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Advising the Board on **Competition Law Risk**

Reports looking at the full range of commercial risk

Risk, Resilience and Reputation

Directors' risk report

Competition law is widely seen as a board-level issue, particularly as enforcement is increasing in this area. The law is rapidly evolving, presenting both risks and opportunities for companies.

Cartel and information exchange risk needs to be identified and assessed; pricing and distribution strategies should take account of competition law; and companies with market power should be aware of their additional responsibilities vis-a-vis other market participants.

It is essential that proper management of competition law risk is at the forefront of any business compliance strategy. Any board that gets these issues wrong risks significant penalties for the business, and for themselves as individuals. The potential for costly follow-on damages actions is a further consideration.

Key to compliance are policies and processes that identify and address the competition law risks relevant to the business or activity at hand. These should look beyond the boundaries of the immediate organisation to the wider network of customers, suppliers and partners. Establishing a culture that positively supports ethical and legal decision-making is also important and competition authorities expect directors to play a key role in this regard.

Consequences of breaching competition law

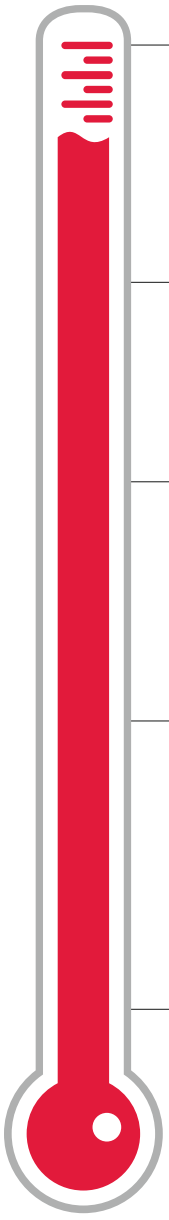
Serious consequences may flow from a breach of competition law. For the business these can include:

— financial penalties of up to 10% of worldwide group turnover;
— unenforceability of commercial agreements;
— damages actions from those who have suffered harm as a result of the infringement;
— exclusion from public contracts tender lists;
— significant loss of management time;
— legal expenses; and
— adverse reputational impact.

For directors, these can include:

— criminal convictions with unlimited fines or up to 5 years in prison;
— director disqualification; and
— damage to professional reputation / difficulty in securing new roles.

Stakeholder risk thermometer



HIGH RISK

Board

— any Board member who is involved or implicated in competition law infringements risks serious personal penalties.

Employees

— may also be at risk of personal penalties, although directors are more often expected to 'know better'.

Consumers

— consumers nearly always lose out from cartel conduct in the form of higher prices, reduced innovation or lower quality.

Shareholders

— the share price of companies implicated in anti-competitive conduct can be depressed due to the risk of follow-on damages claims, particularly those with US exposure. But limited long-term impact.

Funders

— low risk of repayments being impacted by competition law infringements.

LOW RISK

In-house legal perspective

Vishal Puri
Legal Director, CEMEX UK

What measures do you take to ensure compliance with competition law at CEMEX?
We tailor appropriate competition law compliance activities for all levels of the company. The UK Board receives the most comprehensive training as we recognise that they need to be fully aware of their own personal liability, as well as that of the company. Directors also need to understand the principles to help them drive compliance from the rest of the business. Certain teams to which competition law is most relevant receive targeted training. Company-wide, we issue detailed compliance guidelines and encourage employees to come to us promptly with any concerns even where these may seem insignificant. Most of the time a short telephone call can allay any concerns.

How do know whether you are doing an effective job?
We find it effective to undertake an annual compliance audit, where we spot check the compliance of certain individuals with competition law. If any areas arise where compliance could improve, we instigate additional training.

How do you drive buy-in to a compliant culture?
I encourage my team to get out to site as often as possible to ensure that they really understand what is happening in the business. This helps us to spot potential compliance issues early and also helps us to devise training in the most engaging format. We are fortunate that consistent promotion of compliance best practice over a number of years has created a very supportive Board and senior management. Having these individuals on-side makes a big difference in capturing the attention of the business at other levels.

The laws against anti-competitive conduct

The regulators

The Competition and Markets Authority (**CMA**) is the UK's principal competition authority. A number of sector regulators also hold concurrent competition law powers, e.g. the FCA (financial services), Ofgem (energy) and Ofcom (media and telecoms). In Europe, all EU Member States apply similar enforcement regimes and in each case the European Commission (**Commission**) and the National Competition Regulator (**NCR**) have concurrent jurisdiction. Post-Brexit, the UK is no longer bound to follow EU competition law. There is already some divergence, which is a trend that can be expected to continue. Businesses must be alert to the differences between the UK and EU regimes and consider how these may affect their operations. For instance, there is now scope for remedies and/or financial penalties to be imposed by the CMA and the relevant EU regulator. Companies therefore face increased exposure to penalties and corrective measures or remedies may also differ between jurisdictions, potentially raising businesses' ongoing compliance costs.

Criminal penalties, to the extent they apply, are based on national laws.

Anti-competitive agreements

Typical forms of unlawful anti-competitive agreements and restrictions include:

— price fixing and retail price maintenance;
— customer or market sharing;
— bid-rigging;
— restrictions against online selling;
— exclusive contracts of especially long duration;
— projects involving cooperation with competitors; and
— exchanges of commercially sensitive information (e.g. strategy and pricing).

Any form of agreement, understanding or concerted practice (known as a 'meeting of minds') to restrict competition is potentially captured by competition law.

Sharing competitively sensitive information between competitors, or even merely receiving commercially sensitive information from a competitor without then taking steps to actively distance the recipient company from the conduct, could attract a penalty.

Abuses of dominant position

Where a company holds a dominant position in the market (very approximately a share of 40% or more), that company has a 'special responsibility' not to distort competition by excluding competitors from the market or exploiting customers by, for example:

— charging excessively high or low/predatory prices;
— refusing to supply certain customers;
— granting loyalty rebates;
— tying or bundling products; or
— refusing to grant access to essential components for downstream competition.

It looks likely that new categories of abuse will be established as the digital economy grows in importance. For example, gathering large amounts of data (e.g. via an online platform), and then using that data to compete unfairly with platform users downstream, is considered potentially problematic by the European Commission.

Competition law compliance in the digital economy

Increased regulatory focus on the tech sector

Digital markets and ecosystems have been a particular focus for regulators in recent years. CMA and Commission investigations have focused on a wide range of perceived anti-competitive conduct, including self-preferencing, restrictions on use of third-party applications or systems, use of non-public data and bundling and tying strategies. This presents risks and opportunities for companies, depending on where they sit in the supply chain.

Regulation of gatekeeper platforms

To complement traditional competition law enforcement, new laws have been introduced to regulate core platform services and to help remove some of the structural barriers that may help entrench market power and prevent effective competition. The EU Digital Markets Act (**DMA**) proscribes certain conduct for designated gatekeeper platforms, and in the UK, the Digital Markets, Competition and Consumers Bill will empower the CMA to develop bespoke codes of conduct for designated platforms. The DMA has come into force and the UK legislation is expected to come into force in 2024.

Adapting to rapid digitisation

In an era of rapid digitisation, competition law is evolving at an ever-faster pace. This can generate challenges in maintaining compliance. Directors need to be aware that in this environment, even an apparently low-risk business can inadvertently begin to engage in anti-competitive conduct, within a short space of time.

Issues connected to the accumulation and holding of data have attracted significant attention from competition authorities in recent years. They may consider that certain companies who hold that data gain market power as a result. Directors must be aware of the need to use this power responsibly, in a way that does not restrict competition.

Directors should ensure they understand what data is gathered by the business and what it is used for. Best practice is to implement a clear and robust system to process third party data that is separated from any part of the business that competes with those third parties.

Competition investigations

Competition investigations are often commenced as a result of tips from:

- **Whistle-blowers** – often disgruntled present or former employees. Individuals can submit evidence to the CMA anonymously and are protected from any civil or criminal liability. The CMA also incentivises individuals by offering a reward of up to £250,000 for providing information about cartel activity.
- **Leniency applicants** – companies involved in unlawful behaviour can inform a competition authority of any anti-competitive conduct they have engaged in alongside other firms. If they are the first firm to bring such conduct to the regulator's attention they may be granted immunity from, or a reduction in, any penalties that are ultimately imposed. Directors who become aware of competition breaches should seek legal advice and consider the possibility of applying for leniency as early as possible.

Dawn raids

Where the competition authorities have a reasonable suspicion that a company has breached competition law and that evidence may be destroyed, they can enter business premises unannounced (usually, but not always, with a warrant) to carry out any necessary searches, gather documents and collect electronic evidence.

With a warrant, the CMA can also enter domestic premises and vehicles.

This makes a culture of ongoing compliance crucial to reduce business risk. Any document that is not legally privileged and is conceivably responsive to the scope of matters under investigation could be reviewed by the competition authorities. Staff need to be trained to consider how their written communications could be construed by authorities when assessed out of context.

Price monitoring

The CMA has since 2020 deployed the use of an online price monitoring tool, which was developed in-house by the regulator to detect coordinated conduct between competitors and other unlawful pricing practices. The CMA has opened at least two cases following intelligence gleaned from this tool. The CMA intends to increasingly rely on the tool to monitor prices, detect suspicious activity in a variety of sectors, and deter firms from engaging in retail price maintenance.

Damages claims for infringements of competition law

Companies or individuals who have suffered financial loss as a result of a breach of EU or UK competition law can bring an action for damages in the UK against the organisation that breached competition rules. This can be on either of two bases:

— **'Follow-on' basis** – relying on an infringement decision issued by a competition authority (most common); or
— '**Stand-alone'** basis – where no infringement decision has been issued by a competition authority.

Directors therefore need to give due attention to the significant financial consequences of being a defendant to a damages claim. However, damages claims are equally an increasingly powerful tool for companies to consider as claimants, when seeking to mitigate losses caused by third party competition law infringements.

Cartel offence

Any criminal investigation against an individual under the cartel offence will run in parallel to civil administrative enforcement against the company. Any director at risk of individual prosecution under the 'cartel offence' should obtain separate legal representation.

An individual is liable to criminal prosecution if they agree or implement between at least two undertakings (competitors) the most egregious cartel activities such as price-fixing or market sharing. In the worst case scenario, this can lead to prison sentences and/or fines.

Individuals in the UK involved in criminal cartels in other countries may be extradited. Extradition arrangements may apply not only to those who have committed the cartel offence itself, but also to anyone who has conspired to or attempted to commit it.

Director disqualification

Where an undertaking has breached competition law, the CMA is able to apply to the High Court for a competition disqualification order (**CDO**) to disqualify its directors. The CMA will use these powers where it considers it appropriate to do so and has recently disqualified directors of businesses in sectors as diverse as asbestos removal, medicinal tablets and roofing materials.

In order to secure a CDO, the CMA needs to show either that:
— the director's conduct contributed to the infringement; or
— the director had reasonable grounds to suspect that the company was infringing yet took no steps to prevent it; or
— the director ought to have known about the infringement.

Impact of disqualification

Directors can be disqualified for a period of up to 15 years. During that period, it is a criminal offence for the individual to:
— be a director of a company;
— act as a receiver of a company's property;
— in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company; or
— act as an insolvency practitioner.

A disqualified director who continues to be involved in the management of a company can be held personally liable for all relevant debts of the company.

The CMA will typically issue a press release naming any disqualified director, causing immediate harm to that individual's reputation.

Who is a director for these purposes?

Under UK legislation, a 'Director' is any person occupying the position of director **regardless of their title**. This covers individuals formally appointed to a company board, those acting as de facto directors or even shadow directors whose instructions and directions are in practice followed by the business.

The CMA can seek CDOs against both executive and non-executive directors, although executive directors who are expected to be more aware of the day-to-day activities of the business are more at risk.

Directors in certain areas of the business prone to greater competition law risk will also be held more accountable, for instance those in external facing sales roles.

Managing risks

The role of directors

Competition authorities expect all directors to:

— have knowledge of competition law;
— understand the concept of cartels and their serious consequences; and
— know if their company is dominant in the market and the implications of this.

Executive directors need to:

— understand the competition law risks of any commercial agreements/ management areas for which they are responsible;
— take greater steps to prevent, detect and stop infringements within higher-risk areas of the business; and
— ensure compliance systems are put in place and followed.

Non-executive directors need to keep themselves informed of risks and compliance by asking questions of the executive directors to ensure that they have at least:

— demonstrated commitment to compliance;
— taken appropriate steps to identify and assess competition law exposure;
— taken appropriate steps to mitigate competition law risk by implementing appropriate training, policies and procedures; and
— regularly reviewed the position with respect to each of these areas.

Identify risk areas

Typically, individuals in sales or strategic roles and employees who attend industry events, trade shows or trade association meetings will have more frequent contact with competitors and will have greater access to commercially sensitive information such as pricing information.

These staff may require more frequent audits, additional training and/or extra supervision to ensure that they are able to identify relevant risks and that they are sufficiently equipped to manage them.

Deliver effective training

Regular competition law training (delivered at least annually) is a proven and effective way of mitigating risks and ensuring a consistent compliance message is shared across the entire organisation.

Conduct internal compliance audits

Internal competition audits can be helpful to identify risks early. It is best practice for audits to be carried out by external legal advisors. This is because in many jurisdictions (including the EU) legal professional privilege only attaches to (i) the advice of external lawyers; and (ii) the communications sent directly to external lawyers to elicit that advice.

Put the right reporting processes in place

A clear internal procedure should be in place to encourage reporting or ‘whistle-blowing’ on competition compliance issues. Competition law risks need to be identified and addressed quickly because of the potential need to make ‘leniency’ applications as discussed above.

Summary: practical risk management for directors

Directors should actively manage competition law risk by ensuring that the following five principles of compliance are followed:

Culture – promoting a culture of compliance, led from the top down, is key.

Awareness – remind staff at all levels of the organisation that compliance with all applicable laws is a requirement of their employment.

Training – ensure adequate and regular training (typically annual) is compulsory for highest risk staff.

Identification – carry out regular internal audits of risk levels in all areas of the business.

Reporting – to manage potential issues swiftly and mitigate the risk of penalties, create and embed clear guidelines advising when to refer issues to line managers, internal legal teams and where necessary external legal counsel.

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2403-0184387-4