

CLIENT ALERT

The UK Competition and Markets Authority Issues Updated Competition Law Risk Guide to Business Managers and Compliance Officers

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AUTHORS

Philipp Girardet | Rahul Saha | Addiped Cheng

The UK's Competition and Markets Authority ("CMA") has updated its competition law risk guide for business managers, published together with the Institute of Risk Management, signalling tougher and more frequent personal sanctions, and encouraging whistleblowing and reporting of illegal activity. In its updated guidance, the CMA emphasises the need for greater accountability of directors and other business managers to ensure that their companies comply with competition law, noting: "*Not knowing is no excuse*".

The revised guidance comes as the CMA has recently secured its 20th disqualification of a UK company director involved in competition law breaches in the last 4 years. Half of those disqualifications fell into the CMA's last reporting year ended 31 March 2020. The number also covers a disqualification that followed the first application by the CMA for a competition disqualification order to reach the courts (previous cases had involved disqualification undertakings based on the consent by the implicated individuals in return for a shorter disqualification period). In this case, on 3 July 2020, following a 4-day trial, the High Court imposed a competition disqualification order for a period of 7 years on a director of an estate agent business which had agreed to fix a minimum commission rate for residential estate agency services with a number of competitors.

The CMA's updated guide also includes useful new material, including case studies, for use in in-house compliance training sessions.

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The CMA's updated competition law compliance guidance, entitled "Competition law risk: a short guide" was published on the CMA's website on 10 September 2020.¹ We summarise below some of the key messages contained in the updated guidance.

1. Business leaders are reminded that "[n]ot knowing is no excuse" and are expected to "demonstrate unequivocal commitment to competition law compliance"

The CMA's revised guidance advocates a "*proactive management approach*" that requires managers to instil a culture of competition law compliance within their organisations. The CMA notes: "*Not knowing is no excuse. Directors must be clear on the risks of breaking competition law and lead by example – promoting a culture of compliance led from the top down is key*".

Businesses are therefore urged to give serious, renewed consideration to the design and long-term implementation of an effective competition law compliance programme that is well understood not only by employees but also the "*extended enterprise*", which includes businesses' network of customers, supply chain and partners.

This will present a challenge to large, multinational corporations with multiple subsidiaries and business units, and a long list of third-party suppliers, contractors and partners. By the CMA's newly published standards, effective compliance should at the very least include an initial and periodically reviewed risk assessment to identify high-risk business areas and personnel, appropriate checks and balances, infrastructure for training and monitoring, and the establishment of an assurance or audit function that oversees the compliance programme and reports to management.

Internal records of messages from and reports to management, training, and incident reporting and handling will form crucial evidence in demonstrating to the CMA that a compliance programme has been effectively implemented.

2. Director disqualification for up to 15 years is now a matter of course, with the threat of criminal prosecution in serious cases

The revised guidance gives even greater emphasis than in the past to the role of business managers in ensuring compliance and detecting issues at an early stage. The CMA notes that it has updated its internal case handling procedures to allow the CMA to pursue even more director disqualification orders going forward. The CMA notes that it will "*now consider whether to pursue director disqualification in all cases where competition law has been broken*". In the past the focus had mainly been on very serious cases, including criminal cartel cases.

¹ <https://www.gov.uk/government/publications/competition-law-risk-a-short-guide/competition-law-risk-a-short-guide#understanding-the-increasing-risks-for-company-directors>

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In addition to director disqualification sanctions, the guide reminds businesses that individuals who engage in cartel activity may be investigated for committing a criminal offence, prosecuted and sentenced to up to 5 years in prison and/or made to pay a fine. Individuals may also be subject to the confiscation of assets under the Proceeds of Crime Act 2002.

Overall, the guide makes clear that the CMA is sharpening its focus on individual responsibility and individual sanctions where there has been a management or compliance failure in relation to a breach of competition law. The involvement of senior management in a breach may also be an aggravating factor for any fines which may be imposed on the business.

3. Detection risk for competition law breaches will increase further

In an effort to further increase detection rates, the CMA has taken a number of measures to make it easier for the public to report suspected breaches of competition law and encourage whistleblowing.

These include actively encouraging whistleblowing with the promise of leniency (immunity from prosecution and fines), the publication of online forms that allow for easy, anonymous reporting of suspected breaches, and general awareness campaigns that have made the public and business community more vigilant towards potential breaches of competition law. The CMA is also prepared to offer financial rewards for information about cartel activity (informant rewards).

The CMA also reminds businesses of the importance of operating an effective internal compliance reporting procedure to ensure that competition law concerns are reported as early as possible and dealt with in a safe and confidential environment within the business.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Philipp Girardet

+44 20 3580 4717

pgirardet@willkie.com

Rahul Saha

+44 20 3580 4741

rsaha@willkie.com

Addiped Cheng

+44 203 580 4932

acheng@willkie.com

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