Company Directors and UK Competition Law

Guidance Note

Introduction

The Competition and Markets Authority (“CMA”) has retained, unamended, the Office of Fair Trading’s guidance on company directors and competition law. The guidance indicates the CMA’s standard of skill and involvement it expects of company directors, in order to ensure that companies comply with their obligations under EU and UK competition law. Failure to meet that standard could lead to individuals being disqualified from acting as a director or being involved in the management of a company in the UK for up to 15 years.

All company directors must:
• ensure they do not have any personal involvement in infringements of competition law and must not actively encourage anti-competitive behaviour
• take appropriate and reasonable steps to prevent, detect and stop any infringements of competition law.

The personal consequences where there has been an infringement of competition law for company directors can be severe and include disqualification and possible criminal sanctions.

Competition Disqualification Orders

Where a company commits a breach of competition law and the director knew or ought to have known of the infringing behaviour the CMA is likely to apply for a Competition Disqualification Order (“CDO”).

The CMA is unlikely to apply for a CDO where the director is genuinely committed to compliance and has taken reasonable steps to ensure there is an effective company compliance culture. This includes asking appropriate questions and taking steps to bring to an end any infringements of competition law. Where a CDO is made it can lead to an individual’s disqualification for a maximum period of 15 years.

The CMA will assess the level of understanding of competition law that can be reasonably expected of a director, and the steps that it is reasonable to expect a director to take to prevent, detect or bring to an end infringements of competition law on a case-by-case basis. In doing so, the CMA will consider:
• Whether the director has an executive or non-executive role
• The director’s specific responsibilities
• The size of the company and wider corporate group.

CMA’s expectations of ALL directors – adequate and up-to-date knowledge of competition law

A director is required to maintain a standard of skill and knowledge that is appropriate to his position and the nature of the company. A director is also expected to update and refresh his knowledge on an ongoing basis.

A director is expected to understand the most serious forms of infringement of competition law:
• Cartels. A director ought to know that cartel activity, price-fixing and customer/market sharing between competitors are very serious infringements of competition law
• Other potentially anti-competitive agreements. Any director, especially those with responsibility for commercial contracts, ought to have sufficient understanding of the principles of competition law to be able to recognise risks, and to realise when to make further enquiries or seek legal advice. A director should also understand the importance of taking appropriate steps to address any risks that have been identified
• Abuse of a dominant position. Any director with responsibility for a company’s commercial strategy or behaviour is expected to be able to identify whether there is a risk that the company may have a dominant position in any of the markets in which it operates and to be aware of the need not to abuse that position.

Level of understanding specific to a director’s level of responsibility

1. Non-executive directors:
• Not expected to have an intimate knowledge of the company’s day-to-day activities and transactions
• Expected to challenge the decisions and actions of the executive directors
• Expected to ask appropriate questions of the company’s executives, to ensure appropriate compliance measures have been put in place to prevent, detect and stop infringements of competition law.

2. Executive directors:
• Expected to have a more detailed understanding of, and familiarity with, the way in which a company operates on a day-to-day basis
• Those with responsibility for areas of a business with higher exposure to competition law risk, such as those with commercial responsibility for marketing, sales, brand management etc, should take greater steps to prevent, detect and bring to an end infringements of competition law.

3. Compliance Directors:
• Expected to have a sufficient grasp of the principles of competition law to identify and assess the types of risk to which the company is exposed, taking reasonable steps to mitigate those risks
• This will usually require a compliance director to have a greater level of knowledge of competition law principles than other directors
• Provided he/she has this knowledge, a compliance director is not expected to have any greater knowledge of specific infringements by the company than any other director.

Direct management responsibility

Those with direct management responsibility ought to have a greater awareness of any anti-competitive behaviour occurring as a result of conduct by individuals within their business area and, where personally involved in the day-to-day activities and transactions, a greater awareness in relation to those activities or transactions.

Be aware of the degree of staff exposure to competition law risk and especially of those involved in high risk activities (eg. regular dealings with competitors as trade associations, or involvement in pricing decisions). Ensure appropriate mitigating activities and procedures are put in place.

Indirect management responsibility

For those with overall responsibility for a business area, but not direct management responsibility, the CMA will consider what evidence was seen by the director and what evidence that director ought to have seen, having made reasonable enquires.

The CMA will take into account whether the information would have been likely to come to light if appropriate compliance measures had been put in place.

Ask questions and make enquiries where certain events or activities by staff suggest the existence of a risk.

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Impact of a company’s size on the CMA’s expectations of directors
In all cases, company directors are expected to demonstrate a commitment to competition law compliance, and to ensure that their organisation is taking steps to identify and to address the company’s exposure to competition law risks and put in place appropriate steps to mitigate those risks, reviewing these activities on a regular basis.

Directors in smaller companies may have more intimate knowledge of the day-to-day activities of their company, and may therefore be more likely to be aware of actual or potential infringements of competition law.

Those in larger organisations may not have an intimate knowledge of all day-to-day activities and transactions. Nevertheless, the CMA expects directors in larger organisations to take steps to ensure that there are appropriate systems in place to prevent, detect and bring to an end infringements of competition law.

Protecting and preventing infringements – quick reference checklist

1. Risk identification – identify the key competition compliance risks eg.: • Might the company be dominant in any markets? • Does the company regularly deal with or meet its competitors? • Does the company have long-term or exclusive supply or licensing agreements?

2. Risk assessment – consider where the main competition risks arise eg.: • Identify the staff most at risk of breaching competition law – eg. staff attending trade association meetings or dealing with competitors, staff responsible for price-setting or sales and marketing • Identify new joiners from competitors.

3. Risk mitigation:
• Consider how best to achieve competition compliance within the company, focusing on the areas and staff that pose the highest risk of competition infringement • Ensure there is tailored and relevant training for the high risk areas and staff • Vary the intensity, level of detail and form of training according to the level of competition law risk that the employee presents • Ensure that employment contracts emphasise the need for competition compliance • Ensure that competition compliance policies and procedures are in place; eg. for reviewing contacts with competitors and attending trade associations, for reviewing other contracts and commercial practices (especially if a company might be dominant) • Consider means by which staff can raise competition concerns anonymously and confidentially • Less formalised and less structured compliance efforts might be permissible for small businesses.

4. Review:
• Ensure that there is a clear and unambiguous commitment to competition compliance from the top down • Refresh competition compliance training regularly, especially for new joiners • Review regularly compliance procedures/policies to ensure they are working effectively and are still appropriate, especially if the nature of the business or market is changing and following acquisitions • Ensure that appropriate lessons are learned from any competition investigations or “incidents”.

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