Let the Punishment Fit the Crime? UK's OFT Publishes Revised Guidance on Disqualifying Directors for Competition Law Infringements

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Under the Company Directors Disqualification Act 1986 (CDDA), as amended by the Enterprise Act 2002, the UK's Office of Fair Trading (OFT) can apply to a court for a Competition Disqualification Order (CDO) against a director of an undertaking that has infringed competition law. The court must be satisfied that the director's conduct makes the director unfit to manage a company.[1] CDOs can last up to 15 years.[2] To date, the OFT has never used its powers to apply for a CDO, but it is now likely that it will do so in the future.[3] In its revised guidelines, issued at the end of June following lengthy public consultation, the OFT explains how it intends to use this power.[4] In particular, the guidance highlights the possibility of obtaining a CDO against a director who was unaware that the company had infringed competition law, provided the director ought to have known of this infringement.

Prior finding that company breached competition law is normally needed

The revised guidance indicates that the OFT will first consider if a prior definitive decision or judgment has found that the company in which the person is a director has infringed competition law.

The infringement can be a breach of any of Chapter 1 or 2 of the UK Competition Act 1998 or Articles 101 or 102 of the Treaty on the Functioning of the European Union (formerly Articles 81 and 82 EC Treaty). Unlike other penalties that can be imposed on individuals under UK competition law, a CDO is therefore applicable to any infringement of competition law and not just involvement in a horizontal cartel. The OFT states that it will take into account any genuine uncertainty over the legality of conduct – we would hope that this will in particular be the case if the investigation concerns an alleged abuse of dominance as here the boundaries between competing "on the merits" and illegal conduct can be particularly opaque.

The prior decision or judgment can originate from the OFT itself, the European Commission or any competent court, including the Court of Justice of the European Union. While the CDDA would seem

to permit the OFT to apply for a CDO in any case where the European Commission or a European Court has found an infringement, the guidance specifies that the OFT does not intend to use its power unless the infringement has "an actual or potential impact in the United Kingdom".

The guidance suggests that while CDOs will be sought for "more serious breaches", the OFT will not consider it necessary that the prior decision or judgment imposed a financial penalty.

In exceptional cases the OFT may apply for a CDO even in the absence of a prior decision or judgment

In a change compared to the previous guidance, the OFT explains that it could exceptionally apply for a CDO even when there is no prior finding of a breach of competition law; in such circumstances, the OFT would have to prove to the court that there had been an infringement of competition law. The OFT's consultation document indicates that it could be appropriate to apply for a CDO in the absence of a definitive prior decision or judgment when, for example, the company has been liquidated or a decision is under appeal only in relation to the amount of the fine rather than the finding of infringement.

Circumstances in which the OFT will apply for a CDO

Most CDOs will be imposed when a director has been actively involved in the competition law infringement. In addition, the OFT will take account of a director's past direct or indirect involvement in a breach of competition law, any involvement in or ordering that evidence be destroyed, and any other obstruction of the regulator's investigation.

The guidance, however, makes it clear that conduct short of active involvement may also give rise to an application for a CDO. In either of the following two instances, the OFT considers that it is "likely to apply for a CDO".

First, a director may have reasonable grounds for suspecting an infringement but do nothing to prevent it. For example, the director might have approved expenditure related to the infringement having reasonable grounds to believe (or knowing) that the funds would be used to finance the illegal activity.

Second, in the most noteworthy section of the guidance, the OFT explains how it might use its CDO powers in relation to directors who "ought to have known" about the company's infringements. Here the OFT will take account of (i) the director's specific role, position and responsibilities, (ii) the relationship between that role and the individuals directly responsible for the competition law infringement, (iii) the "general knowledge, skill, and experience actually possessed by the director in question and that which should have been possessed by a person in his or her position", and (iv) the information that was available to the director. If, having weighed these considerations, the OFT believes that the director ought to have known of the breach, the OFT will apply for a CDO and the director is effectively treated identically to a director who was actively involved in a breach.

The guidance provides insight into the level of competition law knowledge expected from directors. Directors should be aware of the importance of compliance and "every director" should know that price-fixing, bid-rigging, and market sharing are illegal. The consultation process had highlighted the potential irony that a director in charge of a company's compliance programme could be held to a higher standard than another director. The guidance, however, makes clear that being responsible for compliance does not increase the likelihood of a CDO nor will it create a presumption that the director should have known about illegal conduct. On the contrary, the OFT will take into account a director's efforts to encourage compliance and any efforts to implement a revised compliance programme.

One particularly problematic issue in the context of directors who might have known about a breach of competition law is when a director of a parent company may be held to account for a subsidiary's conduct. The guidance helpfully explains that the parent company director must at least be a *de facto* or shadow director of the subsidiary; it is not normally sufficient merely that he or she was a director of the parent or of another group company.

If a director was coerced by another company, acted under "severe internal pressure", or there was legitimate uncertainty as to whether the company's conduct was illegal, the OFT is less likely to apply for a CDO.

Relevance of leniency applications

The guidance also considers the link with applications for amnesty or leniency from fines and/or individual criminal sanctions. The OFT confirms its existing approach that it will not normally apply for a CDO against any director whose company has benefited from leniency.[5] The guidance, however, notes two situations in which the OFT would consider applying for a CDO even though the director's company has obtained leniency. First, the OFT will consider a CDO if the director has been removed because of having played a role in the infringement and/or the director opposed the leniency application. Second, a CDO is not ruled out if a director fails to cooperate with the OFT or the European Commission during the leniency procedure. We would hope that the OFT would use its CDO powers sparingly in these situations. A company that applies for leniency is entitled to think that its directors would also be immune from CDOs.[6]

Competition Disqualification Undertakings (CDUs)

The guidance notes the possibility of the OFT accepting a Competition Disqualification Undertaking (CDU) instead of continuing with the application for a CDO. A CDU is a promise from a director that he or she will not act as a director for a defined period.

The possibility of offering a CDU arises once the OFT notifies the director that it intends to apply for a CDO. The OFT's notice ("a section 9C Notice") must set out the OFT's evidence, the deadline for

the director to reply and the alternative of offering a suitable CDU. The OFT must send a section 9 Notice whenever it intends to apply for a CDO.

While the effects of breaching a CDU are identical to breaching a CDO, some may consider offering a CDU preferable to court proceedings for a CDO. The acceptance of a CDU is noted in a public register and the OFT or Secretary of State may issue a press release.

Conclusion

The OFT believes that CDOs could have an important role in deterring breaches of competition law. The guidance indicates that the OFT intends to use its power to apply for a CDO. We would hope that it will use the power in the most appropriate cases, namely where a director knowingly was involved in an infringement or turned a blind eye and/or the director has a history of repeated infringements.

While some might argue that CDOs often are more appropriate penalties than imposing fines on a company for infringing competition law, we think the OFT should nonetheless be wary of over-enthusiastic use of its powers. In particular, it would be regrettable if widespread applications for CDOs led to competent people being deterred from becoming non-executive directors. While the final decision on a CDO rests with the courts, the OFT threatening a CDO should not become routine in UK competition law infringements.

[1] See CDDA sections 9A to 9E.

[2] CDOs can apply to directors, or to any other person occupying an equivalent position, whatever their title. In particular, they can apply to so-called shadow directors, namely any person in accordance with whose directions or instructions the company's directors are accustomed to act. During the period of a CDO, it is a criminal offence to be a director of a company and any person who contravenes a CDO can be held personally liable for all of the company's relevant debts.

[3] In the Marine Hose case, the Crown Court, when imposing prison sentences on three executives, also imposed director disqualification orders, but these were under CDDA section 2, which allows for such orders when an individual is convicted of an indictable offence without there being any need for an OFT application to the court – see www.oft.gov.uk/about-the-oft/legal-powers/enforcement_regulation/prosecutions1/concluded.

[4] The relevant OFT documents are available at www.oft.gov.uk/OFTwork/consultations/closed/2010/competition.

[5] In addition, the guidance states that the OFT will not apply for a CDO against a person that has received a "no-action letter" granting amnesty from prosecution under the UK's criminal cartel offence.

[6] In this respect, it is good to see that the OFT has abandoned the idea that it would apply for CDOs when the company has obtained only so-called "Type C" leniency from the OFT or a reduction in the

fine from the European Commission. As the OFT's summary of the responses to the consultation indicates, a majority of the respondents believed that any change to the OFT's current policy would undermine a company's incentives to apply for leniency.

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