e-Competitions
National Competition Laws Bulletin

August 2009

The UK OFT ramps company directors' responsibility for competition law compliance

United Kingdom, Procedures, Reform, Liability (personal), Sanctions/Fines/Penalties, Leniency, All business sectors

UK Office of Fair Trading, 18 August 2009, Competition disqualification orders - Proposed changes to the OFT's Guidance

http://www.oft.gov.uk/news-and-upda...

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On 18 August 2009, the UK Office of Fair Trading (OFT) published a consultation on significant proposed changes to its guidance on the adoption of competition disqualification orders (CDOs) against company directors. The OFT's proposed changes present a significantly more aggressive approach in seeking to force directors to take greater responsibility than they may at present to ensure that their companies comply with competition law. These changes are driven in part by the results of research carried out for the OFT that found that director disqualification comes second only to jail terms as a deterrent to competition law breaches. For the reasons explained below, the proposals, if adopted and implemented, are likely in particular to make shadow and non-executive directors take a closer interest in their companies' behaviour.

I. The OFT's current powers and policy

The OFT and sectoral regulators currently may apply to the courts to have a CDO awarded against a director found to have breached UK or EU competition law. This enforcement mechanism is unique amongst the tools available to competition authorities in the leading economies of the EU and in the U.S. If the court finds that (i) the relevant company breached competition law and (ii) the director is unfit to be concerned in the management of a company, it must disqualify him for a period of up to 15 years. This would prevent him from being a company director (including a shadow director), act as receiver of a company's property, be concerned (directly or indirectly) in the promotion, formation or management of a company, or act as an insolvency practitioner.

The OFT's powers to seek a CDO from the courts currently are more limited. For example: directors of companies benefiting from immunity or leniency on fines cannot be subject to a CDO; directors of companies not fined for a competition law infringement cannot be subject to a CDO; an application for a CDO can only be made once all appeals against an infringement decision have ended; in practice, only a director directly involved in, or who otherwise knew about, the competition infringement is likely to be subject to a CDO. Directors who arguably ought to have known about the infringement are unlikely at present to be targeted by the OFT.

The upshot of this is that CDOs are only likely to be pursued against a director personally involved in or aware of

competition law breaches and whose company does not receive any leniency on fines. To date, the OFT has never used its CDO powers, although three directors have been disqualified under UK criminal law for their part in the Marine Hose cartel. The OFT's proposed changes to the CDO regime indicate that it intends to render its CDO powers more workable so that it may regularly use them in the future and that it wishes to use the threat of a CDO to persuade directors to blow the whistle on cartels and to ensure that their companies do not engage in anticompetitive behaviour in the first instance.

II. Changes proposed by the OFT

A. Possible CDO before expiry of all appeals

The proposals envisage cases in which the OFT may apply for a CDO where an infringement decision remains under appeal, but the appeal relates to the level (or imposition) of a fine, not to the existence of an infringement itself.

B. Possible CDO even if company not fined

The OFT proposes removing the requirement that a company must have been fined before its directors could be exposed to a CDO. This would leave directors of smaller companies that might currently benefit from an exemption from a fine (or even from the OFT choosing not to issue an infringement decision), because their companies are so small or have a minor importance on the affected market, susceptible to CDOs. Equally, if no infringement decision had been issued, because the relevant companies were in liquidation, the proposals would nevertheless enable the OFT to take measures against the directors of these companies.

C. Possible extension of CDO to beneficiaries of leniency

The OFT proposes removing the exemption from CDOs accorded to current directors of companies that have benefited from leniency on fines. Instead, only directors of companies receiving immunity or 100% leniency on fines would be exempt from CDOs. The OFT also proposes having the discretion to pursue a current director of the relevant company where that company was the whistleblower, but the director failed to co-operate with the regulatory investigation. The OFT would also consider the option of pursuing directors of companies that have benefited from leniency but have resigned (as opposed to having been "removed," as is the current position) due to responsibility for the competition law breach.

D. The range of directors that may be subject of CDO

The final change proposed by the OFT is the most significant for directors of larger companies, especially shadow and non-executive directors. The OFT wishes to target a wider range of directors to encourage directors to be more pro-active in monitoring their companies' competition law compliance: if the OFT goes ahead with its proposals, directors not directly involved with the competition law infringement would be more likely to find themselves subject to a CDO application if they ought to have known about the infringement, as would those who had reasonable grounds to suspect a breach but ignored it. The OFT proposes to address this responsibility aspect of its analysis on a case-by-case basis, including (for the "ought to have known breach") consideration of the director's role in the company, the relationship of this role with those responsible for the breach, available information and the objective general knowledge, skills, and experience of the director. It seems that this is aimed at capturing conduct such as a sales director not supervising the conduct of his sales team sufficiently, where (for example) a member of the team agrees to share markets with a competitor, or an experienced director, including non-executives, not taking a sufficiently close interest in the commercial behaviour of his/her company.

III. Compliance

This consultation is the latest in a succession of moves by UK and EU regulators to target cartels and to put cartelists under increasing pressure. The European Commission highlighted cartel crackdowns as its number one priority in its Report on Competition Policy 2008 published last week. Both the Commission and the OFT are encouraging the use of leniency and settlement procedures, and the Commission in particular has in the last year imposed record-breaking fines on cartelists. The OFT's research found, however, that fines do not act as a sufficient deterrent, and its new CDO proposals show that it wants to turn up the heat on individuals ultimately responsible for companies engaging in anticompetitive behaviour.

Interested parties have until 20 November 2009 to comment on the OFT's proposals.

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