

Managing competition law risk

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What is competition law?

- Anti-competitive agreements
- Sharing confidential information
- Abuse of a dominant position
- Illegal State Aid
- Public procurement
- Mergers/Joint Ventures

How do the authorities find out?

- Complaints from third parties
- Whistle-blowing
- Dawn raids
- Covert surveillance
- Market investigations

Risks

- **Competition**
 - Very large fines
 - Damages
 - Unenforceability of agreements
 - Criminal liability for individuals
 - Directors' disqualification
 - Business disruption and damage to reputation
 - Extradition to US
- **State Aid:** repayment of aid and court actions
- **Procurement:** complaints to European Commission, contract could be set aside, possible court actions for damages
- Competition authorities identify who is the “successor” undertaking

What if you are investigated?

- Dawn raid - crisis management
 - Do cooperate
 - Do contact your lawyer
 - Don't destroy documents
- After raid/investigation – carry out audit
- Assess liabilities
- Decide what to do
 - Nothing
 - Fight any allegations
 - Apply for 'leniency' (e.g. Virgin)
 - Training and compliance programme to reduce risks

Compliance - training

- Raise awareness/understanding of risks
- Competition law manual
- Should be tailored to problems, the business and the people in the organisation, e.g.
 - Management: big picture
 - Legal staff: what to do in event of dawn raid, document retention, legal privilege
 - M&A staff: merger control rules
 - Sales staff: anti-competitive agreements and dominance
 - Procurement staff: public procurement rules
- Face to face seminars vs. online training

Compliance - structure

- Code of Conduct
 - after being trained staff sign up to Code
 - infringements can lead to dismissal, loss of pension etc
 - staff must inform compliance officer of potential problems
- Employment contracts
- Help desk, reporting, clearance procedures
- Monitoring and auditing
- Mock dawn raids

Compliance - difficulties

- Compliance will be difficult if:
 - Management doesn't/doesn't fully support it
 - “we're not fans of competition law”
 - Culture in organisation does not change
 - Difficult issues as regards sacking employees (Exxon is good example of zero tolerance, other companies have a more liberal approach to transgressors)
 - Complacency sets in
 - Infringements go 'underground'
 - Incentives are still skewed towards infringement, e.g. sales bonuses
- Bottom line: complicated legal solutions won't work if the organisation and key people don't buy into the need for change

Conclusion

- Competition law risks are increasing
- Liabilities can be very large
- Risks can be managed
- Key is to manage both the legal risk and the organisational risk
- Solutions won't work if the organisation and key people don't buy into the need for change