THIS IS YOUR (ANTITRUST) CAPTAIN SPEAKING: FASTEN YOUR SEATBELTS AND COMPLY WITH COMPETITION LAW

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Policy and Regulatory Alert

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An open letter was issued in January 2023 by the United Kingdom's Competition and Markets Authority (CMA) and Civil Aviation Authority (CAA) in which the two watchdogs have reminded airport operators of their responsibilities and obligations under competition law and warned them that, if there is any suspicion of competition law breaches in the sector, the CMA/CAA may well take formal enforcement action.

The open letter sends a clear warning message to all businesses active in the aviation industry that they are very much in the spotlight, with competition law enforcers being prepared and willing to step in to address any anticompetitive conduct.

WHAT DOES THE OPEN LETTER SAY?

The joint letter from the CMA and the CAA contains a number of very interesting insights and statements. In particular:

- Both authorities already hold intelligence and are in agreement that certain airport operators may be in breach of competition law.
- While sympathetic to the difficulties caused to the aviation industry by externalities such as the COVID-19 pandemic or the conflict in Ukraine, the CMA/CAA remind operators that they need to conduct themselves in compliance with competition law.
- The key type of anticompetitive conduct the authorities are warning against is the exchange of competitively sensitive information, particularly on pricing or market strategies.
- In light of the considerable staff changes that many operators will have undergone recently, the CMA/CAA are stressing the importance of having up-to-date competition compliance policies and of ensuring that personnel receive regular training.

The regulators conclude the letter by summarizing the serious consequences that a business may be exposed to for breaches of competition law, recommending that players active in the industry seek legal advice, and encouraging whistleblowers to come forward if they hold any relevant information.

Interestingly, this is the second open letter issued jointly by the CMA and CAA in the aviation industry. In July 2022, the authorities used this format in reaching market players to remind airlines of their consumer law

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compliance (with respect to flight cancellations and reimbursements), possibly indicating a new trend/preference in terms of the method of communicating preliminary concerns in this sector.

WHAT DOES THE OPEN LETTER ACTUALLY MEAN?

A number of important messages can be distilled, and conclusions drawn, from the three-page open letter:

- The letter is a clear warning shot for airport operators. Competition regulators who hold information in relation to anticompetitive conduct have the authority to launch investigations, issue formal requests for information, and conduct dawn raids that can be enforced through very heavy fines for noncompliance. The CMA/CAA have instead opted for a warning shot, addressed to all airport operators, that they are being watched very closely and that any conduct that is outside the competition law boundaries may be sufficient to trigger official enforcement action. In this respect, the joint letter seems to effectively be saying that the antitrust enforcement cannons are basically loaded, and that the two regulators will not hesitate to use them.
- If businesses active in the aviation industry who have engaged in anticompetitive conduct hope to be able to explain or justify their actions by reference to mitigating factors such as the global pandemic, staff changes or the Ukraine conflict, the letter brings bad news: these defenses are likely to be rejected by the CMA/CAA, who are more focused on protecting the interests of consumers.
- It seems the intention behind the letter was for it to act as a warning to all types of airport operators and businesses active in the aviation industry. As such, it should not be interpreted narrowly as only addressing specific market players or specific airports.
- The responsibility to prevent breaches of competition law sits with every independent operator. Every business must itself ensure that it does not engage in anticompetitive conduct (including through the mere exchange of sensitive information), that its employees understand the “dos and don'ts” of competition law and that they regularly assess whether their agreements and market practices are compliant.
- Given the international nature of the aviation industry, and the cross-border character of the airport operators' businesses, the issues highlighted in the open letter are not limited to the United Kingdom. On the contrary, it would be impossible to exclude the prospect of other national or supranational antitrust regulators also turning their attention to this sector and taking a tougher stance vis-à-vis airport operators.

CONCLUDING REMARKS

While the CMA and CAA have clearly sought to alert and warn airport operators that they are not immune to antitrust enforcement, the open letter could be treated by businesses as a “near miss.” Instead of facing formal information requests or dawn raids, companies active in the aviation industry have been given the opportunity to look into their market practices, revisit their competition law compliance policies, train their staff, and fix any issues they discover.

The open letter is also a good reminder that, in order to be effective, compliance programs must actually be tailored to each business and, together with compliance training sessions, must be implemented in a way that

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meets the minimum standards internationally. This is particularly relevant in the context of exchanges of competitively sensitive information (the key type of conduct the CMA and CAA are concerned about), where it will not always be clear whether a particular email, communication, or discussion ventures into the danger zone and where a better grasp of the applicable legal rules can prevent a single communication (inadvertently) disclosing certain business information from being likened to a cartel-type infringement.

HOW CAN WE HELP?

We recommend that companies active in the aviation sector in the United Kingdom and European Union take a closer look at their agreements and interactions with other operators in the industry, including with competitors, and consider whether there are any competition compliance issues that could expose their businesses to antitrust risks.

Get in touch if you need help navigating this landscape. Our UK and EU competition law teams can assist clients with risk assessments, compliance programs, staff training sessions and, if necessary, interactions with competition law enforcers.

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