

EFFECTIVE COMPETITION COMPLIANCE AUDITING



WHY CONDUCT A COMPLIANCE AUDIT?

→ Competition investigation commenced against your company

Perhaps the competition authorities have conducted a “dawn raid” of company premises (and even homes of company executives) or you have received a Statement of Objections from a competition authority alleging that your company has infringed competition law. In such circumstances a compliance audit can help to craft your defence.

→ Competition investigation anticipated

Where other companies in the sector have been subject to dawn raids, and/or it is believed that another company has made a leniency application in relation to its own conduct and conduct of others (perhaps including your company), or you have received a request for information from a competition authority indicating that it is concerned that your company may be involved in an infringement of competition law. In such circumstances, a compliance audit can help to determine the extent to which your company may be involved in conduct that is anti-competitive and unlawful.

→ Internal investigation or complaint gives reason for concern

Many companies encourage individual employees to report conduct that contravenes company policies - including competition compliance policies. Whistle-blowing may trigger the need to conduct a compliance audit. In other circumstances, concern may arise from an internal investigation into a single incident or a particular course of conduct, indicating that an audit should be carried out.

→ As part of regular or special testing for compliance effectiveness

Some companies run ongoing global audit programmes involving systematic auditing of each existing business unit and/or for due diligence purposes immediately after the acquisition of any new business.

→ Testing effectiveness of control mechanisms

Following the introduction of control mechanisms designed to prevent initial or continued infringement (for example, new compliance training requirements or fail-safe management protocols), it will be necessary to test the effectiveness of the new measures. A limited-scope audit is suitable for this purpose.

SCOPE OF AUDIT

The scope of the audit should be set by reference to the underlying reason for its conduct. In setting the scope, have regard to:

- What type of documents will be reviewed - electronic as well as hard copy documents?
- Whose documents will be reviewed?
- Where are those people and their documents located?
- What will be the period of review: the full limitation period or a shorter/longer period?
- What search terms should be used for the review of electronic data?
- Will employees be interviewed?
- What other fact-finding techniques should be used?

Following, we highlight some of the issues to be dealt with in establishing the audit scope.

WHY CONDUCT A COMPLIANCE AUDIT? (continued)

→ Wide geography?

Where the documents and people being audited are located at more than one site and, particularly, where they are located across a number of countries, this raises issues in terms of document collection and retention as well as the mechanisms for review. Tools available for making this process easier range from on-line secure data-rooms to more sophisticated document collection and search tools available from specialist forensic consultants.

→ Finding a “needle in a haystack” in a large volume of documents

There are advantages in using third-party software providers to carry out the initial selection of documents. If properly managed, the use of such tools may reduce the cost of the audit. If the audit involves substantial numbers of electronic files, it may be more efficient and cost-effective for the review team to use a forensic search tool to identify potentially relevant documents.

→ The need for discretion

In some instances, it may be desirable for the audit to be carried out in a manner that keeps it confidential

even within the company. Proper use of procedures and technology can be used to gather documents without leaving a trace that the search has been carried out. The search can be conducted without the knowledge of the custodian of the documents or the authorities. In most cases, it will be important not to create documents that must be retained under the company's document retention system, or that may not be privileged. Audit protocols should be designed so that no new documents are created.

→ Categories of documents to be reviewed

The following is a list of the types of documents that should be included in most compliance audits. Since each audit will be different, because of the individual circumstances of the company and the underlying reasons for conducting the audit, you should treat these as examples only:

- All documents relating to trade association activities (list of associations, purposes, constitution, by-laws, agenda, minutes, records of attendance)

- All documents (including calendars and diaries) relating to or revealing contacts with competitors outside trade associations
- All documents relating to pricing decisions and price changes
- All documents concerning contacts with customers or suppliers which include a reference to pricing or that contain restrictions on territory and/or customers
- Any distribution agreements (if relevant)
- Business plans

→ Privilege issues

It is important to ensure that the audit is conducted in a manner that preserves privilege in relevant documents and that potentially problematic non privileged documents are not created during the audit process. In particular, no new documents (including review notes) should be made by in-house counsel if that document may have to be disclosed in a country where no in-house privilege is available or reliable.

→ Cost control issues

An audit may be done on a small scale - for example involving the review of documents and email correspondence of just a few staff members in one business division as a one-off exercise, perhaps in response to concerns raised by an employee or as a limited review of the effectiveness of control procedures. At the other end of the scale, audit may be a comprehensive global exercise, conducted in the context of an investigation by a competition authority or as part of an ongoing compliance policy. However, in every case, it is important to balance the need to ensure that the audit is effective against the need to control the costs of running the audit (management time, external counsel costs, and the use of economists and forensic consultants). For a small-scale audit, costs may be most effectively managed through the use of in-house resources for preparation and initial document review. For larger scale audits, costs may be more effectively managed by the use of forensic search technology.

CONDUCT OF THE AUDIT

→ Brief senior management

It is important that senior management understand the importance of the audit and that they are able to manage the process with their internal teams. They should be briefed in advance of the audit on both the reasons for the review and the outcomes it will produce. The briefing should be carried out by senior legal counsel or very senior management so that the management team understands its importance to the company.

→ Educate the review team

This should be done at two levels:

- At the outset, brief senior outside counsel and other professional advisors on the nature of the business in order to allow them to assist with establishing the scope of the audit.
- Secondly, before starting to review documents, the review team should also be briefed on the business so they are more quickly able to understand the meaning of the documents being reviewed and better focus the audit.

→ The stages of the audit process

- **Stage I:** This should comprise a review of the documents that have been gathered by the company's in-house resources or that outside counsel has pre-identified as likely to give rise to concerns. The document review may itself consist of two steps:
 - (a) an initial identification of documents that raise questions or which respond to a particular search terms, and
 - (b) a more detailed review by outside counsel
- **Stage II:** Interviews with selected employees. The selection will depend on the underlying reasons for conducting the audit. These are usually conducted by senior outside counsel, sometimes together with a member of the in-house legal team. The purpose of the interviews are to investigate further the meaning of the documentation reviewed but also to ask more general or more specific questions about the conduct of the company, and to determine the culpability of any individual employee for any non compliant conduct.

OUTCOMES

→ No issues identified

Where the audit reveals no evidence of any competition law infringement, this will usually mean that compliance training and fail-safe protocols have been effective and that no remedial action is required. Nevertheless, to ensure that no issues arise in the future it will continue to be important to train employees on compliance issues on a regular basis and to update them on any changes in the law that may affect their conduct in the future. In addition to regular audits to test for continued compliance, audits may also be necessary where relevant circumstances change (for example, a new competition law is introduced or an existing one is changed in a relevant country, a new business is acquired, or the nature of company conduct changes).

→ Suspicion of infringement

Sometimes the audit may raise concerns about a possible serious infringement, without revealing conclusive evidence of the infringement. In that case it is prudent to consider:

- *The engagement of forensic consultants:* Particularly where the initial review has been carried out on a small scale or by using manual search and review methodology

- *The engagement of economists:* Economists might be engaged to test for the impact of the suspected infringement and/or to examine whether the suspected infringement might in fact merely be a reflection of market conditions

→ Evidence of non-serious infringement

Evidence of infringements that are not cartel-related should enable you to put in place sufficient control protocols to ensure that no further infringements occur. This may range from a renewed compliance programme, upgraded training, or the initiation of fail-safe management control procedures.

→ Evidence of serious infringement

Where the audit reveals evidence of a serious infringement of competition rules, it is necessary to take swift action on the selected response (such as an application for leniency and/or systems to ensure the conduct ceases). Again, if it is anticipated that the company will have to put forward a defence to the infringement - either because the audit has been conducted in response to an investigation by the competition authorities or because of the risk of a complaint being made to the authorities - it may be appropriate to engage economists to assist in the preparation of that defence.

RESPONSE TO FINDINGS

→ Consider strategy towards competition authorities

→ Consider civil damages exposure

→ Put in place disciplinary measures

→ Put in place control measures

- Fail-safe SOPs to prevent infringement
- Redesign of compliance materials and training
- Design trigger event to initiate test for non compliance (e.g., price stability)



MONITOR COMPLIANCE = COMPLIANCE AUDITING!

SUMMARY OF AUDIT PROCESS

TIMELINE	EVENT	IN-HOUSE COUNSEL	BUSINESS CLIENTS	EXTERNAL COUNSEL
DAY 1 MINUS TWO WEEKS	Initial review and compiling of documents	✓		
DAY 1 MINUS ONE WEEK	Review of documents and assembly, secure storage	✓		
Review Week DAY 1	Market visit	✓	Customer Relations	✓
	Review of documents	✓		✓
DAY 2	Review of documents and interviews	✓	✓	✓
DAY 3	Review of documents and interviews	✓	✓	✓
	Drafting presentation			✓
DAY 4	Review of documents and interviews	✓	✓	✓
	Drafting presentation			✓
	Interview with local external lawyer	✓		✓
DAY 5	Presentation of results	✓	✓	✓

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