

# WHY COMPLYING WITH COMPETITION LAW IS GOOD FOR YOUR BUSINESS

Practical tools for smaller businesses to improve compliance

**ICC SME TOOLKIT**

## What has competition law got to do with me?

Competition laws — also known as Antitrust or Trade Practices laws in some countries — are rules on how companies should compete in the markets where they operate. The purpose of these laws is to promote and safeguard undistorted and fair competition — and to punish business conduct that undermines innovation and harms consumers.

### As I run a small business, I don't need to worry about competition laws — right? ...Wrong!

**Most countries have competition laws that apply to all industries and all market players at every level of business — including small and medium sized enterprises (“SMEs”) such as your own business, and to sole traders.**

The way you, your management, employees and agents behave when doing business may result in your company infringing competition laws. This could expose your company and employees (including you) to heavy fines, reputational damage and litigation (such as lawsuits by those who matter most: your customers). In some countries you might face criminal penalties.

There are competition laws in over 140 countries. Regulators have ever-stronger enforcement powers: the news headlines make this impossible to ignore. Getting the basics right is vital! Even a very small company can have a competition law compliance policy or programme: it does not take much and really need not cost a lot.

**What it takes is commitment to do the right thing.** There are plenty of resources to help you: the practical suggestions in this ICC SME Toolkit are a good example. This SME Toolkit does not give you legal advice — you should get that from your lawyers. But it highlights **three key danger areas** to avoid and provides **practical tips** to get you started on your compliance journey.



**“It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you’ll do things differently.” –Warren Buffett**

## Compliance with competition law makes good business sense

Competition laws seek to create a level playing field so that vibrant, competitive and innovative markets can develop. Competition law compliance is about doing the “right thing” for your customers and competing fairly in the marketplace.

Getting things wrong affects the bottom line. Fines can be up to 10% of your business’ worldwide turnover for a single infringement, customers may sue you for damages if they’ve been affected by illegal practices, and individuals can have their reputations, and in some cases careers, destroyed. Compliance helps prevent or mitigate exposure.

## Competition law compliance puts you ahead of the game and helps you fight others who are not playing by the rules

By having a credible approach to competition law compliance, your company could enjoy:

- A stronger corporate culture and employee commitment to business integrity. This will enhance your reputation among existing and potential customers, and help you to recruit top talent.
- Increased confidence when faced with competition law issues in commercial negotiations — just knowing when it’s worth getting specialist legal advice can help you to compete more aggressively (but lawfully).
- Improved awareness of risks, leading to prevention and early detection of issues so you protect your company better.
- Comfort that it will be easier to sell a business with a solid record of competition law compliance: no purchaser wants to bear the risk of future liability for cartel or other anti-competitive activity!



## Three key danger areas under competition law

### 1. Cartels and Collusion:

These cover a large range of illegal arrangements between competitors, not just secret meetings in smoke-filled rooms or written agreements. A single conversation can be enough — see next page!

### 2. Restrictions in vertical agreements:

Agreements between companies at different levels of the supply chain (typically distribution agreements between suppliers and re-sellers) are known as “vertical” agreements.

If agreements seek to fix resale prices (“resale price maintenance”) or restrict where (or to which customers) a reseller or distributor can resell the product, those provisions may be illegal under local competition laws: you need to know what rules apply in markets where you operate.

### 3. Abuse of a position of dominance or market power:

A company with substantial market power (e.g. demonstrated by high market shares, usually > 40%) might be in a so-called “dominant position”.

Just being dominant is usually not illegal, but the misuse of market power can be. Examples of abuse — or misuse — may include refusing to supply customers or treating customers differently without good reason (unlawful discrimination). If you think you may have market power, get legal advice on what you can and cannot do.



## Cartels and Collusion

Cartels (and other forms of illegal collusion) are most likely to harm the competitive process, and particularly customers and consumers. Even informal agreements (so-called “gentlemen’s agreements”) and information exchanges with competitors may expose you to significant fines. Regulators can punish businesses without needing to show that you actually put the arrangement into effect. Make sure everyone understands and follows the rules. Competition laws generally prohibit the following:

- **Price fixing** — this occurs when competitors discuss prices they will charge their customers. This may include agreeing to offer or withhold any element of price, such as credit terms, rebates, surcharges and even promotions. In some cases even just sharing price information may be illegal.
- **Market sharing or customer allocation** — this is when competitors agree not to compete in certain geographic areas or for certain customers.
- **Bid rigging** — this occurs when competitors agree to alter the outcome of certain bids or tenders, e.g. by taking turns to offer high or low bids, agreeing not to bid, or agreeing to withdraw a bid.
- **Production shutdown agreements or production / output limitations agreements** — this occurs when competitors agree to limit production or output by closing or not expanding production facilities or by agreeing to limit production or store product rather than supplying it to the market.
- **Collective agreements to boycott others in the market** — this occurs when companies agree to not supply certain customers or not to deal with certain suppliers. It also occurs where competitors agree to put pressure on their suppliers or customers not to deal with someone else.

Given the strict ban on cartels, get legal advice on any planned competitor collaboration or contact to ensure it is pro-competitive and so that appropriate safeguards are built into the project. For example, **bidding cooperation agreements** may be acceptable where participants are unable to submit individual bids but this must not amount to bid rigging. Similarly, competitor **benchmarking** may support fierce competition, but it must not lead to illegal information exchange.

## Doing the right thing — five easy steps

### There are five elements to tackling competition law compliance for any business:

1. **Commitment:** The most critical success factor in establishing a compliance culture is **tone from the top**. All leaders and senior managers must make a clear, visible and personal commitment to do the right thing, so all employees are confident about making the right choices and speaking up. A well-publicized statement helps embed commitments to integrity and compliance with the laws.
2. **Identify your risk profile:** You must understand the **real competition law risks** your business faces — a checklist is given at page 7 to help you do this, so you don't waste precious resources worrying about remote risks.
3. **Mitigate your risks:** Deploy **appropriate controls** to mitigate your risks — suggestions are provided from page 8 but basically these must be designed to minimize the likelihood of concerns arising from business conduct that you identified as creating risk (e.g. competitor contacts at trade fairs). Since in reality competition law is only one of multiple legal risks your business faces, also think about how you approach compliance with other laws (anti-bribery and corruption, data privacy...) to ensure coherence.
4. **Review how you are doing:** Decide **how you can check**, in practice that everyone representing your company is really complying with the law — and if needed, improve your policies and controls where concerns emerge.
5. **Keep it up:** Nothing ever stands still. Constantly renew your commitment to do the right thing so compliance becomes part of the way your company does business and reflects your company's evolving risk profile.

## How do we identify competition law risks we really face?

There are three key danger areas, as described previously at page 3:

1. **Cartels and Collusion**  
(including anti-competitive information exchanges)
2. **Restrictions in vertical agreements**
3. **Abuse of a position of dominance or market power**

You need to evaluate the likelihood of real, specific competition law risks arising based on your overall business environment. For this, you can use the **checklist** that follows. Ask yourself:

- Are you confident that your employees understand that discussing prices, volumes, customers and territories with competitors might be illegal (and even criminal in some countries)?
- Do your employees know what to do if a competitor initiates an illegal discussion with them? Have you provided them with guidance on how to voice their disagreement with inappropriate suggestions from competitors?
- If you send people to industry events (trade association meetings, conferences or social events) are you confident that they know enough about the danger zones not to engage in inappropriate discussions?
- Can you demonstrate that your company is protecting itself?



## Checklist to help identify competition law risks

	YES	NO
<input type="checkbox"/> Does anyone representing your company ever speak to or contact your company's competitors?		
<input type="checkbox"/> Do you or your employees attend trade association meetings or industry conferences?		
<input type="checkbox"/> Are your competitors your business partners?		
<input type="checkbox"/> Are you in a joint venture with your competitors?		
<input type="checkbox"/> Are your competitors your customers or suppliers?		
<input type="checkbox"/> Do you compete with your distributors?		
<input type="checkbox"/> In your industry, do employees move frequently between competing businesses?		
<input type="checkbox"/> Do your employees seem to have information about your competitors' prices or business plans?		
<input type="checkbox"/> Do you enter into exclusive contracts for long periods with customers or suppliers?		
<input type="checkbox"/> Do your agreements contain joint selling or purchasing provisions?		
<input type="checkbox"/> Do your agreements contain requirements to share sensitive confidential information?		
<input type="checkbox"/> Does your business impose resale restrictions on your distributors, agents or customers?		

Assessing the risk of an abuse of dominance is complex and difficult, and will require expert legal advice. But you can ask yourself: does your company have a large share of any of the markets in which you operate (see page 3)?



## How can you reduce the risks identified?

In the real world, **there is no such thing as “zero risk”**. If you have answered yes to any of the questions on the last page, you will need controls to mitigate the competition law risks identified. Our **Top Ten practical suggestions** for a good compliance programme are listed below:

1. **Decide who “owns” your compliance efforts** — While you can’t make one person responsible for competition law compliance, as everyone has a role to play and accountability rests with your leadership, it’s good to have someone senior in your business to drive this and make sure the company as a whole delivers. Your head of finance or lawyer might be a good fit, or in a very small business, it might be one of the directors or senior managers.
2. **Identify your risks and create a mitigation plan** — and consider benchmarking this using public information on best practices in competition law compliance programmes. There are lots of resources on the internet for small businesses to refer to!
3. When you think about existing business practices, **decide what should be stopped** — high risk activities such as discussions with competitors are not necessarily a good idea. If you want to keep practices that need more safeguards built in, develop and deploy these safeguards without delay.
4. **Ensure your employees understand the rules** that apply in your market — especially employees who have any contact with your competitors or deal with your distributors. Consider arranging **simple training or guidance** for them. At a minimum you will want to ensure they understand your expectation that they comply with the law.



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5. **Training or educating employees need not be expensive** — there are many free resources available on the internet, and many competition law agencies have issued simple guidance notes especially for small businesses.
6. Ensure your employees **avoid communication with competitors** (whether direct or indirect) concerning commercially sensitive information, such as pricing, or competitive plans and strategies. Be cautious when it comes to using consultants who work with competitors — always insist on terms that keep your business information confidential!
7. Make someone in your company responsible for **knowing who attends trade associations and industry events**. Those employees in particular need to be well-briefed beforehand on the rules they must follow. It's best to select someone who understands the (legitimate) business reasons for industry contacts and enforces the right safeguards.
8. Consider how to deal with **“higher risk” employees** — ask yourself: should you stop people who have responsibility for pricing decisions (e.g. sales managers) from attending industry events that are likely to be attended by competitors?
9. Think about how to **ensure and record** that your commercial and strategic decisions are taken independently of competitors.
10. Last but not least, think about how you would react **if something did go wrong**. It's important to stay calm in a crisis and take the right steps to protect the company and its employees, so preparation can make a big difference.



## Examples of basic Dos and Don'ts

Some examples provided by ICC members are provided here, but you should design your own "Dos and Don'ts" (or common sense checklists) to address the specific risks your business faces.

### Example 1: Checklist for employees

- 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"?
  - What 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 your lawyer.

**If in doubt ... JUST ASK FOR HELP.**



## Example 2:

### Guidance on what might be anti-competitive information exchanges with competitors

- Do not speak to competitors, even informally, including by e-mail, about pricing, production, customers or markets without a lawful reason. Always get legal advice on whether a practice is lawful.
- Decisions on our pricing, production, customers and markets must be made by us alone.
- Do not speak to competitors about:
  - which suppliers, customers or contractors we deal or intend to deal with; or
  - which markets we intend to sell into, or the terms on which you will deal.
- Leave industry meetings if competitively sensitive issues arise: insist your departure is recorded.
- Report the matter to your management straight away.
- Always speak up about any anticompetitive practices or if you are uncertain whether practices are legal or not.

## Example 3:

### Guidance on industry contacts

- Discussing sensitive issues with competitors that relate to pricing, markets, production levels, customers and other competitive information may be anticompetitive and illegal.
- Take legal advice before joining or renewing membership in a trade association and ensure that the association is committed to competition law compliance.
- Obtain a copy of the agenda prior to each trade association meeting or call. Competing firms should not participate if no agenda is provided. Ensure the trade association minutes are reviewed and that any mistakes are reported.
- Use caution when participating in trade association events — be alert to the types of discussions that may raise concerns.
- If improper discussions arise, you should leave and have your departure recognized.
- Any incident should immediately be reported to the company (compliance officer, legal counsel or other individual identified in the business' compliance programme, or a member of management if you are a very small company).

## For more information

This International Chamber of Commerce (ICC) guide on competition law compliance for small businesses (“ICC SME Toolkit”) aims to ensure that, like larger businesses, your company and your employees understand the rules and operate both ethically and legally.

This has never been more important. This SME Toolkit is not a legal “manual” and does not give you legal advice: it provides a brief overview of areas your business should be aware of and practical tips to assist you in building or reinforcing a credible approach to competition law compliance. It covers three danger areas, five elements of compliance and ICC’s Top Ten tips.

Businesses requiring further advice should take a look at the ‘full’ ICC Antitrust Compliance Toolkit and seek independent legal advice. <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/icc-antitrust-compliance-toolkit/>

## About the International Chamber of Commerce (ICC)

ICC is the world business organization, whose fundamental mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy.

With interests spanning every sector of private enterprise, ICC’s global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments.

ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the G20 and other intergovernmental forums. Close to 3,000 experts drawn from ICC member companies feed their knowledge and experience into crafting the ICC stance on specific business issues. [www.iccwbo.org](http://www.iccwbo.org)

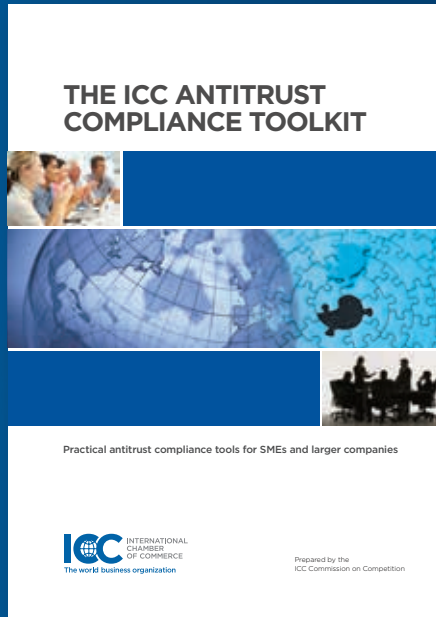
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# ICC ANTITRUST COMPLIANCE TOOLKIT



The ICC Antitrust Compliance Toolkit served as a basis for the drafting of this SME Toolkit. Designed by business for business, the ICC Antitrust Compliance Toolkit provides practical antitrust tools for companies of all sizes wishing to build or reinforce a robust compliance programme.

Launched on 22 April 2013 at the 5<sup>th</sup> ICC Roundtable on Competition Policy in Warsaw, the ICC Antitrust Compliance Toolkit is now published in multiple languages and available online free of charge.

<http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/icc-antitrust-compliance-toolkit/>

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