with accountability for the programme with appropriate authority and access to top executives or the Board? Review compliance risk assessment processes, manuals and audit reports to assess the likely (past) effectiveness of the antitrust (or other compliance) programme.
- **What is the target's risk profile?** Consider: (i) the nature of the target's business and industry, (ii) the nature of the jurisdictions in which it operates, (iii) how it conducts business (e.g. does it use intermediaries, consultants, third parties, joint venture partners?) and (iv) the profile of its customers and competitors.
- **Is there a culture of compliance?** Does the target encourage a compliance mind set? Does management regularly stress the importance of compliance? Is compliance training tailored to prioritized risks? Is there a hotline/whistleblower line to report suspected violations? How often is it used? With what results?

- **Is there a strong compliance control environment?** Ask about the compliance control framework. It may be necessary to expand due diligence in high-risk areas after reviewing monitoring reports.
- **Are any (internal or external) compliance investigations currently under way?** Obtain reports on any ongoing antitrust investigations (including pending, threatened or anticipated investigations). Consider the cost of: (i) dealing with any pending or ongoing investigations, (ii) ceasing certain business practices resulting in reduced revenues, and (iii) upgrading the target's compliance culture/introducing an antitrust compliance programme once your company has acquired the target.

Additional antitrust compliance due diligence could enquire into:⁵⁸

- Existence of closed antitrust procedures/litigation (within a specified period) involving the target company;
- Existence of antitrust sanctions/penalties/damages awards imposed on, or antitrust remedies/commitments (structural and/or behavioural) undertaken by the target company (within a specified period) for infringement of antitrust law;
- Existence of any outstanding antitrust warranties or indemnities given by the target company;
- Details of the target's participation in any trade or industry association, copy of the by-laws of such association, description of its goals, copy of the minutes of the last [stated number of] meetings;
- Participation in any joint production, joint logistics, joint distribution/sales arrangement or joint procurement (whether formal or informal, incorporated or unincorporated);
- Details of directorships, shareholdings or other interests held in any competing company;
- Existence of merger control clearances for all relevant M&A activity within the target (to ensure the target has obtained all relevant merger clearances and has not engaged in "gun jumping" - *i.e.* that the target has not implemented a transaction before receiving all necessary antitrust clearances).

Due diligence, however, is normally only the start of the compliance process for mergers and acquisitions. As the acquiring company, you will also need to ensure that the acquired company promptly adopts and satisfies all your own company's internal controls, including your antitrust compliance programme.

You should consider arranging antitrust training for all new employees in a commercial role (*i.e.* those who qualifying under your antitrust training nominations criteria - see Chapter 4: "Antitrust compliance know-how"). Where appropriate, you should consider conducting in depth legal antitrust assessments on new business units (see paragraph (c) of this chapter, above).

⁵⁸ This is not intended to be a comprehensive due diligence checklist; it is merely a suggestion of some antitrust related questions that could be asked as part of a more comprehensive due diligence exercise. Nor does it attempt to suggest any due diligence questions for other compliance areas outside of antitrust.

In order to identify antitrust compliance violations more quickly - some companies have considered offering an internal “amnesty”⁵⁹ to the employees of the target company post acquisition if they come forward within a short period of time to confess to wrongdoing. The intention of this from an antitrust perspective is to allow you - as the acquiring company - to make an amnesty/leniency application to the relevant antitrust agencies and also to trigger contractual indemnities if relevant. However the legal difficulties of going down this route should not be underestimated, and if you are contemplating this, your company should seek legal advice, in particular in relation to employment law, directors’ duties, disclosure requirements (for quoted companies and for companies regulated for example by the Financial Services Authority or similar), Legal Professional Privilege, anti-money laundering, and proceeds of crime considerations to name but a few.

f. Practical tips for due diligence

Antitrust due diligence should (ideally):

- Be risk based and show a different focus for different risks;
- Be flexible enough to be changed if the antitrust risk profile changes;
- Be broad enough to cover the entire range of antitrust risk;
- Not be static and should be revised regularly based on the antitrust risk profile and potential liability for breaches;
- Cover all key new hires who come into your business and who could create/increase antitrust risk (e.g. hiring from a competitor in a concentrated market);
- Cover newly acquired entities and also their intermediaries (e.g. those that are acquired as a result of an acquisition);
- Be documented and be available for review and improvement;
- Be a part of an overall compliance due diligence programme. Other risks might include anti-bribery and corruption, anti-money laundering, fraud, fiscal irregularities, trade control (sanctions) violations etc.

Measures that you could consider in conducting the due diligence exercise (whether it is in relation to a new employee, your own company’s activities, the activities of a trade association or M&A due diligence) include:

- Collecting material and background prior to any assessment;
- Where possible reviewing the material by use of an independent compliance-focused background screening (for example with the assistance of specialist external antitrust counsel);

⁵⁹ As mentioned above, “internal amnesty” would clearly have to be strictly internal, and could only relate to the company’s intention to discipline the individual - no guarantees can be given in relation to the actions of external agencies and/or prosecutors towards the individual.

- Bearing in mind that more formal types of due diligence (forensic antitrust legal assessment/selective deep dives) might uncover antitrust violations that require (or would prudently require) an immunity/leniency application to antitrust agencies in one or more countries, which itself may trigger follow-on damages actions, think very carefully about (and document steps taken to preserve) the integrity of the chain of evidence, the methodology of the due diligence⁶⁰ and Legal Professional Privilege.

⁶⁰ See Chapter 6: "Handling of internal investigation".

9. Antitrust compliance certification

Quick summary - The options that might be considered include:

- Setting up a process for internal certification by individual employees so that they understand and abide by compliance requirements;
- Weighing up the pros and cons of neutral, forward or backward-looking compliance statements;
- Relying on external certification, whether from third parties or (where available) regulators.

You would normally only consider antitrust compliance certification when your antitrust compliance programme is more mature and has been in place a number of years. For this reason, antitrust certification may not be appropriate for SMEs or if your company is just starting on the compliance journey.

Certification can be considered at a number of levels:

- Certification by individuals in your company that they have received antitrust training and have understood their obligation and/or complied/will comply with the Code of Conduct including the antitrust rules;
- Certification by third party Non-Governmental Organizations (NGOs) that your company's compliance programme meets certain objective standards;
- Recognition by governmental or regulatory bodies that your company's compliance programme meets certain objective standards.

a. *Individual certification of compliance*

Ensuring that employees focus on antitrust compliance on an ongoing basis can be a challenge. Some companies require employees to sign an annual (or other regular) statement of compliance with the company's Code of Conduct and/or antitrust policy. This could take the form of:

- A statement that the individual has undertaken (antitrust) training and has read and understood your company's compliance requirements, including your company's policies and procedures (*i.e.* a neutral statement acknowledging the policies);
- A statement that the individual has undertaken (antitrust) training and has complied with antitrust laws and with your company's business principles or Code of Conduct (*i.e.* a backward-looking statement assuring actual compliance);
- A statement that an employee has undertaken (antitrust) training, has understood your company's compliance programme and will comply with the law (*i.e.* a forward-looking statement assuring future compliance).

Some considerations to bear in mind when deciding which option to adopt include the following:

- A neutral statement of acknowledgement of having taken antitrust training and having understood your company policy does little to embed a compliance culture or give any assurance/indication of a change in behaviour;

- There is a risk that a backward-looking statement of past compliance by individuals may be counter-productive within your company: it may be viewed by employees as a cynical and self-serving attempt by the company to “cover” itself in the event of a violation and provide grounds for disciplinary action;
- A backward-looking statement may require works council/staff council approval, and/or may encounter employment law issues in some countries;
- A forward-looking statement, on the other hand, may do more to embed a compliance culture in your company and ensure personal individual responsibility among the employees for compliant behaviour;
- Given the administrative difficulties of obtaining and monitoring such statements on an annual (or other regular) basis, some companies now incorporate this statement in their online training to capture certification electronically, but the associated cost involved needs to be borne in mind (particularly by SMEs, if you are in an SME and wish to consider certification).

Examples of different types of certification:

Canadian Competition Bureau suggested example:⁶¹ *Neutral acknowledgement of the need to comply*

“I, [xxx] am employed by [Company X] in the capacity of [xxx]. I acknowledge that I am subject to and am required to comply with [Company X]’s Corporate Compliance Program, including its Policies and Procedures

(The “Program”). This is to advise that I have read and understand [Company X]’s Program, the goal of which is to promote compliance with the [specify: the Competition Act etc.] generally and [list specific sections of the Competition Act that are relevant to the business]. I understand that compliance with [Company X]’s Program is a condition of my continued employment with [Company X] and that failure to comply with the Program may result in disciplinary action, including termination of employment. I also understand that this certification letter is not a guarantee of continued employment with [Company X].

Date: [x] Signature: [x] Witness name: [x] Signature: [x]”

Generic example of a backward-looking certification:

“I confirm that I have undertaken antitrust training, that I understand the requirements set out in the Code of Conduct [and other relevant documents] and that I have complied with the law [during X year].”

⁶¹ See Competition Bureau of Canada, Revised Enforcement Bulletin, *Corporate Compliance Programs* (27 September 2010), at: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf): “Each employee is required to acknowledge that he/she has read and understands this Program and that he/she understands his/her obligations under it. Such an acknowledgement will also be sought in the event that significant changes to the Program take place.”

Generic example of a forward-looking certification:

I am aware of and understand the Code of Conduct and the antitrust rules and regulations applicable to my work and confirm that I will comply with those rules.”

b. Certification by a third party NGO

A number of NGOs offer the possibility for a compliance programme to be certified as meeting certain objectively set standards.

Independent agencies and NGOs are progressively expanding their review and certification programmes to cover antitrust compliance programmes, and are used to benchmark programmes. This is likely to be a growing trend.

Example 1:

The Australian and New Zealand ISO Standard on Compliance programmes (AS/NZ Standard 3086-2006). The Australian Standards Institute has also proposed (to the International Standards Organization) the development of a new global ISO Standard on Compliance programmes to provide principles and guidance for organizations designing, developing, implementing, maintaining and improving an effective compliance programme. The proposal is to base the new Standard on the existing Australian/New Zealand Standard 3806-2006 on Compliance programmes.

Example 2:

Examination of compliance management systems (CMS) by German public auditors under the IDW (the German Public Auditors' Institute) audit standard: "Principles of proper auditing of compliance management systems" (IDW PS 980).⁶² Under the standard, there are three different audit types:

- *"Type 1": Assessing the CMS's **conceptual content and documentation**, i.e. has the CMS's concept been appropriately described by management, and does the description comprise all of the basic elements of a CMS?*
- *"Type 2": Examining the CMS's **appropriateness**, i.e. have its principles and measures been accurately described, are they appropriate, and have they been implemented at a particular point in time?*
- *"Type 3": Auditing the CMS's **effectiveness**, i.e. in addition to a type 2 audit the auditor will also inspect if the principles and measures were effective within a particular period.*

⁶² This was prompted by article 4.1.3 *German Corporate Governance Code*, which provides: "The Management Board ensures that all provisions of law and the enterprise's internal policies are abided by and works to achieve their compliance by group companies (compliance)".

Example 3:

As part of its advocacy initiatives the CCI (Competition Commission of India) hosted a roundtable meeting in January 2013 on the subject of “Competition Compliance for Good Corporate Governance”.⁶³ The Chairman of the CCI said he would ask the Chairman of the Securities and Exchange Board of India to include antitrust compliance as a mandatory requirement under Section 49 of Listing Agreements for all listed companies. He also suggested each listed company should form a competition compliance committee to consider antitrust compliance considerations.

c. Governmental certification of compliance programmes

As well as NGO certification, a few government agencies are starting to consider recognizing/certifying compliance programmes, if these meet certain objective standards. Although this is still (at the date of publication of this document) relatively rare in the antitrust field, there are some examples of this happening.

Example: Brazilian Legal Framework - Official PPI Certification

Ordinance No. 14, issued by the Brazilian Secretariat of Economic Law (“SDE”) on in 2004, established the guidelines for the preparation of an antitrust prevention programme and for the issuance, by SDE, of an Official Certification attesting that the company complies with antitrust rules in Brazil (“PPI Certification”).

In order to obtain PPI certification, the applicant company has to demonstrate it has (inter alia):

- *Clear standards and procedures to be followed by employees of the company in order to assure compliance with antitrust laws;*
- *Assignment of overall responsibility to oversee antitrust compliance to a specific executive within the company;*
- *Evidence of consistent enforcement of standards through appropriate disciplinary mechanisms;*
- *Detailed report of all background material used for the preparation of the Preventive Programme: videos, folders, training sessions, software, document retention policy, among others;*
- *Evidence that an external consulting company will conduct regular antitrust due diligence;*
- *Statements by relevant employees - managers, directors, chief sales officers, those attending trade/industry association meetings - attesting they are aware of the existence of the programme;*
- *Statement by the trade/industry associations to which the applicant company belongs declaring that the member companies do not adopt common commercial or price-fixing policies.*

⁶³ See <http://pib.nic.in/newsite/erelease.aspx?relid=91809>.

10. Compliance incentives

Quick summary - The options that might be considered include:

- Deciding whether your company needs to use compliance incentives to reinforce personal engagement with your company's attempts to embed a compliance culture;
- Deciding whether and what forms of reward your company might use for individual compliance efforts;
- Deciding whether your company should use positive incentives ("carrots") such as bonus payments/motivational incentives, or negative incentives ("sticks") such as holding back promotion;
- Considering how your company's bonus structures (relating to results and financial performance) might undermine substantive compliance or the compliance message.

Compliance **incentives** may help to **change behaviour** positively within your company. Incentives can work as effective tools for a business that wishes to promote compliance by employing concrete actions and can play an important role in fostering a culture of compliance, although introducing compliance incentives may be more suitable if your company already has a well-developed and mature compliance programme.

Incentives are seen (particularly by agencies) as offering support to a company's culture of compliance.⁶⁴ However unlike more mainstream antitrust compliance programme measures, such as training and in-depth antitrust legal assessments, incentives have often proven to be controversial in theory and difficult to implement in practice. Therefore, you should carefully consider what incentives your company wishes to (or can legally) provide to ensure that antitrust compliance processes are followed.

a. Why have compliance incentives?

The first reason why you might consider having incentives to bolster your company's compliance programme is because many agencies view incentives an important part of a credible programme.⁶⁵ At the same time, while there is general encouragement to consider appropriate incentives, the agencies have not been prescriptive to date about what incentives should be introduced.

Some of the controversy around giving incentives for compliance can be summarized as follows:⁶⁶

- A belief among some that employees should not be rewarded for doing what the company expects them to do in terms of compliance with the Code of Conduct (to counter this: the incentive need not necessarily be pecuniary, but can be a motivational incentive that encourages compliant behaviour);
- A belief that it is difficult (or even impossible) to measure an individual's real commitment to ethics (again, motivational incentives or incentives attached to individual performance could address this);

⁶⁴ The 2004 revisions to the *US Federal Sentencing Guidelines* include as item 6 of the 7 standards of an effective compliance programme: "The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program".

⁶⁵ In 2010 the US Securities and Exchange Commission charged Alcatel-Lucent SA with FCPA violations (which the company paid US \$137 million to settle). Part of the charge was that the company failed "to provide appropriate **incentives** to perform in accordance with [its] compliance and ethics program."

⁶⁶ See also "Using Incentives in your Compliance and Ethics Program" by Joseph Murphy published by the Society of Corporate Compliance and Ethics, available at <http://www.corporatecompliance.org/Resources/View/smid/940/ArticleID/814.aspx>.

- Legal concerns, such as employment law and people management considerations, as well as the risk of use against the company in litigation;
- A concern that rewarding the absence of reported incidents may lead to pressure not to *report* violations. This genuine concern needs to be addressed in terms of how incentives are designed;
- In structuring incentives it is important to be alert to the danger of unintended consequences: for instance, an objective that managers receive a totally “clean” antitrust audit result could drive problems underground, and that in turn would undermine the effectiveness of the compliance programme.

b. *Types of incentives*

There is a **wide range of compliance incentives**, from “softer” incentives to more tangible incentives:

- The “softer” incentives include non-tangible encouragement/recognition, such as commendations (public or not, as appropriate) from your senior business leaders for an employee’s exemplary compliance-related conduct (e.g. as “compliance champions” or “compliance heroes”);
- These “softer” incentives can also be addressed to a group (e.g. publicizing a country or business unit being the first within your company to have 100% employee completion of training);
- They may include tangible rewards, possibly monetary (which can be very effective, but occasionally offend those who feel that doing what is right is part of everyone’s job);
- You could consider using compliance criteria in personnel evaluations (employee appraisals), which - along with other criteria - can impact an employee’s compensation;
- Compliance incentives can be either general or risk-area specific - for instance, in a personnel evaluation (employee appraisal) you could test whether an employee has demonstrated an understanding of and adherence to your company’s policies and procedures.
- Some companies require consideration of compliance performance as part of succession planning - which can be a powerful compliance-related motivator for leaders and future leaders in your company;
- You should also consider how other incentives (such as bonuses linked to stretching business targets) could deter compliance (for example, if the rewards scheme prompts employees to take undue risk, e.g. promotes “do or die” attitude);
- For internal career planning, you may wish to consider whether promotions could depend also on an individual employee’s compliance track record.

Example: Engineering and electronics multinational - compliance as a management task

With a view to strengthening management's compliance responsibility, compliance has been an integral part of the bonus system for top executives since 2008. The variable compensation of senior management includes a compliance component based on the results of the worldwide employee compliance awareness survey, in addition to other criteria.

11. Monitoring and continuous improvement

Quick summary - The options that might be considered include:

- Determining upfront how to monitor the effectiveness of your antitrust compliance programme design and operational controls;
- Gathering, reviewing and benchmarking data to support an objective evaluation of whether your company's antitrust programme is appropriate to prevent, detect, and respond to antitrust violations, and whether your programme is effective in doing so;
- Continuously monitoring the programme and developing a Compliance Programme Improvement Plan;
- Institutionalising a regular review and upgrade of your antitrust compliance programme.

Your company should take reasonable steps periodically to evaluate the effectiveness of its antitrust compliance programme. **Regular evaluations are essential features** of any antitrust compliance programme given the dynamic business and regulatory context in which companies operate and how this affects both internal and external risk factors (see Chapter 3: "Risk identification and assessment"). Your company's compliance and ethics programme should be measured like any other critical capability.

There are two aspects of compliance monitoring and assessment that your company could use to determine whether the design of its compliance programme meaningfully assists in preventing, detecting, and responding to violations of applicable antitrust laws (also known as "assurance"):

- The first involves checking that your programme's **processes and controls** are - and continue to be - appropriate, and are being implemented and are operating effectively and efficiently;
- The second (considerably more difficult) aspect is a periodic review of parts of your company's business or of certain practices to assess whether these are compliant (*i.e.* a **substantive compliance assessment**).⁶⁷

a. *Monitoring and assessing processes and controls*

By using accurate recent data to measure whether your company's antitrust compliance programme processes and related controls are appropriately designed and are being applied consistently and adequately throughout your company, you should evaluate the effectiveness of those controls and improve them where necessary. This assurance process may be done as part of your regular risk assessment (discussed in Chapter 3: "Risk identification and assessment") or may be done as a separate exercise.

Monitoring and assessing processes and controls involves a periodic review and assessment of your company's compliance programme by:

- Monitoring whether individual behaviours within your company meet the programme's process requirements (e.g. tracking antitrust training attendance completion rates, ensuring other antitrust controls are operating effectively);

⁶⁷ See also Chapter 8: "Antitrust due diligence".

- Checking managerial tasks designed to increase the likelihood of success of the programme are followed - for example, if your company adopts a control requiring line manager approval for attendance at trade associations, ensuring that processes are in place for employees to obtain such approvals and for these approvals (or refusals) to be tracked and monitored;
- Reviewing information produced by internal and/or external auditors (e.g. on levels of employee awareness and understanding of relevant antitrust controls);
- Considering scope for internal and external benchmarking against commonly accepted “best practices”.

There is no set standard for the frequency with which your antitrust programme processes and controls should be monitored, but most companies appear to undertake thorough assessments and benchmarks of their programme controls **every 3 to 5 years**.

It makes sense to decide in advance what metrics to use so relevant data can be gathered and captured from the outset; *ex-post* data-gathering may be more complex.

b. *Measuring effectiveness of processes and controls*

There is merit in your company deciding upfront **how to measure related processes and controls**, focusing on three key aspects:

- Effectiveness;
- Efficiency;
- Responsiveness.

The selected approach should be designed to help ensure, maintain and improve the performance of your antitrust compliance programme, based in the findings that emerge. Key metrics and indicators should be specific, simple, measurable, actionable, relevant and timely. Your company’s performance measurement system (for assessing the effectiveness of your company’s compliance processes and controls) should be refined on an ongoing basis - but is best designed with your company’s existing financial and risk control framework in mind. By gaining experience of measuring your company’s programme performance you can fine-tune and improve the system over time.

Effectiveness describes **the quality** of a programme’s (i) design effectiveness and (ii) operational effectiveness.

Design effectiveness describes the degree to which the programme’s processes and controls are logically designed to meet defined requirements:

- Does the control system contain all the necessary elements to evaluate antitrust risk thoroughly?
- Have the programme processes and controls been designed for maximum effectiveness?
- If not, what features must be added to improve the programme processes and controls?
- Does the programme design include appropriate monitoring and reporting?

Operational effectiveness describes the degree to which the programme operates as designed. It helps management understand if, given a strong design, the antitrust programme is operating as intended:

- If the antitrust programme has been well designed, does it function correctly?
- Does it operate the way it was designed?
- If not, how must it be managed/altered to improve its level of operation?

Because operational effectiveness is about determining whether the programme is increasing (or positively contributing to) substantive compliance, it is hard to test. Companies will usually need the appropriate skill set and resources to undertake a meaningful analysis, although for SMEs and companies with fewer resources, the measurement of operational effectiveness does not need to be unduly burdensome: this could be tested by Internal Audit (if you have such a function) or by external auditors.

The concept of **efficiency** captures the cost of the programme: not simply in terms of the total amount of money spent but also the cost of human capital relied on to execute the antitrust programme processes and controls. However, it is very important (to ensure the integrity and effectiveness of the antitrust compliance programme) that the cost of certain systems or controls is not used as a reason to implement cheaper but less adequate/less effective controls that do not appropriately mitigate risk.

Responsiveness should be looked at in two dimensions, namely the programme's ability to operate **quickly** and **flexibly** in response to changing circumstances. Flexibility/adaptability describes the degree to which the system can integrate changes including new requirements (e.g. a new law, rule or regulation) and/or new business units (due to merger and acquisition activity).

Example: Food manufacturer

The Company spent significant resources in making antitrust compliance guidance available for reference on its internal website, since it views ready access to such guidance for non-lawyers as a vital component of its compliance programme and a “control” to help colleagues find out more about how to “do the right thing”.

When the Company’s Legal team decided to check how often the data was actually accessed, it found that the majority of users accessing the information came from a specific geographic region, suggesting lower awareness of the materials elsewhere. The information on what pages were accessed also proved to be incomplete, showing the difficulties it faced in demonstrating how effective its approach was in reaching its target audience. This prompted a fresh discussion on the pros and cons of a “push” and “pull” approach to disseminating information.

c. Auditing and benchmarking

Audit reports from your company’s external and/or internal auditors (e.g. performing confidential departmental programme audits) can be very useful sources of information about the operation of the process elements of an antitrust compliance programme. Audits with an antitrust component or “focus theme” generally consider the operation of the programme in terms of the effectiveness of its

processes and controls in raising awareness and understanding of compliance considerations that are relevant to a company's operations, but are not an audit of substantive compliance (which auditors are often not best placed to assess - see below).

Reviews of your company's antitrust compliance programme by informed external counsel can also be useful to compare external trends and provide a benchmark where external counsel are actively involved in developing materials for a variety of companies' antitrust compliance programmes.

However, reliance on external counsel is not a prerequisite for benchmarking: many in-house antitrust lawyers are happy to share experience and best practice, provided that such **benchmarking exercises** are themselves conducted in compliance with antitrust laws. Furthermore, numerous external compliance professionals and consultants provide useful information and publications (available on the Internet and free of charge in many cases) that you can use to benchmark against generally accepted best/good practices. Recently a number of **antitrust agencies** have also started to articulate what they expect to see in credible antitrust compliance programmes, and you may also find this guidance valuable. Certainly this type of advocacy and engagement by antitrust agencies is a trend that should be encouraged.

The important thing in undertaking any benchmarking exercise and learning from best practice around antitrust compliance programmes is that your assessment must remain objective. It is advisable that your review involves an individual or group that is not responsible for the operation of your existing programme, who can thus review its effectiveness with an appropriate degree of objectivity, even if this is done within the company itself (for example by Internal Audit or others in the Finance function).

Ultimately, the objective is to encourage **constructive dialogue in which companies can challenge themselves** (or be challenged) on how well their approach works and what improvements can be made (and within what time frame).

d. Monitoring and assessing substantive compliance⁶⁸

Periodically assessing whether parts of your company's business or certain business practices are complying with antitrust laws in practice allows senior managers to know whether the company is moving closer to its antitrust compliance objectives. It helps ensure that there is continued, clear and unambiguous commitment to antitrust compliance from the top down, that the antitrust risks identified or the assessment of these risks have not changed (or if they have changed, to reassess controls) and that the risk mitigation activities/controls remain appropriate and effective. It may also enable your company to identify substantive antitrust concerns, rectify any illegal behaviour, and to assess if it is appropriate to apply to one or more antitrust agency for immunity/leniency.

It is important not to be prescriptive about how (or how often) substantive antitrust compliance assessments should be undertaken. They could be undertaken, for example, as part of the assessment or reassessment of risks (see Chapter 3: "Risk identification and assessment"), as part of antitrust due diligence (see Chapter 8: "Antitrust due diligence"), or following a complaint made to the compliance helpline (see Chapter 5: "Antitrust concerns-handling systems"). Alternatively (or additionally) substantive antitrust compliance can be assessed on a continuous basis when providing antitrust counselling within a company, or selectively from time-to-time.

An important early consideration when planning to undertake a **substantive antitrust assessment** is to ensure that appropriate resources are dedicated to it. This implies consideration of the following:

⁶⁸ See also Chapter 8: "Antitrust due diligence".

- **Who should undertake the assessment?**

It will generally be advisable for the assessment to be undertaken by people with specialist antitrust knowledge and experience. For this reason many companies rely on specialist in-house or external antitrust counsel for such assessments rather than (for example) having such assessments conducted by financial auditors or controllers.

- **Will Legal Professional Privilege be maintained?**

This is a reason why companies often choose to use external antitrust legal counsel for compliance assessments in order to protect its results.

- **How will the review be conducted?**

It may involve electronic searches of documents and databases, interviews of key employees. The company must take into account legal issues such as data privacy, employment law considerations (the need to seek staff council approval) and so on.

- **How will the results of the assessment be shared within the company?**

You will want to balance the need to share learnings with the importance of protecting Legal Professional Privilege (see above).

- **How will the review be funded (internal budget considerations)?**

Example: Consumer goods manufacturer

- *The Company is active in a jurisdiction that recently reinforced the resources of its antitrust agency and is seeking more proactive regulatory enforcement of national antitrust rules. While the Company's Code of Conduct always required employees to observe all applicable laws when doing business, it decides to carry out a substantive antitrust assessment using external counsel to determine whether relevant internal guidance is understood and followed. It decides to focus on a part of the business where the Company has a high market share and comparatively high levels of recent staff turnover.*
- *It takes steps to plan its approach and presents this to senior management to secure the necessary endorsement and funding. The process is launched in a way that makes clear to employees contacted for interview that they are expected to collaborate fully. It is understood that all relevant findings and recommendations will be presented to senior management and necessary changes implemented without delay to ensure that the Company can continue to do business confidently and grow sustainably, in ways that are fully in line with its compliance requirements and the regulatory framework.*

e. Compliance programme improvement plan

Having assessed the effectiveness of an antitrust programme's processes and controls, (and having tested substantive antitrust compliance as appropriate), it will be important to consider whether the company should develop a compliance programme improvement plan (CPIP). This can be an effective way to capture and present learnings from the monitoring activities described above, and ensure that any recommended improvements are put into effect expeditiously (or prioritized based on a clear timeline).

If your company adopts a CPIP, it should set out deliverable actions to address identified control gaps, to introduce new controls (as required) and should articulate timelines for delivery, including details of who is accountable in the company to ensure delivery. The plan would also usually articulate how delivery of the action points agreed will be tested and how desired improvements to the programme will be objectively monitored.

Example: Review of antitrust compliance programme improvement plan

- *Agree Antitrust Programme Update Terms of Reference;*
- *Benchmark best practices with [X, Y, Z] by [date];*
- *Produce a Stakeholder Management Plan;*
- *Identify and seek comments from all relevant internal stakeholders by [date];*
- *Revise/update all antitrust know-how content by [date];*
- *Summary/logic of how the Antitrust Programme reflects business risks;*
- *Recommendations to resolve current Antitrust programme control challenges and gaps;*
- *Recommendations for future Training Programme including course structure, content, controls/processes to manage both attendees and trainer network;*
- *Agreed rules for Antitrust Training nominations by [date];*
- *Produce plan to embed the Antitrust Programme improvements from [Q3] to include tools and processes to support the businesses in sustaining the Antitrust Programme, accountabilities and deliverables;*
- *Produce a Communications Plan to support the relaunch of the Antitrust Programme and inform target audiences in the business of what the changes mean for them;*
- *Produce a revised Programme Control Framework document which captures how the Antitrust Programme is intended to operate - with detailed accountabilities, roles and responsibilities, governance - reporting and management, interface with training controls, performance Metrics Risk/Issues Log, Change Log, Audit Requirements, Document Repository, Knowledge Management;*
- *Produce an Implementation Plan to support the above changes.*

Annex 1: Compliance Blue Print

Outline of generally accepted standards applicable for a robust antitrust compliance programme: Further enhancing the foundation for a European culture of antitrust compliance

All compliance efforts must demonstrate a company's commitment to conducting business in conformity with the law, and as such, compliance programmes will contain basic ingredients necessary for robust antitrust compliance. Programmes are designed to:

- Help companies identify and minimize/eliminate risks that infringements occur, and to provide evidence of the implementation of the programme both internally (e.g. towards the board/audit committee) and externally (e.g. towards competition agencies);
- Serve as a basis for consideration by European competition agencies and legislators of the formal recognition of compliance programmes meeting this standard as mitigating factors in possible sanctions for antitrust violations.

The design of a robust programme depends on the size, geographic presence, activity and structure of a specific company, so flexibility must be built into any description or acceptance of best practice. However, although there is no one-size-fits all programme or template, common components of a robust programme include:

Antitrust compliance embedded as company culture with management commitment

- Formalisation of the compliance commitment which demonstrates and reflects all management levels' commitment to comply with strong support from the top/senior management levels;
- Compliance is considered a business priority at all levels of the corporation:
 - Compliance is identified as part of the corporation's core values;
 - Senior management accepts that it is its responsibility to create and maintain the compliance culture; it communicates and operates that illegal or unethical behaviour is not tolerated.

Antitrust policies and procedures

- Appropriate policies and procedures should be implemented;
 - The appointment of a specialist compliance executive and advisor with overall responsibility for the programme reporting to senior management;
 - Identification of individuals responsible for each element of the programme;
- Disciplinary action will be taken internally against staff who intentionally or recklessly involves the organization in infringements of antitrust laws.

Antitrust training

- Training (online, face-to-face or a combination of both) to ensure that staff understands the compliance dimension of its work;
- Availability of a clear and jargon-free antitrust law compliance manual addressing the specific risks faced by the organization.

Risk assessment and controls

- Regular reporting and periodic reassessment of compliance risks and response:
 - Commitment and main elements of the programme communicated internally and externally to stakeholders;
 - Continuous re-evaluation and upgrading of the programme;
 - Independent internal audits and appropriate due diligence where risks have been identified;
 - Mechanisms for reporting antitrust infringements or concerns up the corporation's ladder.

European Best Practice Compliance Programmes: Building the foundation for a European culture of antitrust compliance

1. Common Compliance Programme Components

All compliance programmes must demonstrate a company's commitment to conducting business in conformity with the law, and as such, all will contain the same basic ingredients necessary for robust antitrust compliance. All programmes are designed to:

- Help companies design and implement a programme to identify and eliminate compliance risks, and to provide evidence of the implementation of the programme both internally (e.g. towards the board/audit committee) and externally (e.g. as part of a Compliance Defence);
- Serve as a basis for consideration by European competition agencies and legislators of the formal recognition of compliance programmes meeting this standard as mitigating factors in possible sanctions for antitrust violations.

The design of a robust programme depends on the size, geographic presence, activity and structure of a specific company, so flexibility must be built in to any description of best practice. However, although there is no one-size-fits all programme or template, common components of a robust programme include:

- Formalisation of the compliance commitment which demonstrates and reflects senior management commitment to comply;
- Compliance is considered a priority at all levels of the corporation, starting with the highest :
 - Senior management accepts that it is their responsibility to create and maintain the compliance culture; it communicates and operates a zero tolerance policy to illegal or unethical behaviour;

- Compliance identified as part of the corporation's core values.
- Reporting to senior management, the appointment of a specialist compliance executive and advisor with overall responsibility for the programme:
 - Identification of individuals responsible for each element of the programme;
- Regular reporting and periodic reassessment of compliance risks:
 - Commitment and main elements of the programme communicated internally and externally to stakeholders;
 - Continuous re-evaluation and upgrading of the programme;
- Training to ensure that staff understands the compliance dimension of their work.

2. Implementation: for large organizations

The following compliance programme is a mechanism designed to identify and reduce the risk of an Organization infringing applicable antitrust laws, and in the event of a breach, rapidly and effectively to remedy that breach.

The template needs to be adapted according to the corporate structure and governance of the particular Organization concerned, and references to "Board" or "senior management body" and "senior management" should be interpreted as the highest level of management of the company.

The implementation of the elements of this template should comply with all applicable laws (for example data privacy laws).

Purpose of the Template

The purpose of the template is to assist entities to implement robust antitrust compliance programmes and therefore to avoid or reduce the risk of an antitrust violation occurring in the future.

If an Organization can demonstrate that it has in place the relevant elements of the template and the means of enforcing such elements in a manner suitable to the antitrust risks in its relevant businesses, the Organization should be deemed to have a robust antitrust compliance programme.

An Organization is defined here in the broad sense as the "business" rather than a particular legal entity. This distinction is warranted because a legal entity structure rarely reflects the organizational - business structure of a group of companies. A legal entity may host several different Organizations - businesses which are managed pursuant to their respective processes and senior management structure. Accordingly, the adequacy of the compliance programme and efforts ought to be evaluated in the context of an Organization rather than within the confines of a legal entity. Depending on the scope of the operations of a group, which may include a variety of businesses the adequacy of the compliance programme should be judged in the context of the relevant businesses.

| Element | Details |
|---|--|
| Antitrust compliance embedded as company culture and policy | <p>This should be reflected in a Statement of Business Principles/Code of Conduct/Code of Business Ethics (or similar corporate policy document), which must be adopted and endorsed by the most senior management body in the Organization and be made publicly available.</p> <p>Reasonable and effective steps shall be taken to support a culture of compliance and integrity.</p> |
| Senior management commitment to antitrust compliance | <p>“Tone at the Top” is critical and senior management’s visible commitment and support for a culture of antitrust compliance should be reflected in messages given by senior leadership, including but not limited to endorsement of the antitrust training programme.</p> |
| Senior management supervision and identified accountable positions | <p>A senior individual either on or reporting to the Board will be responsible for the Compliance Programme.</p> <p>A report (at least on an annual basis) on the antitrust Compliance Programme will be made to the Board, to non-executive directors, and to the Audit Committee (and/or Group Risk committee) (as appropriate to the structure of the Organization).</p> <p>Larger Organizations will designate a Chief Compliance Officer or a Compliance Committee who will be (or will include) a senior member of the management of the Organization with accountability for the implementation of the programme.</p> |
| Compliance organization and resources | <p>The Organization will establish and suitably resource/fund a compliance office or similar organizational structure with suitably qualified staff to ensure that antitrust risks are appropriately identified and managed.</p> <p>This could include (as appropriate to the structure of the Organization):</p> <ul style="list-style-type: none"> - Chief ethics and compliance officer - Business or Country/Regional Compliance Officers/Advisors (reporting to the Chief Compliance Officer) - One or more subject matter experts (within the Legal function, if there is one) who are familiar with antitrust laws and are suitably experienced to identify and advise on antitrust risk |
| Defined risk assessment process | <p>The Organization will define a risk assessment methodology and process. The Organization will regularly conduct antitrust risk assessments across the business and will adapt the antitrust compliance programme to manage and mitigate those risks.</p> <p>The outcome of the risk assessments and actions following on from the risk assessment will be appropriately recorded.</p> |

| | |
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| Defined risk control points | <p>The Organization will define control points. Control points in this context means control mechanisms designed to manage the identified antitrust risks.</p> <p>The control points should be suitable to the risks faced by the particular Organization.</p> |
| Antitrust compliance know-how | <p>Simple, clear and jargon-free antitrust rules and guidelines must be developed to address the identified antitrust risks.</p> <p>Rules, policies and procedures must be developed to address specific antitrust compliance issues in the business operations of the Organization.</p> <p>Rules, guidelines and policies must be distributed to relevant staff and their circulation suitably documented.</p> |
| Antitrust training | <p>Antitrust training is one of the key components of an antitrust compliance programme. Training should be designed to provide practical (business specific) examples, explain the aims and reasons for the Organization's policies and procedures and the consequences if these are not followed.</p> <p>Employees who need training should be identified on a risk basis, and senior management should all receive appropriate antitrust training. The Antitrust compliance programme should clearly stipulate the frequency of required training, which should be appropriate to the antitrust risks in the business concerned.</p> <p>All new employees in commercial or management roles should receive on-boarding antitrust training. This includes both newly recruited employees and employees who move from a lower risk role to a higher risk role within the same organization.</p> <p>Antitrust training could be face-to-face, online or both, depending on the risks faced by the Organization concerned. Suitable records of all training must be maintained.</p> <p>Regular assessment of training needs to be conducted to ensure it has been robust (see Continuous Improvement below).</p> |
| Antitrust compliance certification | <p>Employees who have been identified as requiring antitrust training on a risk basis should certify after antitrust training that they have understood the Organization's policy on antitrust compliance and will comply with the law. The certification can be in any suitable manner (online/manual) provided records of the certification are maintained.</p> |
| Compliance incentives | <p>The Organization should carefully consider the incentives it provides and ensure that suitable HR or other controls are in place to ensure compliance processes are followed (e.g. tracking training through performance evaluations)</p> |

| | |
|---|--|
| Antitrust concerns-handling system | <p>The Organization's compliance program should include a system of handling compliance concerns including antitrust concerns (for example a "whistleblower" line or "help line"), including means to identify, classify, store and investigate such concerns after seeking antitrust advice.</p> <p>The compliance concerns-handling system should include appropriate whistle-blower protection safeguards, to protect employees who raise compliance concerns</p> |
| Investigations | <p>The Organization should adopt a written process for Organization compliance related investigations/audits.</p> <p>Investigators/auditors should be adequately qualified, trained and resourced, and should use external resources if required.</p> |
| Disciplinary action | <p>The Organization's antitrust compliance programme should affirm that disciplinary action would be taken internally against any staff who knowingly or recklessly infringes antitrust laws. The policy should make clear that the Organization would not indemnify those employees if personal criminal fines were imposed against them in a final decision.</p> |
| Antitrust due diligence | <p>The Organization will exercise due diligence and undertake all appropriate checks when:</p> <ul style="list-style-type: none"> - Hiring new employees in commercial or management roles - Acquiring companies or entering into pre-existing JVs to ensure that the employee or business concerned has not engaged in antitrust violations. <p>In the case of a business that has previously been found guilty of engaging in antitrust violations, the Organization will exercise due diligence to ensure suitable controls are in place in the business to avoid a recurrence, including ensuring that from closing of the transaction, the business adopts the Organization's Antitrust Compliance programme (or in the case of a Joint Venture, that the JV adopts an equivalent programme).</p> |
| Monitoring | <p>The Organization must regularly evaluate its own performance and its approach to ensure they are appropriate to manage the antitrust risks faced by the business.</p> <p>Periodically an independent review of the antitrust compliance programme processes and controls must be undertaken to ensure that the antitrust compliance programme remains best practice and fit for purpose. The reviewer must be suitably independent, qualified and experienced in antitrust and compliance matters to review the programme effectively.</p> |
| Continuous improvement | <p>The Organization must track all feedback on the programme, including feedback on training and processes, internal audits and independent reviews, and must put deal appropriately with any deficiencies in the programme.</p> <p>The Organization will monitor "best practice" in antitrust compliance programmes (through benchmarking and other means) and will introduce measures consistent with best practice to improve its programme.</p> |

Annex 2: Examples of risk registers

| ACTIVITY/ RISK | INHERENT RISK | | | CURRENT CONTROLS | | | | | | RESIDUAL RISK | | | Deep dives and findings | Post assessment actions |
|---|-----------------|--|---------------|---------------------------------------|---------------------------|---------------------------|---------------------|--------------------------------|----------------------------------|-----------------|---|-------------|----------------------------------|-------------------------------|
| | Impact (1-4) | Likelihood (1-4) based on preliminary review | Gross risk | CONTROL 1: Tone from the Top | CONTROL 2: Training | CONTROL 3: Guidance | CONTROL 4: Other | CONTROL 5: Legal support | CONTROL 6: Cascade process | Impact (1-4) | Likelihood (1-4) reflecting control effectiveness | Net risk | | |
| Activities expressly prohibited under Code of Conduct | | | | | | | | | | | | | | |
| Cartel activity including through industry associations | 4 | 4 | 16 | | | | | | | 4 | 4 | 16 | | |
| Improper sharing of confidential information | 3 | 4 | 12 | | | | | | | 3 | 1 | 3 | | |
| Other activities that imply antitrust risks | | | | | | | | | | | | | | |
| Resale price maintenance | 3 | 4 | 12 | | | | | | | 3 | 2 | 6 | | |
| Abuse of dominant position | 3 | 3 | 9 | | | | | | | 3 | 3 | 9 | | |
| Territorial restrictions | 3 | 3 | 9 | | | | | | | 3 | 1 | 3 | | |
| Unique local activity | 3 | 3 | 9 | | | | | | | 3 | 1 | 3 | | |

| RISK DESCRIPTION | RISK CONTEXT | | | | Description of the risk | | | | | | | | | | | | | | | |
|------------------|------------------|------------|--------|---------------|---|------------|--------|---------------|--------|------------|--------|---------------|--------|------------|--------|---------------|--|--|--|--|
| | RISK CONDITION | | | | What is the current condition of the risk (as at Q1)? | | | | | | | | | | | | | | | |
| | RISK CONSEQUENCE | | | | What is the worst case scenario if the risk is not addressed? | | | | | | | | | | | | | | | |
| RISK RATING | Q1 | | | | Q2 | | | | Q3 | | | | Q4 | | | | | | | |
| | Impact | Likelihood | Trends | Acceptability | Impact | Likelihood | Trends | Acceptability | Impact | Likelihood | Trends | Acceptability | Impact | Likelihood | Trends | Acceptability | | | | |
| | | | | | | | | | | | | | | | | | | | | |

Annex 3: Example of a company's compliance investigation principles

Example: Integrated multinational oil and gas company

CONFIDENTIALITY: All investigations will be conducted in the strictest confidence at all stages from receipt of allegation to the conclusion of the Investigation. Confidentiality extends to the fact of the Investigation, the person(s) involved, the subject matter, the process followed, the materials or information gathered and the results of the Investigation. Those involved in investigative matters will not communicate any information to anyone that does not have a need to know.

IMPARTIALITY AND OBJECTIVITY: An investigation must be free of influence from personal opinion and bias. No one may be involved in the Investigation or decision-making process who has any vested interest in the result of the Investigation, has a close personal relationship with the Investigation Subject or could become an Investigation Subject, or may be responsible for failure to take reasonable steps to prevent or detect the alleged violation (e.g. a Line Manager). Conflicts or potential conflicts of interest must be raised promptly. If the conflict or potential conflict cannot be adequately managed to protect the integrity of the Investigation, then the individual must withdraw from the Investigation Team and a suitable replacement be found.

PERSONAL AND BUSINESS INTEGRITY: Investigators will conduct themselves and their Investigations with integrity, honesty, fairness and diligence and in accordance with the Code of Conduct, these Investigation Principles and the Law. An Investigator must treat everyone involved with respect. Improper, illegal, unethical or unprofessional behaviour will not be tolerated.

COMPETENCE: Training in investigation requirements and skills, including knowledge of these Principles is a prerequisite to performing the role of Investigator. This applies equally to Business and Functional staff, whatever their other qualifications may be. Where specialist competence is required, the person responsible for assigning the Investigation team must locate the resources needed.

TIMELINESS: While investigations vary in complexity and duration, all must be carried out promptly, where possible this should be no longer than is reasonably necessary given the Investigation scope.

PROTECTION FROM RETALIATION: All companies in this group are required to protect anyone who makes a Code of Conduct Compliance Incident allegation in good faith, and those who participate in or conduct an Investigation, from retaliation. Investigators will advise all employees and others they interview of this commitment, and report any perceived retaliation based on participation in an investigation.

Annex 4: Trade association due diligence

| Area to Review | What to do | How to use this information/Questions to ask |
|-------------------------------------|--|--|
| Size and scope of membership | Find out how many companies are members of the association (and of committees/subgroups as appropriate). Check the work of the committees, sub-committees and working groups of the Association. | If the association (or committee/subgroup) is very small (5 or fewer members) the risk of collusion is higher than in a larger organization. Are all the committees/sub-committees appropriate: for example “marketing” committees (or sub-committees/work groups) would be likely to involve high-risk discussions. |
| Formal Constitution | Find out exactly what the trade association is constituted to do. The trade association should have a formal constitution which should recognize the need to comply with antitrust laws. | Is there a formal constitution? Does it recognize the need to comply with antitrust law? Are there any sub-committees? If so, what do they discuss and are they appropriate? (marketing or sales committees should raise a red flag). |
| Entry criteria | Find out what the criteria for entry are. | Is it open to all or is it restricted entry? Entry criteria which are not objective justifiable will themselves cause antitrust issues for the trade association and its members. |
| Website | Check if the trade/industry association has a website and whether it has a members'-only or a password protected area. Review the content of the website/members'/protected area. | Is the content appropriate? Does it comply with antitrust law? <ul style="list-style-type: none"> Are prices <u>or any elements of price</u> (including pricing mechanisms, credit terms, rebates, promotions, surcharges, freight rates or differentials etc.) listed on the site? Is there any evidence that granular (disaggregated) or current or future information on prices, market shares, customers or volumes is being exchanged? Is there a list of “approved” customers or suppliers? |
| Legal Advisor | Check if the country antitrust agency recommends a legal advisor to attend trade association meetings and social events. | If necessary/advisable ensure that a lawyer is present (this does not necessarily have to be a Company lawyer). |
| Agenda | Check that any formal meetings of the association and its committees use an appropriate agenda. Check topics on the agenda. Are they appropriate or could any of the topics give rise to antitrust risk? | Is there an agenda? Agendas, with inappropriate or vague topics e.g. “any other business” (or “AOB”) should be rejected and Company staff should not attend the meeting unless the agenda item is dropped or amended. |
| Minutes | Ensure that minutes are produced for formal meetings. Check with Company attendees that minutes are accurate. | Are there minutes for formal meetings? Are they accurate? Do they contain evidence of inappropriate discussions? Do they contain evidence that the Company staff member followed the Company policies if appropriate? |
| Social events | Ask about the frequency and location of social events. | While there is nothing inherently illegal in attending industry social events, very frequent industry social events or social events in unusual places may indicate that inappropriate business matters are being discussed. |

Links

| | | |
|--|---|---|
| <i>Internal Control: Integrated Framework</i> (and the 2011 revision) | Committee of Sponsoring Organisations of the Treadway Commission | http://www.coso.org/documents/coso_framework_body_v6.pdf |
| <i>Bulletin on Corporate Compliance Programs</i> (27 September 2010) | Competition Bureau of Canada | http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf |
| <i>Sarbanes-Oxley Act</i> | Cornell University Law School | http://www.law.cornell.edu/uscode/text/15/chapter-98 |
| <i>Compliance matters: What companies can do better to respect EU competition rules</i> | European Commission | http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD3211985 |
| International Chamber of Commerce | ICC | http://www.iccwbo.org |
| <i>ICC Guidelines on Whistleblowing</i> (2008) | ICC Commission on Corporate Responsibility & Anti-corruption | http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/corporate-responsibility-and-anti-corruption/whistleblowing/ |
| <i>International Financial Reporting Standards</i> | IFRS Foundation | http://www.ifrs.org |
| <i>Promoting Compliance with Competition Law</i> (2011) | OECD | http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf |
| Article: <i>CCI Holds Round-Table Meeting with Top Corporates, Emphasis Competition Compliance for Good Corporate Governance</i> | Press Information Bureau Government of India | http://pib.nic.in/newsite/erelease.aspx?relid=91809 |
| <i>A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs</i> by Joseph Murphy | Society of Corporate Compliance & Ethics | http://www.corporatecompliance.org/Resources/View/ArticleId/349/-A-Compliance-Ethics-Program-on-a-Dollar-a-Day-How-Small-Companies-Can-Have-Effective-Programs-Free.aspx |
| <i>Using Incentives in your Compliance and Ethics Program</i> by Joseph Murphy | Society of Corporate Compliance & Ethics | http://www.corporatecompliance.org/Resources/View/smid/940/ArticleID/814.aspx |

| | | |
|--|---|--|
| <i>UK Bribery Act</i> | United Kingdom Ministry of Justice | http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf |
| <i>Drivers of Compliance and Non-compliance with Competition Law (May 2010)</i> | United Kingdom Office of Fair Trading | http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft1227.pdf |
| <i>Economic discussion paper: OFT 773 Predicting cartels</i> | United Kingdom Office of Fair Trading | http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft773.pdf |
| <i>Guidance Document 1341: How your business can achieve compliance with competition law</i> | United Kingdom Office of Fair Trading | http://oft.gov.uk/shared_offt/ca-and-cartels/competition-awareness-compliance/oft1341.pdf |
| <i>Reward for information about cartels</i> | United Kingdom Office of Fair Trading | http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/cartels/rewards |
| <i>FCPA guidance</i> | United States Department of Justice | http://www.justice.gov/criminal/fraud/fcpa/guide.pdf |
| <i>Guidelines on FCPA compliance: A Resource Guide to the U.S. Foreign Corrupt Practices Act</i> | United States Department of Justice | http://www.justice.gov/criminal/fraud/fcpa and http://www.sec.gov/spotlight/fcpa.shtml |
| <i>Sarbanes-Oxley Rulemaking and reports</i> | United States Securities and Exchange Commission | http://www.sec.gov/spotlight/sarbanes-oxley.htm |
| <i>Federal Sentencing Guidelines</i> | United States Sentencing Commission | http://www.ussc.gov |

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Notes

About the International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the 20th century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rule setting, dispute resolution, and policy advocacy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice. ICC also offers specialized training and seminars and is an industry-leading publisher of practical and educational reference tools for international business, banking and arbitration.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on relevant technical subjects. These include anti-corruption, banking, the digital economy, marketing ethics, environment and energy, competition policy and intellectual property, among others.

ICC works closely with the United Nations, the World Trade Organization and intergovernmental forums including the G20.

ICC was founded in 1919. Today its global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. National committees work with ICC members in their countries to address their concerns and convey to their governments the business views formulated by ICC.



International Chamber of Commerce

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