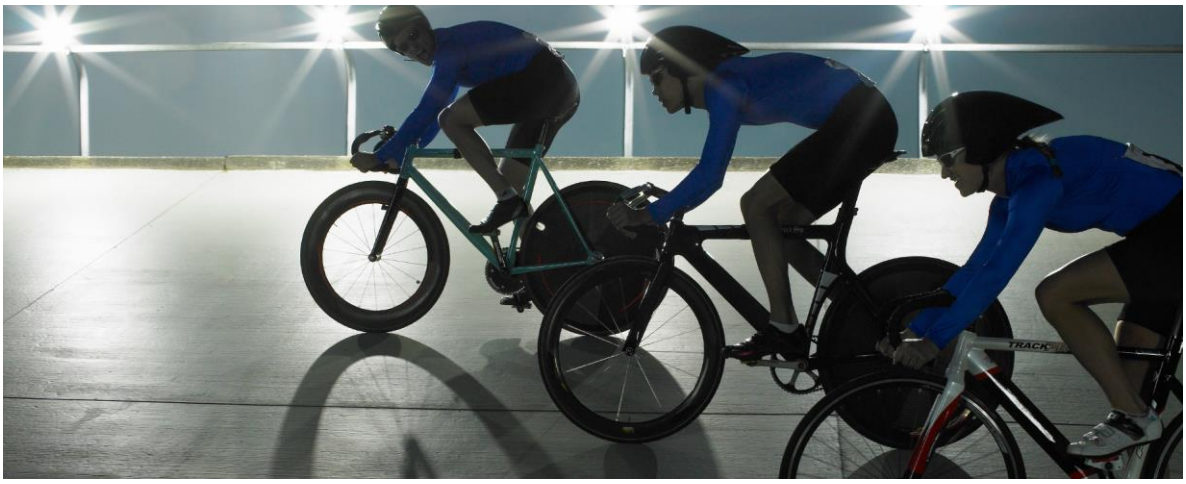

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Competition compliance – is your business doing enough?

With total fines for competition law infringements imposed by EU and UK competition authorities now regularly exceeding £1 billion a year, the cost of failure to comply has never been higher. Individuals, particularly directors, are also increasingly at risk. This briefing looks at what businesses should do to achieve compliance.

Benefits for business

For a business, the key benefit of a compliance programme is in minimising the risk of infringing competition law in the first place, given the very serious consequences of such conduct.

Key consequences of infringement

- Fines of up to 10% of worldwide turnover
- Unenforceability of agreements
- Third party damages claims; and
- Reputation damage.

Dealing with an investigation by a competition authority also usually involves a significant commitment of time and expense/resources.

Some competition authorities – such as the UK's Competition and Markets Authority (CMA) - will also consider a reduction in the level of any fine imposed where the company can show that it had taken appropriate compliance measures.

Benefits for individuals

In some countries, individuals – including directors - are now being targeted by regulators. For example, in the UK, the CMA has signalled its intent to make wider use of its powers to apply for disqualification of directors.

However, directors who have ensured that their company has taken adequate steps to mitigate competition law risks are very unlikely to be targeted by the CMA in this way (provided that they were not involved in the infringement nor turned a blind eye).

Individuals involved in price fixing and certain other cartels between competitors are also at risk of criminal prosecution in the UK.

Official guidance

Both the European Commission and the CMA have produced guidance on compliance programmes. This briefing focusses on the CMA's guidance, partly because it is more detailed - but also because it specifically deals with the steps that directors are expected to take.

What is expected of businesses?

The CMA guidance stresses that there is no "one-size-fits-all" approach to compliance. It also advocates a risk-based approach, focussing more efforts on those areas of activity where the potential for infringement is judged to be higher (see box). However, there needs to be a clear "top down" commitment from senior management and it is important that the resulting compliance programme is more than just a "box ticking" exercise.

The CMA advocates a four step approach:

- **Step 1 - Risk identification:** which areas of competition law and which areas of the business' activities are most likely to pose problems?
- **Step 2 - Risk review:** what level of risk does the business face? The higher the risk, the more the CMA will expect your business to do in order to mitigate that risk.
- **Step 3 - Risk mitigation:** effective measures should be taken to mitigate risk through appropriate policies, procedures and training at all levels of the business; and
- **Step 4 - Review:** compliance efforts should be reviewed at regular intervals, and whenever the business enters a new market, to ensure that they remain appropriate and effective.

Practical steps

Specific measures which the CMA suggests that businesses may want to consider include the following:

- appointing a board member or senior manager to take responsibility for compliance with competition law and report regularly to the board;
- regular written reminders from senior management to staff at all levels about the importance of compliance;
- making it clear to staff that failure to comply with competition law may result in disciplinary action or even dismissal (this may require amendment of staff handbooks);

- establishing a system to enable individual staff to report concerns confidentially and/or anonymously;
- provision of appropriate training on how to identify and respond to competition law issues (training should be tailored to the issues that staff are likely to face in practice);
- ensuring that staff understand when they should seek specialist competition law advice and/or when to report concerns (e.g. through training and regular reminders); and
- ensuring that the business' lawyers have the opportunity to review significant proposed contracts for compliance with competition law.

Contact with competitors

The CMA guidance also sets out a number of practical steps which businesses can take to prevent or detect inappropriate contact with competitors, including:

- requiring senior manager approval before staff join trade associations or attend events where representatives of competing firms will be present;
- ensuring that staff who are likely to come into contact with competitors understand what they can and cannot discuss;
- a clearly understood system for reporting inappropriate contact (e.g. where staff have been approached by a competitor with a view to cartel activity); and
- active review by managers of business travel and expenses (as these may reveal meetings where inappropriate contact with competitors has taken place).

What is expected of directors?

The CMA expects directors to understand key competition law risks and to take appropriate steps to ensure the prevention and detection of competition law breaches. Directors who fall below the CMA's expectations face a greater risk of disqualification proceedings in the event that their company subsequently breaches competition law.

DIRECTOR DISQUALIFICATION: WHAT THE CMA HAS TO PROVE

The CMA does not have to prove that the director in question *actually contributed* to the breach of competition law; the court may also grant a disqualification order where the director either:

- had *reasonable grounds to suspect* a breach of competition law (and took no steps to prevent it); or
- did not know that the conduct amounted to an infringement but *ought to have known*.

The CMA is more likely to consider applying for a disqualification order in cases involving more serious infringements of competition law, such as those where a financial penalty has been imposed.

Price-fixing and cartels

All directors are expected to be aware that arrangements with competitors to fix prices, engage in bid-rigging, limit production or share customers or markets constitute serious infringements of competition law.

Commercial contracts

Directors with responsibility for commercial contracts are expected to recognise when they may need to seek advice on competition law compliance. The CMA suggests that they should be aware of this in at least the following cases:

- exclusivity provisions of 5 years or more;
- agreements restricting terms on which customers can resell products, especially price;
- exclusivity provisions in intellectual property licensing agreements; and
- standardisation, joint selling or purchasing and agreements involving collaboration with competitors.

Abuse of a dominant position

Businesses which enjoy substantial market power may occupy a position of dominance. Where a business is dominant, the CMA expects all directors to understand that the business may be prohibited from engaging in the following practices:

- charging excessively high prices;
- refusing to supply an existing customer without good reason;

- granting rebates or discounts that do not relate to objective criteria such as the volume of purchases made;
- tying or bundling (requiring customers to buy two products together);
- charging prices which are so low that they do not cover costs; and
- refusing to grant access to facilities which are essential to other businesses.

Non-executive directors

The CMA does not expect non-executive directors to have the same level of awareness as, say, a director with responsibility for commercial contracts.

However, where non-executive directors are involved in approving key commercial decisions (such as a new joint venture), they are expected to satisfy themselves that the arrangements have, where appropriate, been reviewed for compliance with competition law.

They are also expected to satisfy themselves that the business has taken adequate steps to address competition law risks and that those measures are being kept under review.

The CMA suggests a number of questions that all directors should ask:

QUESTIONS ALL DIRECTORS SHOULD ASK

- What are our competition law risks at present?
- Which are the high, medium and low risks?
- What measures are we taking to mitigate these risks?
- When are we next reviewing the risks to check they have not changed?
- When are we next reviewing the effectiveness of our risk mitigation activities?

How we can help

We have considerable experience of advising companies and trade associations, and their boards of directors, on competition law compliance measures. Please contact **Nigel Seay**, **Stephen Whitfield** or your usual contact at Travers Smith.

[The Competition Team at Travers Smith LLP is] 'hugely impressive'

Legal 500

Stephen Whitfield is 'insightful and user-friendly' and gives 'pragmatic, reliable' advice.

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Clients characterise Nigel Seay as 'the whole package: he's approachable, knowledgeable and incredibly practical.'

Chambers Guide (UK)

Travers Smith LLP is praised for its response times […] and 'ability to distil dense detail into clear and concise conclusions.'

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