SQUIRE PATTON BOGGS

CMA Publishes Updated Guidance on Competition Law Compliance

EMEA – October 2020

Following the Competition and Markets Authority's (CMA) launch of its Cheating or Competing Campaign in February 2020, the CMA recently published an update to its Competition Law Risk Short Guide (the Guide).

In presenting the updated Guide, CMA Chief Executive, Andrea Coscelli, stated:

"Business leaders must be alive to competition law risk. They should take an active role in ensuring compliance. And the public rightly expects there to be personal responsibility for very serious wrongdoing in firms … It's in the interests of business leaders – as well as their customers – that competition law compliance is clearly on the radar, and that's what this Guide is about."

While the Guide is not a substitute for legal advice in specific situations, it offers a useful reminder that:

- Violating competition law may give rise to the risk of hefty fines being imposed on your company, disqualification of the company's directors and – in cartel cases – criminal liability of the individuals concerned. In the last financial year, for example, the CMA imposed fines totalling £56 million, and secured 10 directors' disqualifications and seven Competition Act infringement decisions.
- Effective compliance programmes may help mitigate this risk and may be taken by the CMA as a mitigating factor in determining a penalty in case of a finding of infringement. In its 2017 Infringement Decision, for example, the CMA reduced the fine imposed on certain real estate agents by 10% on account of the fact that the company had an effective compliance programme in place.
- To be effective, a compliance programme must be based on the management's commitment to ensuring compliance, identification and assessment of the specific risks facing a company, remedial action to mitigate the risks identified and a regular compliance review (as demonstrated in the figure below).

The remainder of this client alert provides a summary of the updated Guide.

What Is the Guide and How Can It Help?

Competition Principles

The Guide outlines the basic principles of competition law on:

- Cartels (such as bid rigging, market sharing, price fixing and competitively sensitive information exchanges between competitors)
- Other anti-competitive agreements (such as horizontal agreements between competitors or vertical agreements between suppliers and distributors, including resale price maintenance)
- Abuse of dominant position (such as refusal to supply, discrimination or unfair pricing/trading terms by dominant companies)

Key Features of an Effective Compliance Programme

The Guide explains that an effective compliance programme should include the following key features:

- A risk-based approach
- Ownership by the board and senior management of the responsibility to instil competition compliance throughout the organisation
- Methods to identify competition risk (e.g. vulnerabilities in contracts that may contain clauses on exclusivity or information sharing; or gaps in employee knowledge on competition law)
- Analysis of the level of each competition risk
- Policies, procedures and training to mitigate competition risk
- Regular review of competition compliance

Case Studies

To illustrate examples that could be specific to particular businesses, the Guide contains several recent case studies of CMA enforcement that feature summaries on the lessons learned from each, identifying the risk presented across industry sectors.

Particular focus is given to case studies that highlight the dangers of competitively sensitive information exchange and of resale price maintenance.

For further information on specific matters, the Guide contains links to other relevant guidance throughout, such as the CMA's Short Guide on Trade Associations, a link to which is provided after a case study on a trade association that was found guilty for breaking competition law for facilitating collusion on prices between its members. The Guide contains a reminder that unlawful information exchange within trade associations will be investigated and punished as a cartel.

COVID-19 and Brexit

The CMA published the updated Guide in a climate of uncertainty, during a global pandemic and the EU/UK Withdrawal Agreement Transition Period. However, amidst this uncertainty, one thing is clear: that the CMA takes competition law enforcement very seriously.

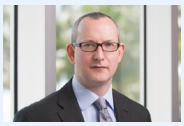
The outbreak of the coronavirus disease 2019 (COVID-19) raised legitimate questions amongst businesses about the circumstances in which cooperating with rivals may be acceptable. In response to this unprecedented situation, the CMA was able to offer, in specific circumstances, reassurance for firms where cooperation was necessary to meet the needs of consumers, for example by ensuring security of supply of essential products, as highlighted in our previous blog on the emergency waiver of competition rules due to COVID-19: COVID-19 and Competition Law: May the Force Be With You? At the same time, the Guide makes it clear that the CMA would not tolerate unscrupulous businesses exploiting the crisis as a "cover" for non-essential collusion or price gauging.

As regards Brexit, under the EU/UK Withdrawal Agreement, there is a transition period that runs until 11 p.m. on 31 December 2020, during which the CMA is required to apply both EU and UK competition law. However, the end of the transition period is likely to have a number of important consequences for the UK competition regime in the future, including new expanded functions for the CMA. To prepare for this new position, the CMA has spent the period since the referendum in planning for its expanded role, recruiting additional staff, setting up systems, drafting guidance and assisting the government in the development of policy and legislation.

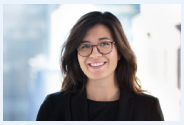
Contacts

Francesco Liberatore
Partner, London
T +44 20 7655 1505
E francesco.liberatore@squirepb.com

Martin Rees
Partner, London
T +44 20 7655 1137
E martin.rees@squirepb.com



Diarmuid Ryan
Partner, London
T +44 20 7655 1310
E diarmuid.ryan@squirepb.com



Chloe Rankin
Associate, London
T +44 20 7655 1421
E chloe.rankin@squirepb.com

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations, nor should they be considered a substitute for taking legal advice.

squirepattonboggs.com

© Squire Patton Boggs. All Rights Reserved 2020

39662/10/20