
THE COMPETITION ACT 2010 COMPLIANCE > GUIDELINES



“THE DISCIPLINE OF A COMPLIANCE PROGRAMME WILL ALLOW YOU TO IDENTIFY RISK AREAS IN YOUR BUSINESS SO THAT POTENTIAL BREACHES CAN BE PREVENTED.”

Since the Competition Act 2010 (CA 2010) was enacted and the Malaysia Competition Commission (MyCC) created, the MyCC has been recommending that all businesses undertake a review of their agreements, conduct and procedures for compliance with the CA 2010. The MyCC has been advising businesses to put in place a competition law compliance programme that applies to all employees, including the board of directors, to ensure ongoing compliance with the CA 2010.

The MyCC has prepared this guideline to assist businesses to understand what is involved in implementing a competition law compliance programme. It is not a definitive guide and your business may have alternative processes it uses to successfully achieve compliance.

The benefits of having a competition law compliance programme are many and varied. Most importantly, it will help to ensure your business does not breach the CA 2010. If your business inadvertently breaches the CA 2010 despite having a compliance programme in place, it may assist in reducing the financial penalty imposed. The discipline of a compliance programme will allow you to identify risk areas in your business so that potential breaches can be prevented.

The importance of a competition law compliance programme has been recognised by competition authorities around the world. The MyCC acknowledges that a competition law compliance programme will take time and money but the benefits for your business will far outweigh these downsides.

The CA 2010 may require significant potential changes to the way in which many Malaysian businesses are run. A comprehensive competition law compliance programme will help you identify the changes required by your business and allow you to continue operating your business, knowing that you are not breaching the CA 2010.




Tan Sri Dato' Seri Siti Norma Yaakob
Chairman
Malaysia Competition Commission

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The MyCC recommends that all Malaysian businesses take steps to ensure compliance with the CA 2010. This will involve a review of all existing arrangements and practices for compliance with CA 2010 and the implementation of an ongoing competition law compliance programme (“compliance programme”), specifically tailored to the needs of each business.

There is no ‘one size fits all’ compliance programme. Each business must assess its own competition law risks and determine what is required to ensure compliance. Each business will need to review its current contractual and non-contractual arrangements and business practices to determine whether there are any existing concerns. Once this is complete, each business will need to introduce a tailored compliance programme which includes an ongoing commitment to competition law compliance. The specific requirements will differ from business to business, depending on size and the industry in which the business operates. The different risks faced by each different business need to be reflected in the compliance programme.



A review of your business arrangements will offer an opportunity to consider the conduct of your competitors, suppliers and other business contacts. If conduct of a competitor, supplier or customer appears to be anti-competitive, your business may wish to lodge a complaint about that business to the MyCC. Therefore, the CA 2010 can be used as a tool to defend against anti-competitive practices in your industry.

This guideline sets out the matters that the MyCC consider should be covered to ensure an effective competition law compliance programme. It is not an exhaustive or definitive list. Your business may have its own compliance programme that adequately deals with competition law compliance.

A compliance programme is a set of policies and procedures designed to ensure that your business complies with the CA 2010. The policies and procedures will differ from business to business, from industry to industry, depending on the competition law risks.

NO business can engage in hard-core cartel activity, such as price fixing, market sharing, limiting production and bid rigging. These activities are **ALWAYS** against the law, regardless of the sizes of the businesses involved or the industries in which they operate.

In other cases, competition law risks will differ. Risks may be greater in highly concentrated industries, for larger companies in strong (potentially dominant) positions or for those companies that are in regular contact with their competitors. Competition law risks may be lower for smaller businesses that have very low market shares. The nature of the risks faced should be reflected in your compliance programme.

FEATURES

Once your business has identified and assessed its competition law risks, it will need to implement its compliance programme.

Most competition law compliance programmes will need to contain:

- A Compliance Policy statement;
- A Competition Law Compliance Manual;
- Training of all relevant staff, including senior management;
- A Competition Law Compliance Committee or representative;
- Regular Reporting; and a Periodic Audit.

The level of detail required for each of these features will differ, depending on the size of your business and the nature of the risks you have identified. These are explained below.

Since the introduction of the **CA 2010** on **1 January 2012**, a compliance programme will be essential in ensuring good corporate governance for Malaysian businesses. It may form part of a wider corporate compliance programme, covering matters such as health and safety, anti-bribery or environmental issues.

THERE ARE A NUMBER OF BENEFITS FOR YOUR BUSINESS IF IT HAS A COMPLIANCE PROGRAMME

EDUCATION

A compliance programme gives your business an opportunity to educate your employees so they understand what is and is not permitted under the CA 2010. Your employees should also understand the powers of the MyCC in conducting investigations, including the obligation to comply with requests for information or documents and to cooperate in the event of a search.

PRACTICAL TIP

Your employees will be able to act with more confidence in their business dealings if they understand what is and is not permitted under the CA 2010.

PENALTIES

The MyCC has power to impose large financial penalties (up to 10% of worldwide turnover) on any business found to have infringed the CA 2010. The risk of your business infringing the CA 2010 should be significantly reduced if you have a compliance programme in place. The MyCC may also consider a reduction in penalties for a business that has an effective compliance programme in place.

LENIENCY

If your business regularly reviews its activities, it will provide the opportunity to identify a potential breach of the CA 2010 before the MyCC does. Your business may wish to apply for leniency. The MyCC will publish further guidance on its leniency policy in due course.

PRACTICAL TIP

A successful application for leniency could result in a 100% reduction in penalty payable by your business. You will only be in a position to apply for leniency if you identify the breach before the MyCC does. In other jurisdictions, many companies have benefited from a 100% reduction in fine for being the first business to notify the relevant competition authority of a breach.

DAMAGE TO REPUTATION AND THE TIME AND COST OF AN INVESTIGATION

If your business is investigated by the MyCC, it will take a lot of time and resources to defend an investigation. It is also likely to generate negative publicity for your business and damage its reputation, especially if your business is found to have infringed the CA 2010.

PRACTICAL TIP

In a recent UK OFT study, the damage to reputation was ranked as a greater deterrent than the penalties that can be imposed for breach of competition law.

The reputation of a senior manager will be affected if they are associated with a business that has infringed the CA 2010.

PRIVATE ACTIONS

Any party who suffers loss or damage directly as a result of an infringement of the CA 2010 can bring an action against any party to that infringement. This means that your business could be sued by another party in the civil courts if it breaches the CA 2010. This would be in addition to any fine payable to the MyCC. The risk of your business infringing the CA 2010 should be significantly reduced if you have a compliance programme in place.

PRACTICAL EXAMPLE

This means that one of your competitors, suppliers or customers could bring an action against your business to claim damages if they believe they have suffered loss or damage as a direct result of your business infringing the CA 2010.

GOOD CORPORATE GOVERNANCE

Other businesses (including international businesses) will view the existence of a compliance programme as a positive sign that your business has good corporate governance. They may be more willing to do business with you.

USING THE CA 2010 AS A TOOL

You can also use the CA 2010 to lodge a complaint about the anti-competitive conduct of your competitors, suppliers and other business contacts.

Each business should develop a compliance culture. Rules and guidelines may not be enough to instil a sense of regulatory duty in every employee. Building a culture of compliance better ensures that workers at every level will abide by ethical standards and hold themselves and each other accountable. The business as a whole must take competition compliance very seriously. It also means not only following a set of external requirements, but also adhering to a company's internal rules, expectations, policies and best practices. Simply putting in place a compliance programme to 'tick a box' will not be adequate.



All levels of the business must be supportive of the obligation to comply with the CA 2010. In particular, senior management must support competition compliance as otherwise it is unlikely to be taken seriously by the employees.

Your business should set out its competition law compliance policy in a compliance policy statement. The policy should be in writing and available to all employees.

PRACTICAL TIP

Your competition law compliance policy statement could be made available to all employees by placing it on your intranet, in your employee code of conduct or at the beginning of your competition law compliance manual.

If your CEO is able to sign the policy, it will demonstrate its importance to your business.

Regular messages to your staff stressing the need to comply with the CA 2010 will help to build a compliance culture.

To identify your competition law risks, all of your business agreements and conduct will need to be reviewed. This will require a review of current contractual and non-contractual arrangements and business practices.

WHEN CONDUCTING YOUR REVIEW, YOU SHOULD PAY PARTICULAR **ATTENTION TO THE FOLLOWING:**

HARD-CORE CARTELS

Hard-core cartels are the most serious breaches of the CA 2010 and will be an enforcement priority for the MyCC. 'Hard-core cartels' are commonly referred to as price fixing, market sharing, limiting production and bid rigging. If you identify any hard-core activity, you must ensure that it ceases immediately. You may also wish to consider obtaining your own legal advice and/or informing the MyCC of the hard-core cartel, as part of an application for leniency.

If you are part of a discussion to engage in any of the hard-core cartel activity described above, you are strongly advised to distance yourself from such discussions.

AGREEMENTS WITH COMPETITORS

Some types of agreements entered into between competitors, such as information exchange agreements or joint purchasing or selling, may have the effect of preventing, restricting or distorting competition in breach of the CA 2010.

These types of agreements need to be carefully considered to determine whether your business is at risk of breaching the CA 2010. It is likely you will need assistance from a competition law specialist.

You should refer to the **MyCC Guidelines on the Chapter 1 Prohibition** for further information.

AGREEMENTS WITH NON-COMPETITORS

Agreements with non-competitors, such as suppliers or distributors, could also be anti-competitive if they contain certain types of provisions, such as resale price maintenance or exclusivity provisions.

These types of agreements need to be carefully considered to determine whether your business is at risk of breaching the CA 2010. It is likely you will need assistance from a competition law specialist.

You should refer to the **MyCC Guidelines on the Chapter 1 Prohibition** for further information.

RISKS IF YOUR BUSINESS IS DOMINANT

If your business has a large share of any market in which it operates, it may be dominant for competition law purposes. Being dominant is not against the law, but abusing a dominant position is. You are likely to need assistance from a competition law specialist to decide if your business is dominant.

If your business is dominant (or potentially dominant), you will need to carefully review your business practices for any potential risk areas. You should refer to the **MyCC Guidelines on the Chapter 2 Prohibition** for further information.

EMPLOYEES AT RISK

Some employees will be at increased risk of breaching the CA 2010 by virtue of the positions that they hold or the role that they play within your business.

It would be prudent to interview these employees to identify whether any of their business practices are at risk of breaching the CA 2010. You may need to engage a competition law specialist to assist you with this process.



PRACTICAL TIP

Employees that you may wish to interview might include:

- Senior management, simply by virtue of their senior position;
- Sales and marketing personnel;
- Employees that set prices for your products;
- Procurement personnel;
- Employees that attend trade association meetings or industry events as competitors are likely to be present;
- Employees that are involved in negotiating distribution agreements;
- Employees involved in preparing bids;
- Employees that regularly meet with your competitors, for example, where you have a joint venture with a competitor.

ASSESSING THE RISKS

Once your business has identified its competition law risks, you will need to assess the seriousness of the risks. The high risk areas will need immediate attention; others will need further review and assessment. It is likely you will need assistance from a competition law specialist to conduct this further assessment.

PRACTICAL TIP

You may wish to classify the risks as 'high, medium or low' or 'red, amber or green' as a system of this nature will help you to prioritise the risk areas.

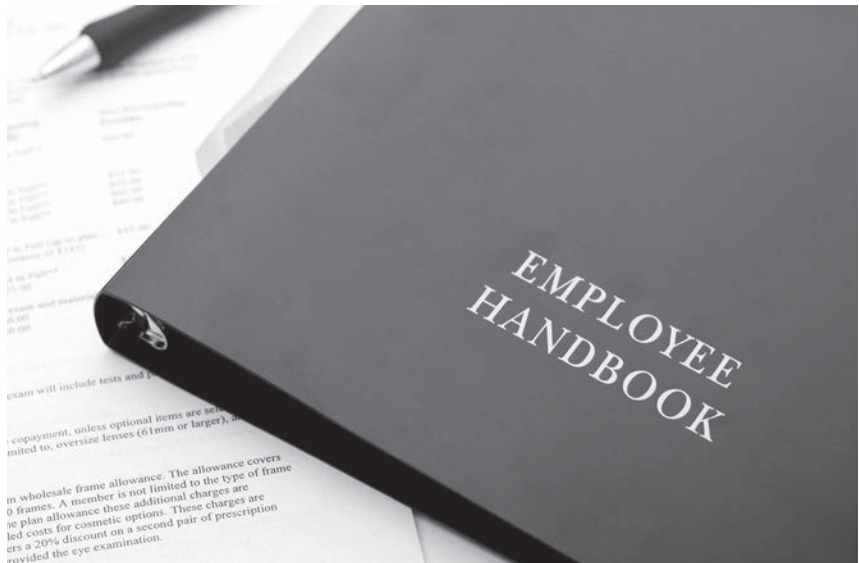
Your compliance programme will only be effective if it ensures ongoing compliance. It is not sufficient to conduct a review of your current arrangements and practices, address any concerns and then resume business as usual.

To ensure ongoing compliance, your business should consider implementing a compliance programme, including the features explained below. The level of detail required will differ depending on the size of your business and the nature of the risks you have identified.

COMPETITION LAW COMPLIANCE MANUAL

A competition law compliance manual should be prepared and made available to all employees. It should:

- Explain how the CA 2010 applies to your business in simple (non-legal) language;
- Focus on areas you have identified as being medium to high risk for your business; and
- Provide hypothetical and real case examples, so that your employees can understand the potentially serious implications of a breach of the CA 2010.



PRACTICAL TIP

The compliance manual should explain any procedures that you wish employees to follow. This could include:

- Requiring employees to record all forms of contact with competitors (whether by telephone, at meetings or industry events) by introducing a 'competitor contact form' and making it compulsory to submit this to senior management after their meeting.
- Requiring all contracts to be reviewed by the company's lawyer.
- Requiring employees to record attendance at association meetings or to record membership of associations.

It could also set out any guidelines for employees on matters such as:

- Pricing discussions
- Attending association meetings
- Contact with competitors
- Information sharing

It could contain a simple list of do's and don'ts that could be printed onto small cards for your employees to hang up at their desks.

The compliance manual should also set out a procedure for employees to follow if they have competition law questions or concerns.

TRAINING

Mandatory training on the CA 2010 should be provided to senior management and all employees, particularly those in medium to high risk areas of your business.

The training should explain how the law applies to your business in a practical way, for example, by including examples relevant to your business and industry. It should explain the consequences of breaching the law and the powers that the MyCC have to investigate potential breaches of the CA 2010.

PRACTICAL TIP

Your competition law training programme should be conducted by an experienced professional. You may wish for your CEO or one of your senior managers to also speak at the training session to emphasise how important competition law compliance is to your business.

Face-to-face training will be of most benefit to your employees, especially those in medium to high risk areas. Follow up training or training for those in lower risk areas could be provided through interactive computer-based training.

Your training programme should be tailored to your business and should include examples of situations that commonly arise in your business. It could also include case examples that are relevant to your industry.

The training should be revised regularly as the issues faced by your business and the industry will change from time to time.

You could consider requiring employees who have undertaken competition law compliance training to:

- Complete a test to determine whether they understood the training received;
- Sign a form acknowledging attendance at the training. This will help them appreciate the importance of the training.
- Sign a statement as part of their annual review process confirming that they are not aware of any competition law breaches.

You may also wish to inform your staff that, having completed the training, disciplinary measures will be taken against them for any breach of the CA 2010 in which they are involved.

COMPETITION LAW COMPLIANCE COMMITTEE

Your business should appoint a committee (or an individual in smaller businesses) that is responsible for ensuring competition law compliance. This committee (or individual) should be available to provide guidance to your employees and answer questions that arise from time to time.

PRACTICAL TIP

You could appoint a competition law 'champion' in each part of your business. This person does not need to be a legal expert but should have a good understanding of what your business can and cannot do to comply with the competition law. This person should be available to all staff to answer any competition law questions and concerns.

REPORTING

The compliance committee (or individual) should prepare regular reports for the board of directors or senior management explaining how competition law compliance is being managed within your business.

PERIODIC AUDITS

You should conduct regular audits (say once a year) to check that the business is maintaining its compliance culture and to identify any new risks that may have arisen. The audit should thoroughly consider whether the compliance programme you have put in place remains appropriate to address your ongoing competition law risks as these may change over time.

PRACTICAL TIP

It may not be possible to conduct an audit on your entire business arrangements. Instead, it may be more practical to audit a randomly selected segment of your business.

You may wish to run a mock (or pretend) raid whereby competition law experts pretend to conduct a search of your premises looking for anti-competitive agreements. This will provide an opportunity for your business to test how you would respond in the event of a raid by the MyCC and also to identify any new competition law risk areas.

All businesses, big and small, must comply with the CA 2010. However, the MyCC recognises that the risk of breaching the CA 2010 is likely to be lower for smaller businesses as the activities of a small business are likely to have less effect on the market.



Remember: Hard-core cartel activities (price fixing, market sharing, limiting production and bid rigging) are prohibited for all businesses, regardless of size.

The MyCC recommends that small businesses ensure:

- A document is available to remind staff of the key 'do's and don'ts' to ensure compliance with the CA 2010;
- Members of staff are given training on how the CA 2010 applies to the business. This training should include relevant examples and information on the consequences of breaching the CA 2010;
- A senior person is appointed as the competition law 'point of contact' to whom staff can direct any questions or concerns about competition law;
- Their competition law compliance processes are reviewed regularly to ensure they are still relevant.

These steps should be relatively straightforward and need not be costly. Your industry association may be able to assist with a simple 'do's and don'ts' list and/or competition law training that has been tailored to your industry. This may be able to be provided at a significantly reduced cost for each business.

The MyCC has prepared the following suggested checklist for businesses to consider as part of their competition law compliance activities.

- ✓ Ensure your business understands its obligations under the **CA 2010**.
- ✓ Ensure your employees understand that the **CA 2010** applies to your business.
- ✓ Conduct regular mandatory training courses for your employees on the **CA 2010**, preferably one that is tailored to your business.
- ✓ Adopt a culture of competition compliance in your business, especially at senior management level.
- ✓ Review your current business arrangements and practices and identify any risk areas.
- ✓ Take any necessary steps to deal with the risks you have identified.
- ✓ Create a competition law compliance manual or checklist, tailored to your business including practical examples and key risk areas for your business.
- ✓ Appoint a compliance officer who is the person within your business that is responsible for competition law compliance.
- ✓ Conduct regular reviews to ensure your compliance programme is working.

The MyCC has prepared the following suggested checklist for businesses to consider as part of their competition law compliance activities.

✓ Attend your professional or trade association meetings but...

✗ **DO NOT** discuss commercially sensitive aspects of matters such as pricing, production or tenders.

✓ Make business decisions about the price and quantity of your product or service, the areas where you will operate and the tenders that you will bid for **INDEPENDENTLY**.

DO NOT reach any agreements with your competitors regarding:

- Prices for your products/services;
- ✗ · The markets in which you operate;
- Limitations on production; or
- Which company will bid for particular tenders.

✓ Compete to the best of your ability in your market but...

✗ **DO NOT** abuse your market power if you hold a dominant position.

✓ Make sure that your employees understand the investigation powers of the MyCC, in particular the power to request information and documents and to search premises.

✓ **REMEMBER:** The costs of implementing a compliance programme will be far outweighed by the benefits.

If you require any further information, please email:

enquiries@mycc.gov.my

Further information on the CA 2010 and other publications by the MyCC can be found at the following website:

www.mycc.gov.my

The International Chamber of Commerce has published an Antitrust Compliance Toolkit which provides further useful guidance. It is available on their website:

<http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2013/ICC-Antitrust-Compliance-Toolkit/>

DISCLAIMER

This document has been prepared to assist Malaysian businesses to understand the key steps involved in implementing a competition law compliance programme. It is not intended to be a definitive or exhaustive guide and is not a substitute for the need for all businesses to obtain their own advice on what is required to comply with the CA 2010.

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Level 15, Menara SSM@Sentral,
No.7, Jalan Stesen Sentral 5,
Kuala Lumpur Sentral,
50623 Kuala Lumpur.

Tel: +603-2273 2277

Fax: +603-2272 2293

Email: enquiries@mycc.gov.my

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@themycc
www.mycc.gov.my