
DISCLAIMER

This quick guide is published as part of the advocacy programme of the Competition Commission of India (the Commission). Its contents should, in no way, be treated as official views of the Commission. Readers are advised to carefully study the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, and seek legal advice, wherever necessary.

COMPETITION COMPLIANCE PROGRAMME FOR ENTERPRISES

(A Suggested Framework for Compliance of the Competition Act, 2002 by Enterprises)

COMPLIANCE ARRANGEMENTS BY ENTERPRISES

Q.1 What is meant by a Competition Compliance Programme (CPP)?

Ans. Compliance involves the active efforts on the part of an enterprise to comply with the provisions of the Act. When the enterprise takes certain necessary and concrete steps to ensure that knowingly or unknowingly it does not infringe the provisions of the Act, it can be stated to maintain a 'Competition Compliance Programme'.

Q.2 What are the objectives of Competition Compliance Programme?

Ans. The Competition Compliance Programme should have the following three main objectives:

- (i) Prevent violation of law, i.e. the Competition Act 2002 and all Rules, Regulations & Orders made there-under.
- (ii) Promote a culture of compliance, and
- (iii) Encourage good corporate citizenship

Q.3 What are the advantages of maintaining a Competition Compliance Programme?

Ans. Broadly, Competition Compliance Programme offers the following advantages:

- Inculcates a culture of compliance throughout the organization which in turn can be a business enhancer offering positive benefits to business

- Provides enterprises with a competitive advantage by enabling them to detect any violation at an early stage and take corrective measures to their advantage
- Assists enterprises to enhance reputation and build goodwill. Enterprises that contravene the provisions of the Act may suffer damage to their reputation, damaging years of careful marketing and brand development
- Obviates or reduces the costs and negative effects of litigation and regulatory intervention.
- Establishes enterprises as having social conscience, economic ethics and national interest at heart.
- The existence of a strong Compliance Programme reflecting the eagerness of the management to comply may temper the severity of the punishment that may be meted out for violation.

Q.4 What are some of the major costs of non-compliance?

Ans. Non compliance can be very costly for enterprises. The law vests the Competition Commission with adequate powers of investigation and decision. The chances of conviction are, therefore, high for non compliant enterprises. The consequent cost to the enterprise may be one or more of the following:

- Damage to reputation that has been built at very high cost
- Heavy fines: Ten per cent of the average of the turn over for the preceding three years of violation, for anti-competitive agreements and abuse of dominance. In the case of a cartel there are provisions for imposing on each member of the cartel a monetary penalty of up to three times of its profit for each year of the continuance of such cartel or ten per cent of its turnover for each year of the continuance of such cartel, whichever is higher
- Abuse of dominance can also result in division of the dominant enterprise being ordered by the Commission
- In case a violation is determined by the Commission, affected parties can approach the Competition Appellate Tribunal (CAT)

for compensation, which can be very large depending on the type of violation involved

- Drain of resources in handling competition law infringement cases
- Loss of business as potential customers / investors / joint venturists may be repelled

Q.5 What are the benefits of compliance with Competition Act?

Ans. The benefits of compliance include the following:

- Helps avoid fines or mitigate the level of the fine
- Potentially void agreements can be avoided
- Potential action for compensation can be avoided
- A number of indirect costs, that may otherwise be avoidable, can be avoided
- Helps benefit from 'leniency' provisions in the Act
- Helps increased awareness on competition law among employees

Q.6 What are the elements of a Competition Compliance Programme?

Ans. A well formulated and adequate compliance programme should address the business realities faced by the enterprise concerned.

The basic issue is its situation in the market – whether it is a dominant player, going by the definition in the Act. A dominant enterprise needs to be particularly cautious about its behaviour in the market as the law explicitly prohibits certain types of behaviour by dominant enterprises. The law also recognizes group dominance. Every dominant enterprise should make it a point to educate its employees, especially senior executives, about the type of behaviour that should be carefully avoided.

Enterprises that have entered into agreements or are in the process of negotiating agreements, especially agreements with competitors should take precautions to ensure that they remain on the correct side of law.

Enterprises that are members of industry/business associations need to have a clear policy regarding participation in association meetings and the need to keep the legal counsel in the picture when there is doubt.

A Compliance Programme should be implemented to ensure that it is of practical use on a day-to-day basis. A sophisticated legal treatise may not be the appropriate document for the employees who look after the work on a day to day basis and may not be legally trained.

Compliance Programmes will have to be custom-made for each enterprise and an “off the shelf” programme is very unlikely to serve the purpose.

Practical guidelines should be made available to reflect the market position of the company.

Some of the areas that may be covered in Guidelines are:

- Types of external discussion that will always be prohibited (e.g. about pricing)
- Guidelines on the information that can be legitimately exchanged and what constitutes confidential or commercially sensitive information
- Guidelines for the proper conduct of meetings with competitors (or suppliers/customers)
- Guidelines on direct and indirect price fixing (including re-sale price maintenance, where suitable)
- Guidance on how to deal with complaints from customers and/or suppliers; and
- Guidance for dominant companies on the care to be taken while dealing with customers/suppliers
- Practical examples of ‘Dos & Don’ts’, along with real-life examples from the company’s business would turn out to be very effective.

Q.7 What are the essential features of a Competition Compliance Programme?

Ans. The essential features of a Competition Compliance Programme are:

- Explicit statement of the commitment of senior management to the Compliance Programme
- Availability of an Enterprise's Compliance Policy
- Training and education of employees
- Compliance manual
- The main principles of the compliance policy should be set out in simple and plain language that is easily understandable.
- An effective Compliance Policy may include seeking a written undertaking from employees to conduct their business dealings within the compliance framework and taking disciplinary action against employees whose actions result in an infringement of the law.
- The relevant procedures should enable the employees to seek advice on whether a particular transaction complies with competition law and report activities that they suspect infringe the law. These practices should be included in the "best practices" norms of every enterprise.

The enterprises may consider the following as essential elements for devising an effective Compliance Policy:

- An overarching commitment to comply with the Competition Act and regulations, orders and directions issued by the Government and Competition Commission of India
- Placing a duty on all employees and directors to conduct their business dealings within this overarching policy and seeking a written undertaking from them to this effect
- A commitment to take disciplinary action against employees/ CEOs/directors/proprietors/partners for intentionally or negligently involving the company in an infringement of the provisions of the Act.

Q.8 How can the commitment of Senior Management be made explicit?

Ans. The support of Senior Management must be visible, active and regularly reinforced. Commitment of senior management must be driven from the topmost level to take responsibility for its implementation. The element of commitment can best be achieved in a number of ways, including:

- A personal message to staff from the most senior officials in the enterprise stating their commitment to the compliance programme
- Referring to the compliance policy in the company's 'Mission Statement' or Code of Conduct and Ethics
- Making adherence to the programme one of the overall objectives of the enterprise
- Designating a member of senior management team to take overall responsibility (Compliance Officer) for ensuring that the compliance programme is :
 - properly designed
 - regularly monitored
 - effectively implemented
 - reported upon at regular intervals to the Board

Effectiveness of a Compliance Policy will be enhanced if it is linked to an enterprise's human resource (HR) and disciplinary policy. This would prompt employees to attach seriousness to the compliance issues. Besides, this would reflect the seriousness of the management to compliance, as far as the competition authority is concerned. Different levels of infringements can be dealt with by increasing levels of sanction, resulting ultimately in dismissal for the most serious infringement.

Competition compliance can also be built into the existing staff appraisal procedures, so that employees are regularly asked to sign a form to confirm that they are not aware of any existing compliance breaches. This will help detect any anti-competitive practice that may exist at early stage.

Most of the enterprises have a policy in place for retaining financial

information for accounting and tax purposes. Documents relevant to prove the compliance of the enterprise and its employees with competition law provisions will have to be retained for adequate period to save the embarrassment of not being able to defend in case of allegation related to infringement.

Q.9 What is the role of training in a Competition Compliance Programme?

Ans. An enterprise should consider having an active training programme that includes instruction by knowledgeable professionals having expertise and experience in corporate compliances. The training should be as practical as possible, including case studies drawn from the enterprise's actual experiences. It should also highlight the consequences of violations.

The objective is to enable all officers and employees to develop capabilities to recognize and identify law-violating activity related to their business. Compliance education must contain sufficient practical explanation/examples on difficult legal concepts and issues. It is, therefore, advisable that enterprises integrate compliance education as part of overall training and education programme of the enterprise.

It is advisable for an enterprise introducing the Compliance Programme for the first time to make the compliance education mandatory for all officers and employees, in respect of the enterprise's compliance policy, purpose of the programme, and compliance measures.

Those enterprises which are effectively operating and implementing the Compliance Programme should regularly revise the programme rather than repeating the same year after year, keeping in view the :

- changes in business environment
- market share
- competition in relevant market
- changes in competition regime

Preparing the employees for investigations

When faced with an inquiry, investigators will interact with the employees responsible for the task. However, employees, in general, should be aware of the possibility of such investigations. A 'dawn raid', for example, is a possibility when the Competition Commission, is cracking down on cartels. Every employee in the organization should have basic knowledge about the law so that he/she able to react suitably when faced with investigating team all of a sudden in the office premises.

Identify employees and divisions at risk

It is necessary to identify the employees and divisions that are likely to be exposed to competition law risks. These can normally be:

- those doing sales and marketing;
- anyone having direct contact with competitors
- those engaged in setting up and operation of distribution arrangements
- strategists dealing with combinations

Engagement of senior management is a must for the compliance programme to be taken seriously by employees.

Confidentiality

Unless confidentiality is assured employees may not turn up to inform about alleged infringement, especially if known people are involved. Contacting the Compliance Officer to inform verbally in the first instance may work towards confidentiality. Documentation has to follow and action taken report also will have to be documented so as to ensure that the issue has not been ignored or tacitly approved.

Q.10 What is active risk management (ARM) and why is ARM approach to compliance important?

Ans. Compliance Programme is aimed at avoiding or minimizing the risk of infringement /non compliance, with all its consequences for the enterprise.

However, law evolves, procedures and regulations are regularly streamlined and views and outlook on issues change. A static policy towards risk management through Compliance Programme may not serve the purpose; it may even turn out to be counterproductive.

A dynamic environment necessitates active risk management. What is consistent with the competition law yesterday may be declared inconsistent today; or the conditions under which behaviour is considered consistent today may become consistent only under different conditions tomorrow. Therefore, an active risk management is called for. This is all the more important in the case of agreements.

ACTIVE RISK MANAGEMENT

The case of agreements

- It is important to keep a record of all the agreements signed by the company and assessed for competition compatibility. The risk from an agreement being found null and void by the Commission may be very costly for the enterprise
- There should be a time table for review of the status of the agreement from competition angle. There should be a system for reminding the official concerned about this. The responsibility could be entrusted to a senior executive of the commercial division since the risk is most felt by the commercial wing
- Marketing/sales/procurement department should liaise with the legal department. Every agreement on record should be subjected to competition review every three to five years. For very large enterprises such review could be on yearly basis
- When such active risk management is not found feasible in-house, assistance of specialized external agencies should be sought

An effective Compliance Programme may also include a system of audit. At the time of the start of the compliance programme an internal audit of procedures and documents, including email, may be introduced. This may be repeated at intervals to ascertain if the policy is working. The nature of such audit will have to be tailored to the nature of the enterprise concerned.

While auditing the procedures, documents and emails of each and every employee may be a herculean task it would be always possible to identify those individuals who are most at risk and to conduct an audit of a “snap shot” of their e-mails on a given day. External legal advisers could be employed to do such auditing to avoid embarrassment to the employees concerned while auditing their correspondence/e-mail.

Q.11 Is it essential to evaluate and review the Competition Compliance Programme?

Ans. Enterprises are advised to ensure that the Compliance Programme represents current best practices, remains relevant, comprehensive and effective. Periodic evaluation of Compliance Programme is suggested to keep it relevant. The process may include evaluation of individual employees’ knowledge of law, policy and procedures. Adherence to compliance policy could also be used as one of the criteria for individual’s and department’s/division’s performance appraisal. It is important to ensure that the evaluation process remains as transparent and open as possible.

The evaluation should also include as to whether the Compliance Programme achieves expected results, and whether the system is appropriate and effective. The evaluation findings should be appropriately reflected in the overall operational system, including compliance monitoring, education programs, and the compliance manual.

It is worth emphasizing that evaluating implementation of Compliance Programme depends on motivation for compliance, impetus of

leadership, distribution of authority and responsibility, support of human and physical resources, and communication within the enterprise. The enterprises are, therefore, advised to set evaluation criteria conforming to their compliance policy.

Q.12 What are the performance indices for evaluation of Competition Compliance Programme?

Ans. The enterprises may also consider devising performance indices to evaluate the Compliance Programme. An illustrative list of performance indices may include:

- How well are officers and employees aware of the chief executive's determination and commitment as regards compliance?
- Do officers and employees have a clear understanding of what kind of conduct violates competition law?
- Do officers and employees properly recognize the 'dos and don'ts' of preventing violations of law?
- Is compliance accountability accurately perceived at all levels of management?
- To what extent do the enterprise's business practices conform to the provisions of competition law and other related regulations?
- How high is the enterprise's level of conformity compared to other enterprises engaging in the same business activities?
- How many violations took place and how serious were they?
- What kind of corrective action was taken against those violations, and how effective have they been?
- How often internal monitoring is carried out and has the monitoring proved effective in preventing and detecting violations of law?
- To whom and to what extent is compliance education provided, and how effective are education programs?

Q.13 What care should be taken by executives/employees while dealing with Trade Associations?

Ans. Executives/employees of enterprises should avoid discussing the following topics while dealing with trade associations and/or with competitors:

- Past, current or future prices
- What constitutes a 'fair profit level'
- Pricing policy and actual costs of individual enterprises
- Possible increase or decrease in prices
- Standardization or stabilization of prices
- Bidding prices for projects
- Collusive tendering (bid rigging)
- Standardization of credit and trade terms
- Control of production
- Division or allocation of markets
- Select customers to deal or not to deal because of the above reasons

Q.14 What is the role of Compliance Officer?

Ans. In order to ensure effectiveness of compliance programme, it is desirable that a Compliance Officer with appropriate delegation of authority be appointed to enforce the Compliance Programme.

- The Compliance Officer should preferably be an independent professional with expertise and core competency in compliance and compliance management.
- He should be a focal point and in charge of designing a program, motivating officers and employees, managing any accompanying administrative/ organizational issue, preparing compliance manual, and auditing compliance.

Q. 15 How is the Compliance Manual important?

Ans. To facilitate compliance, the enterprises should develop a

Compliance Manual and distribute it to their officers and employees as detailed guidelines for compliance with the provisions of the Act.

- The manual should incorporate the features set out above and contain up-to-date information regarding its business(es), its operational environment, and relevant competition regimes.
- It is necessary that the manual incorporates full, relevant and correct information and is properly distributed.
- The Compliance Manual should be developed, distributed and implemented under the overall supervision of Compliance Officer.
- In-charge(s) of Departments/Divisions should be put under obligation to inform the Compliance Officer of any changes in the business environment and market scenario that may have bearing on compliance, including the opinion of subordinates concerning the Compliance Manual.
- The Enterprises are advised to constitute a Compliance Committee comprising senior management, with ultimate responsibility of overseeing the Compliance Programme, including conducting periodic review of its effectiveness.

Competition Compliance Programme CHECK LIST

- Compliance Programme will have to be tailor-made for each enterprise, though number of elements will be similar
- Compliance Officer: Identify a senior management personnel to oversee the implementation and monitoring of compliance programme
- Regular and adequate training on points of law as well as in identifying potential violations
- Have a comprehensive compliance manual, intelligible to employees in general. It should contain useful illustrations
- Every enterprise should have a guidance or clearance procedure for situations where there may be doubt about possible course of action by employees for fear of violation of competition provisions
- Agreements will invariably have to be processed in consultation with the legal department to ensure that the provisions therein are consistent with the provisions of Competition Act, 2002. These should be reviewed periodically from the competition angle
- Familiarize the employees with a likely 'dawn raid'. In relatively large enterprises it would be useful to arrange mock 'dawn raid' to keep employees vigilant against possible violations
- Employees should be educated about the use of language while communicating, whether it be verbal or written. Special care should be taken to ensure that the language used in email communication is appropriate
- Ensure a proper system of recording/ minuting of meetings and other events that may serve as evidence of non-participation in anti-trust practices by the enterprise or its employees
- Compliance Programme should be suited to the situation in all countries where the enterprise is operating
- Active/dynamic risk management programme should be an essential element of the Compliance Programme
- It would be advisable to integrate the competition Compliance Programme into the overall compliance programmes of the enterprise



COMPETITION COMMISSION OF INDIA

Sh. Dhanendra Kumar

Chairperson,

E-mail: cci-dkumar@nic.in

Tel No. 91-11-26177175, 26701605,

Fax No. 26169278

Sh. H.C. Gupta

Member,

E-mail: cci-hcg@nic.in

Tel No. 91-11-26162110,

26701603

Fax No. 26103853

Sh. R. Prasad

Member,

E-mail: cci-ratneshwarp@nic.in

Tel No. 91-11-26162085,

26701613

Fax No. 26103859

Sh. P.N. Parashar

Member,

E-mail: cci-parashar@nic.in

Tel No. 91-11-26162097,

26701611

Fax No. 26162084

Dr. Geeta Gouri

Member,

E-mail: cci-geetagouri@nic.in

Tel No. 91-11-26162107

Fax No. 26162108

Sh. Anurag Goel

Member,

E-mail: agoel@nic.in

Tel No. 91-11-26162096

Fax No. 26162099

Sh. M.L. Tayal

Member,

E-mail: cci-tayal@nic.in

Tel. No. : 91-11-26107429

Fax No. : 91-11-26107428

Sh. S.L. Bunker, IDAS

Secretary,

E-mail: cci-bunker@nic.in

Tel. No. : 26701619

Fax No. : 26162097

Sh. K.K. Sharma, IRS

Director General,

E-mail: cci-kksharma@nic.in

Tel. No: 91-11- 26701680

Fax No. 26172895

Dr. Seema Gaur, IES

Adviser (Eco)

E-mail: seema.gaur@nic.in

Tel. No: 91-11-26102314

Sh. R.N. Sahay, IRS

Adviser (Eco)

E-mail: cci-rns@nic.in

Tel. No. 91-11-26701695

Sh. Amit Pradhan

Adviser (Law)

E-mail: cci-amit@nic.in

Tel No. 91-11-26701630

Fax No. 26102313

REGULATIONS NOTIFIED BY COMPETITION COMMISSION OF INDIA

- The Competition Commission of India (Procedure for Engagement of Experts and Professionals) Regulations, 2009; (No. 1 of 2009)
- The Competition Commission of India (General) Regulations, 2009 ; (No. 2 of 2009)
- The Competition Commission of India (Meeting for Transaction of Business) Regulations, 2009; (No. 3 of 2009)
- The Competition Commission of India (Lesser Penalty) Regulations, 2009; (No. 4 of 2009)
- The Competition Commission of India (Determination of Cost of Production) Regulations, 2009; (No. 5 of 2009)
- The Competition Commission of India (General) Amendment Regulations, 2009; (No. 6 of 2009)

Above regulations are available on the website of the Commission : www.cci.gov.in