The Competition And Markets Authority: New Powers And The Need For Compliance

8 Jul 2019 Nicola Sharp.

With the Competition and Markets Authority set to gain greater powers, Rahman Ravelli’s Legal Director Nicola Sharp outlines the importance of compliance for both companies and their directors.

If new proposals become a reality, the Competition and Markets Authority (CMA) will soon have increased powers to intervene and fine companies for poor business behaviour.

The UK government has confirmed that it may give new powers to the competition watchdog to penalise businesses directly if they have broken consumer law. It believes this is the way to tackle what it calls the loyalty penalty - where people are penalised for staying with a service provider – along with practices such as tying customers into subscriptions and imposing unfair cancellation charges.

Under the new plans, firms that overcharge or mislead their customers could be penalised without the matter ever going to court. The government is consulting on giving the CMA the power to decide itself whether consumer law has been broken, without the need for a court hearing. This would enable the CMA to intervene earlier and quicker and directly impose fines on firms for poor business behaviour.
This will not only have the effect of making it much easier for the CMA to act – it also means that the whole matter could be resolved in much less time than it would currently take if it was conducted under the CMA’s existing powers. The government has also said it will legislate to give regulators such as Ofcom and the Financial Conduct Authority (FCA) extra powers if their current powers to stop loyal customers being taken advantage of are insufficient.

**Compliance**

There is little doubt that the new powers proposed for the CMA will be welcomed by it. Ofcom and the FCA are also likely to be grateful recipients of any extra powers that they are granted.

But those who could be affected by – and even fall foul of – such powers need to heed the signal that the extra powers are sending. Putting it bluntly, the government believes that companies (or at least some companies) have shown themselves unable to exhibit proper business behaviour. If that continues, many could be facing fines without even having their “day in court”.

Supporters of the new proposals will argue that they are welcome and necessary. But those that they apply to must view them as an urgent reminder to ensure their compliance measures are fit for purpose. They need to make certain that their activities are not breaching any aspect of the law - in this instance, consumer law. Those affected by these changes have to analyse and, where necessary, adapt their working practices to ensure they are doing nothing that could be considered illegal.

A company’s failure to ensure compliance with consumer law has always meant that it ran the risk of prosecution. The new powers, however, mean that the penalties could be imposed quicker than ever. There may also be major implications for directors of such companies.
Director Disqualification

As recently as May this year, the CMA has talked openly of how it has been ramping up how it uses its disqualification powers. It says that, as a result, the risk of director disqualification for those who break the law has never been higher.

Under the Company Directors Disqualification Act, the CMA can seek the disqualification of a director and ban them from holding company directorships, or performing certain roles in relation to a company, for up to 15 years. This is done by accepting a legally binding undertaking from the individual or by seeking a court order to disqualify that individual.

The CMA has been especially keen recently to consider whether to pursue director disqualification in all cases where competition law has been broken: scrutinising the responsibility of individual directors to see if they contributed to the breach, had reason to suspect it but failed to stop it or should have known about it. As a result, there has been a spate of disqualifications in 2018-2019.

The new powers the CMA is soon likely to possess may mean that more disqualifications are likely. Yet the CMA's own research shows that competition law risk is not a major consideration in the boardroom: only 18% of those polled by the CMA said their business had held discussions at senior level about it.

Such an approach, at a time when the CMA is set to gain new powers, is dangerous.

Extra CMA Powers

The CMA has been talking of the need for extra powers for some time. If the current proposals become a reality, this will act as a powerful deterrent to firms that the watchdog believes are making misleading claims or imposing contracts that are hard to leave and include unfair terms and conditions: practices that are regular features of “subscription traps”. Prime Minister Theresa May said:
The new powers will be consulted on in the government’s upcoming Consumer White Paper. While the proposals are only at the consultation stage, it appears a foregone conclusion that they will be introduced. The Department for Business, Energy and Industrial Strategy has already put out a press release heralding their imminent arrival; compete with quotes from the Prime Minister Theresa May and the Business Secretary, Greg Clark.

At present, the CMA can fine traders a maximum of 10% of worldwide turnover if it decides there has been a breach of competition rules. But the latest proposals seek to toughen the current position. This is more than likely due to the CMA’s unhappiness with the issue of loyalty penalties and subscription traps. The CMA carried out a review of loyalty penalties and how they were being applied to consumers signing up for internet, phone, insurance, savings and mortgage services. It is almost a year since it started examining allegations that consumers who stayed with their existing service provider were often paying a higher price to do so than new customers were being charged.

**Principles Behind the Changes**

In giving his support to the CMA’s attempts to tackle the problem of loyalty penalties, Greg Clark said the regulators such as the CMA and Ofcom should take an approach to enforcement that is driven by a number of principles.

These principles are:

- People must be able to leave a contract at least as easily as they were able to enter it
- Automatic renewal of a contract should only be allowed if a customer has opted in to this – and the option not to automatically renew should be clear and prominent.
- Exit fees should not be used after an initial minimum or fixed term.
- Automatic renewal onto a fresh fixed term should not generally be used.
• Customers should be given information about the renewal and any price changes in good time.
• When a customer wants to switch suppliers, this should be managed by the new supplier so that customers do not have to contact their existing supplier when they want to move.

Research conducted by Citizens Advice discovered that customers remaining loyal to their mobile and broadband providers or to those providing financial services providers can pay up to £1,000 a year more than customers who regularly switch providers. This reportedly equates to a total £4 billion overpayment across these sectors.

The government is looking to the CMA to tackle this problem, as shown by the new powers proposed for the watchdog. Companies need to take heed of the changes that are coming.

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