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Director disqualification and the CMA: Encouraging a "top down" compliance culture in the UK

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In April 2018, the UK's Competition and Markets Authority (the "**CMA**") announced that two individuals would be disqualified from acting as directors for 3 and 3.5 years as a result of a company's infringement of UK domestic competition law, specifically Chapter I of the Competition Act 1998 (the "**Chapter I Prohibition**").[1]

This case follows a separate case in December 2016 in which another individual was disqualified from acting as a director for 5 years following their direct involvement in an infringement of the Chapter I Prohibition while acting as managing director.[2]

The CMA's public messaging in both cases confirms its approach towards holding directors personally responsible for competition law compliance.

Given the inherent uncertainty in pursuing criminal convictions under the Cartel Offence and a higher burden of proof[3], we can expect a greater reliance by the CMA on director disqualifications as a more reliable and cost effective enforcement tool. Setting aside the desirability of the CMA using this tool to press for early settlement as opposed to judicial (and jury) scrutiny, it is clear that directors are well advised to assume responsibility for adequate compliance procedures within their own organisations.

The CMA's powers to disqualify individuals from acting as directors

Competition disqualification orders ("**CDO**")

Under the Company Directors Disqualification Act 1986 (the "**CDDA 1986**"), the CMA (and certain specified regulators[4]) may apply to court for a CDO against an individual.[5] If a CDO is made, the individual may be prevented for a period of up to 15 years from:

- being a director of a company; acting as a receiver of a company's property; or being concerned in any way with the promotion, formation, or management of a company, without obtaining leave of the court; and
- acting as an insolvency practitioner.

It is a criminal offence for an individual to breach a CDO, punishable by up to two years imprisonment, and/or a fine. In addition, if an individual is involved in the management of a company in breach of a CDO, they will be personally liable for all of the relevant debts of the

company in question.

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

Where the court receives an application for a CDO, it is required to a make such an order if the following two conditions are satisfied in relation to the individual: (i) a company of which the individual is a director or shadow director[8] has infringed UK and/or EU competition law;[9] and (ii) the court considers that the conduct of the individual as a director or shadow director makes them unfit to be concerned in the management of a company.

When assessing the conduct of the individual, the court is required to 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.[10]

Accordingly, there is no requirement for the CMA to demonstrate that the individual had actual knowledge of the company's conduct, or that the company's conduct was infringing UK and/or EU competition law.

As such, from the CMA's perspective, an application to court for a CDO imposes a far lower evidential burden than mounting a successful prosecution under the Cartel Offence. Further, as a matter of procedure, the fact that a CDO is made by the court eliminates a significant uncertainty that exists in relation to the Cartel Offence (notwithstanding its revision to remove the need to evidence dishonesty) – will a jury be convinced by the CMA's case?

Competition disqualification undertakings ("**CDU**")

The CDDA 1986 also provides for a mechanism whereby disqualification may be obtained without the need for an application to court. Specifically, in circumstances where the CMA (or a specified regulator):

- thinks that a company of which the individual is a director or shadow director has infringed (or is infringing) UK and/or EU competition law;
- thinks that the conduct of the individual as a director or shadow director makes them unfit to be concerned in the management of a company; and
- receives an offer from the individual to give a competition disqualification undertaking ("**CDU**"),

that offer may be accepted instead of proceeding with an application for a CDO.[11] If accepted, a CDU has the same legal effect as a CDO.

CDU – the path of least resistance?

In *Posters and Frames*, the CMA's press release announcing the disqualification of the director states that where an individual offers a CDU "*this will normally result in some discount in the period of disqualification which the CMA is prepared to accept*".[12] Further, where a CDU is accepted, the CMA will not usually seek to recover costs from the individual (in contrast to the position where a CDO is made).[13] In this context, there are apparent benefits for an individual that result from having the offer of a CDU accepted, as compared to being the subject of a CDO.

The same press release also outlines the process by which (i) the CMA served notice on the individual setting out the grounds and evidence upon which it intended to rely to seek a CDO; and (ii) the CMA determined to seek a CDO if the individual was not prepared to give a CDU.[14] In a situation whereby the CMA has a strong case in favour of a CDO, offering to give a CDU instead may be viewed as the path of least resistance for an individual. Evident benefits will be the resultant reduction in the period of disqualification and the savings in terms of costs if the offer is accepted.

Moreover, for the CMA, while a CDU achieves the same legal outcome as a CDO, the process remains under the CMA's control, and avoids the costs of court proceedings. In any event, the CMA retains the option of applying for a CDO if discussions with an individual do not progress towards the offer of a CDU.

Director disqualification as a deterrent

In 2007, the CMA's predecessor, the Office of Fair Trading (the "**OFT**"), commissioned a report by Deloitte that considered the deterrent effect of the OFT's competition enforcement activities (the "**Deloitte Report**").[15]

Amongst other things, the Deloitte Report was informed by a telephone survey of 202 UK companies, which were surveyed in February and March 2007. Following this survey, director disqualification was ranked in importance by UK companies as second only to criminal penalties, and the Deloitte Report noted that "[w]*hile the sanction has not yet been used, the threat …is seen as a serious one by both lawyers and companies, and many thought that a greater use of this sanction would improve deterrence*".[16]

Having pursued a number of unsuccessful criminal prosecutions under the Cartel Offence since 2007,[17] the CMA appears now to have settled upon the use of director disqualification as its frontline deterrent for individuals, while holding the prospect of further criminal prosecutions in reserve (and maintaining a perceived level of risk of criminal sanctions via its external communications).

In this context, the risks for the CMA in pursuing further unsuccessful criminal prosecutions are clear. As noted by the National Audit Office's 2016 report on the UK competition regime, "*successful high-profile enforcement action builds the credibility of a competition authority, clarifies the law and deters anti-competitive behaviour*".[18] Implicitly, the other side of that same coin is that unsuccessful enforcement action undermines the reputation of a competition authority, and efforts to achieve a deterrent effect. In addition, the failure of high-profile actions brought by publicly-funded agencies invites a chorus of criticism regarding the use of tax payers' money; it is notable that following the unsuccessful prosecution of two individuals in 2015, the CMA opted to defend publicly its decision to prosecute.[19]

Conversely, from the CMA's perspective, accepting a CDU avoids a number of the uncertainties

that may be expected to arise in a criminal trial, and provides a faster, lower cost means by which to sanction an individual in respect of an infringement. A CDU also enables the CMA to retain a greater degree of control over the publicity and messaging in relation to the disqualification of a director, including the extent to which director disqualification is linked to the CMA's leniency programme.

It is therefore unsurprising that the CMA's current Annual Plan confirms that "[i]*n appropriate cases, we will continue to seek disqualification of directors of companies that breach competition law, to ensure that unsuitable individuals cannot serve as company directors and in the most serious cases, we will pursue criminal prosecutions*".[20]

From a broader societal perspective, undue reliance by a public authority on settlements untested by courts, has clear potential drawbacks and implications for the use (or misuse) of the authority's powers. Over time, it is to be hoped that there is sufficient testing of these mechanisms, so as to guard against the CMA using them unchecked and unchallenged.

Conclusion

The CMA's published guidance provides that while directors are not expected to have specific expertise in competition law, the CMA does expect that:

- all company directors should appreciate the importance of competition law compliance; and
- every director of every company ought to know that price-fixing, market sharing and bid-rigging agreements are likely to breach competition law.[21]

In view of the CMA's current approach to individual liability, directors are being given the clear message that it is their responsibility "*to ensure that their companies don't engage in illegal anti-competitive practices…* [and] *if their companies breach competition law they risk personal disqualification*".[22]

Against this background, it would therefore be prudent for directors to be proactive in ensuring that effective and robust competition law compliance policies and procedures operate at all levels of their organisations, and that there is a demonstrable commitment to ongoing compliance "from the top down". Significantly, a failure to do so risks having a considerable impact upon individuals' professional activities, as well as their personal ambitions.

[1] See, CMA press release "Estate agent cartel directors disqualified", April 2018, available at: www.gov.uk/government/news/estate-agent-cartel-directors-disqualified

[2] See, CMA press release, "CMA secures director disqualification for competition law breach", 1 December 2016, available at: www.gov.uk/government/news/cma-secures-director-disqualification-for-competition-law-breach

[3] See, section 188 of the Enterprise Act 2002.

[4] Being, variously, the Office of Communications; the Gas and Electricity Markets Authority; the Water Services Regulation Authority; the Office of Rail and Road; the Civil Aviation Authority; Monitor; the Payment Systems Regulator; the Financial Conduct Authority (see section 9E(2) of the CDDA 1986).

[5] See, section 9A of the CDDA 1986.

[6] See, section 22(2) of the CDDA 1986.

[7] See, Limited Liability Partnerships Regulations 2001 (SI 2001/1090), Regulation 4(2).

[8] Shadow director is defined at section 22(5) of the CDDA 1986 as "*a person in accordance with whose directions or instructions the directors of the company are accustomed to act*", but a person shall not be considered a shadow director for the sole reason that directors act on that person's advice given in their professional capacity.

[9] Being, any of the Chapter I Prohibition; Chapter II of the Competition Act 1998; Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**"); and Article 102 TFEU.

[10] See, section 9A(6) of the CDDA 1986. In addition to the mandatory considerations of the court, when addressing an application for a disqualification order the court may also have regard to the individual's conduct as a director or shadow director in connection with any other breach of UK and/or EU competition law (see, section 9A(5)(b) of the CDDA 1986).

[11] See, sections 9B(1) – (2) of the CDDA 1986.

[12] See, CMA press release, "CMA secures director disqualification for competition law breach", 1 December 2016, footnote 2.

[13] See, OFT510, Director disqualification orders in competition cases, paragraph 5.2.

[14] See, CMA press release, "CMA secures director disqualification for competition law breach", 1 December 2016, footnote 3.

[15] See, OFT962, "The deterrent effect of competition enforcement by the OFT", Deloitte, November 2007, available at: http://webarchive.nationalarchives.gov.uk/20140402181127/http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf

[16] The Deloitte Report, paragraph 5.117.

[17] Including the collapsed criminal trial of certain present and former senior managers of British Airways in *R v George and others* (2010), and the acquittal of two individuals implicated in the galvanised steel tanks cartel in *R v Dean and Stringer* (2015).

[18] See "The UK competition regime", National Audit Office, February 2016, available at: www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf

[19] See, "Criminal cartel enforcement after galvanised steel tanks", CMA blog, September 2015, available at: competitionandmarkets.blog.gov.uk/2015/09/29/criminal-cartel-enforcement-after-galvanised-steel-tanks/

[20] See, CMA Annual Plan 2018/19, section 2.17, available at: assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696351/AnnualPlan-201819-PDF__1_.pdf

[21] See, OFT510, Director disqualification orders in competition cases, paragraph 4.23, available at : assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/324978/oft510.pdf

[22] See, CMA press release “Estate agent cartel directors disqualified”, April 2018.

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