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Competition Law and Director Disqualification: Proposed Changes to the Current UK Guidance

Samuel Beighton (Gowling WLG) · Monday, August 13th, 2018

The UK's Competition and Markets Authority ("CMA") is consulting on proposed revisions[1] to its current guidance on director disqualification in competition law cases (the "Current Guidance").[2]

The consultation on the CMA's proposed revised guidance (the "Draft Revised Guidance") closes at 17:00 GMT on Thursday 13 September 2018, and follows the director disqualifications secured by the CMA in December 2016, and in April 2018, in two separate investigations.

Under the Company Directors Disqualification Act 1986 (the "CDDA 1986"), the CMA[3] can seek the disqualification of an individual from holding company directorships, where that individual has been a director of a company that has infringed UK and/or EU competition law.

The CMA is able to apply to court for a competition disqualification order ("CDO") against the individual, or otherwise accept a binding competition disqualification undertaking ("CDU") from the individual, with the maximum period of disqualification being 15 years.[4]

Against this background, the Draft Revised Guidance emphasises the CMA's focus upon ensuring that individuals face possible sanctions for infringements of UK and EU competition law, and reiterates the need for directors to:

- demonstrate a clear commitment to competition law compliance from the "top down"; and
- take active steps to ensure that robust and effective compliance procedures and policies operate at every level of their organisations.

This update provides an overview of the CMA's director disqualification powers, and considers key aspects of the Draft Revised Guidance.

THE CMA'S DIRECTOR DISQUALIFICATION POWERS

Applying to Court for a CDO

If the CMA successfully applies to court for a CDO, the individual in question may be prevented for a maximum period of 15 years from:

- being a company director; acting as a receiver of a company's property; or being concerned with the promotion, formation, or management of a company (e.g. a so-called "shadow director"),[5] without obtaining leave of the court; and
- acting as an insolvency practitioner.

An individual commits a criminal offence if they breach a CDO. Further, where an individual is engaged in the management of a company in breach of a CDO, they will be liable personally for the relevant debts of that company.

Importantly, the definition of a "company" under the CDDA 1986 includes companies registered in Great Britain under the Companies Act 2006, as well as unregistered companies[6] (which may include companies registered outside Great Britain). The CDDA 1986 is also applicable to limited liability partnerships.[7]

In addition, a "director" includes an individual holding the position of director (irrespective of their title) and generally includes the position of a shadow director, as well as a de facto director (i.e. a person who assumes to act as a director).

Circumstances in Which the Court is Required to Make a CDO

Having received an application for a CDO, a court is required to make such an order where the following two conditions are satisfied in relation to the individual in question:

- a company of which the individual is a director has infringed UK and/or EU competition law;[8] and
- the court considers that the conduct of the individual as a director makes them unfit to be concerned in the management of a company.

In assessing the conduct of the individual, the court must consider whether:

- the individual contributed to the infringement, irrespective of whether they knew that the company's conduct was infringing UK and/or EU competition law;
- the individual, while not contributing to the infringement, had reasonable grounds to suspect that the company's conduct was infringing UK and/or EU competition law, and took no steps to prevent this; and
- the individual did not know, but ought to have known, that the company's conduct was infringing UK and/or EU competition law.[9]

Therefore, the CMA is not required to show that the individual had either (i) actual

knowledge of the company's conduct, or (ii) actual knowledge that the company's conduct was infringing UK and/or EU competition law.

As such, from the CMA's perspective, seeking a CDO (or accepting a CDU, as considered below), may be regarded as a lower risk – and more cost-effective – means by which the CMA may impose individual liability for competition law infringements, particularly given the challenges that the CMA has experienced in bringing successful criminal prosecutions under the Cartel Offence.[10]

Accepting a CDU

Under the CDDA 1986, director disqualifications can also be effected without a court order.

In circumstances where:

- the CMA considers that a company of which the individual is a director has infringed UK and/or EU competition law, and the conduct of the individual in that role makes them unfit to be concerned in the management of a company; and
- the CMA receives an offer from the individual to provide a CDU,

the CMA may accept a CDU offered by the individual instead of making (or progressing) an application for a CDO.[11]

If a CDU is accepted by the CMA (as happened in the two cases in December 2016 and April 2018, considered in our earlier updates), a CDU has the same legal effect and consequences as a CDO, and may be accepted for a maximum period of 15 years.

KEY ASPECTS OF THE DRAFT REVISED GUIDANCE

As outlined further within the CMA's consultation document,[12] the proposed revisions to the Current Guidance are primarily intended to ensure that the CMA does not limit its discretion, or its ability to act, by imposing restrictions upon its functioning that go beyond the requirements of the CDDA 1986.

Key aspects of the Draft Revised Guidance are explored below.

Disqualification of Current and Former Directors

The Draft Revised Guidance clarifies that the CMA is able to seek CDOs against individuals that are currently directors, as well as against individuals that have previously been directors.[13]

This clarification is not apparent within the Current Guidance, which implicitly refers to current directors, and confirms the CMA's intention in relation to the broad application of its powers.

No Requirement for the CMA to Establish an Infringement of Competition Law

Where a competition law infringement has not been established (e.g. by a decision of a competition authority, or by a court judgment), the Current Guidance provides that only in exceptional cases will the CMA consider seeking a CDO.

The CMA believes that this approach unnecessarily limits its powers, and goes beyond the provisions of the CDDA 1986.

As such, while the CMA anticipates that in most cases it will rely upon competition law infringements having already been established, the Draft Revised Guidance provides that there may also be cases in which it is appropriate for the CMA to apply for a CDO in the absence of a finding of infringement.

No Requirement for an Infringement to Have an Impact in the UK

The Current Guidance provides that the CMA does not intend to apply for CDOs where a competition law infringement did not have an actual or potential impact in the UK.

Again, the CMA considers that this approach unnecessarily limits its powers, and goes beyond the provisions of the CDDA 1986.

Accordingly, while acknowledging that such cases are likely to be unusual, the CMA considers that it would undermine the rationale of the disqualification regime to rule out applying for a CDO where EU competition law is infringed in another jurisdiction.

This also represents a clear attempt by the CMA to ensure that it retains a wide ambit in relation to the possible application of its powers.

Removal of the "Five-Step" Process when Deciding to Seek a CDO

The Current Guidance provides a five-step process (summarised below) that the CMA will follow when deciding whether to seek a CDO:

- Has there been an infringement of UK and/or EU competition law?
- If so, what was the nature of the infringement, and was a financial penalty imposed?
- Has the company in question benefitted from leniency?
- What is the extent of the director's responsibility for the infringement?
- Are there any aggravating and/or mitigating factors?

However, in light of the CMA's recent experience it considers that the five-step

process risks being interpreted narrowly, and that the process may wrongly give the impression that each step is of equal weight in a given case. The CMA therefore believes that it is more useful to assess an individual's conduct "in the round", having regard to the facts and evidence in each case, and whether it is "expedient in the public interest" to seek a CDO.[14]

In this context, the Draft Revised Guidance sets out an overview of general principles and factors (including aspects of the former five-step process) that the CMA intends to consider when deciding whether to seek a CDO.

Emphasizing that the general principles and factors cannot be applied mechanistically, as well as the intended broad ambit of the CMA's approach, the Draft Revised Guidance makes clear that: "[t]he CMA retains full discretion when deciding whether to investigate the conduct of a director, to apply for a CDO, or to accept a CDU".[15]

Parent Company Directors Could Face Applications for CDOs

The Draft Revised Guidance confirms the CMA's approach in relation to the directors of parent companies.

The CMA will consider the conduct of all directors of the companies which form the undertaking[16] that has (or may have) infringed UK and/or EU competition law.

On this basis, where the companies within a corporate group form a single undertaking, in certain circumstances the directors of the ultimate parent company in that group could face applications for CDOs in relation to infringements committed by a subsidiary company within the group.

Given the CMA's focus upon director disqualification as an effective enforcement tool, it appears likely that the CMA would be minded to pursue parent company directors where it considered it appropriate to do so.

Seeking a CDO while an Infringement Finding Remains Subject to Appeal

The CMA believes that the Current Guidance unnecessarily restricted its ability to act by preventing it from seeking a CDO while a finding of infringement remained subject to appeal.

The CMA removed this requirement from the Current Guidance in June 2018, and is now consulting upon this aspect under the Draft Revised Guidance.

In particular, the CMA considers that if it was able to seek a CDO while an infringement finding was subject to appeal, in certain cases this would mean that disputes regarding the infringement could be addressed at the same time by the

Competition Appeal Tribunal ("CAT").[17] This may then be expected to reduce the risk of divergent outcomes between the CAT and the High Court in relation to the assessment of the same competition law infringement.

However, if implemented, it remains to be seen how this approach would work in practice, including how the rights of the individual would be adequately protected in the context of any appeal from the CAT in respect of an infringement finding.

ENGAGING WITH COMPLIANCE CONCERNS

In light of the CMA's recent cases, and views expressed in the context of the Draft Revised Guidance, it would be prudent for directors to be proactive in their approaches to maintaining an effective culture of competition law compliance at all levels of their organisations, including their wider corporate group.

Significantly, failing to do so potentially risks a detrimental impact upon individuals' personal activities and professional ambitions.

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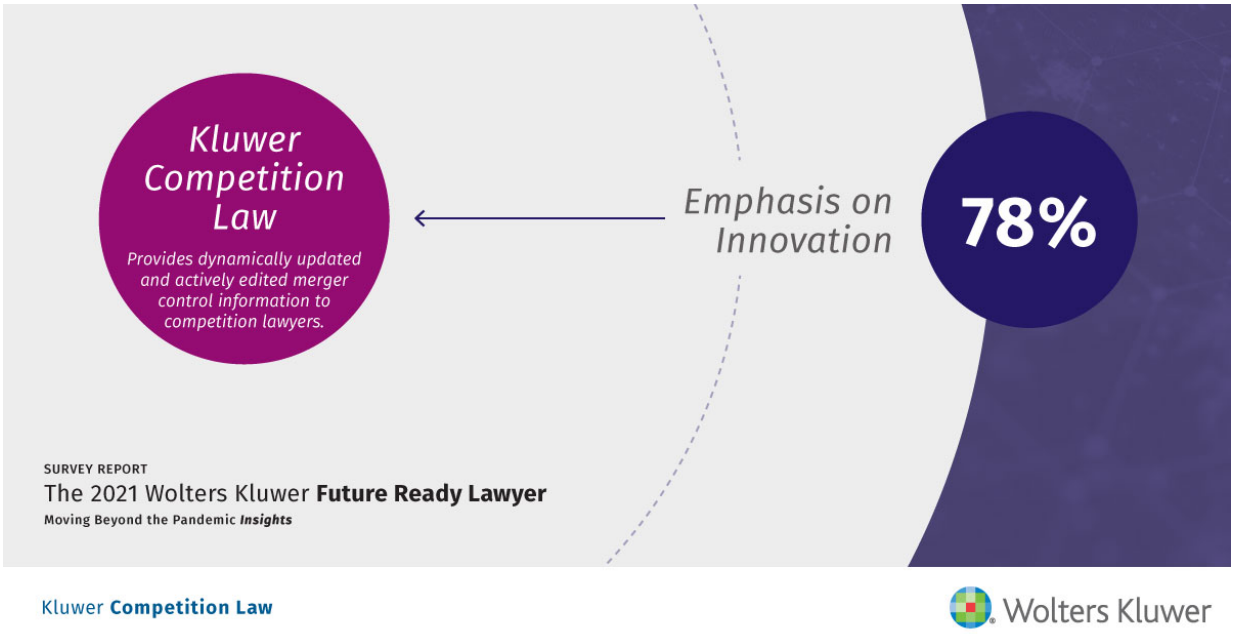

References[+]

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