April 2018

UK Competition Law Newsletter

Highlights

— CMA secures disqualification of two company directors following their involvement in estate agents' cartel.

— CMA announces nomination of a new Chairman, Andrew Tyrie.

— CMA sends final report on Fox/Sky to Secretary of State – decision due on 13 June.

CMA Director Disqualification

On 10 April, the CMA announced that it had secured the disqualification of two company directors following their company's involvement in an estate agents' cartel.[1] To date, director disqualifications for breaches of competition law have been rare – this is only the second example of the penalty in the UK in a civil case.[2] But the CMA appears determined to step up the use of its powers to sanction individuals for competition law infringements. Announcing the disqualifications, Michael Grenfell, Executive Director of Enforcement at the CMA, emphasised the "*important responsibility*" that company directors have to ensure their companies act lawfully, and stated that their disqualification "*should send a clear message to directors that if their companies breach competition law they risk personal disqualification.*"[3]

The Rules on Director Disqualification

The Company Directors Disqualification Act 1986 (the "**1986 Act**") empowers the CMA to apply to the court for a Competition Disqualification Order, preventing the relevant individual from being involved in the management of a company for a period of up to 15 years.[4] The court may grant a disqualification order if two criteria are satisfied: (1) the individual in question is a director (or shadow director) of a company that has infringed UK or EU competition law;[5] and (2) their conduct renders them unfit to manage a company.

In assessing the director's conduct, the court will consider whether the director contributed to the infringement; had reasonable grounds to suspect that the conduct infringed competition law, but took no steps to prevent the infringement; and did not know, but ought to have known, that the conduct broke competition rules. Accordingly, the CMA does not have to demonstrate that the director had actual knowledge of the conduct or that the conduct infringed competition law. In the CMA's words, it will be

[1] CMA Case 50235, *Residential estate agency services in the Burnham-on-Sea area*, 10 April 2018.
[2] In the *Marine Hose* criminal case, three directors were disqualified and imprisoned.
[3] CMA, *Estate agent cartel directors disqualified*, 10 April 2018.
[4] These provisions sit alongside other provisions under which directors may be disqualified by other regulators – for example for fraud – and were added by section 204 of the Enterprise Act 2002.
[5] A company under the 1986 Act is interpreted broadly, and includes unregistered companies (including companies registered outside Great Britain) and limited liability partnerships.

a ground for disqualification if "*a company breaks competition law and the director did not know about it but wasn't diligent and should have known.*"[6]

The CMA will not seek to disqualify a director whose company benefitted from leniency. To gain this immunity, though, the director must maintain "*continuous and complete co-operation*" throughout the course of the investigation.[7]

The 1986 Act provides an alternative mechanism whereby the director in question gives the CMA a competition disqualification undertaking, which has the same effect as a disqualification order. There are advantages to this for both sides: the CMA avoids the unpredictability of court proceedings and the need for a full investigation, while the director may benefit from a shorter period of disqualification and will not be liable for legal costs.[8] The CMA has opted to use undertakings in both instances where it has exercised its powers under the 1986 Act.

While the UK offers a standalone competition disqualification sanction, in other EU Member States, such as France and Germany, directors can be disqualified for breaking competition rules, but as part of a criminal penalty or by the supervisory board of the company.

The CMA's Director Disqualification Cases

The present case of director disqualification arises out of the CMA's finding in May 2017 that six estate agents fixed commission fees on residential property sales in the Burnham-on-Sea area. The CMA found that several company directors were either actively involved in, or were aware of, the cartel, but had not taken steps to end their company's involvement.

The disqualified directors – Mr. David Baker and Mr. Julian Frost – were directors of one of the estate agents involved in the cartel. They actively participated in the cartel by attending meetings to form the cartel, supporting the formation of the cartel, and implementing and policing the cartel arrangements. They were disqualified from acting as directors of any UK company for three and a half years and three years, respectively.

This is the second time the CMA has secured the disqualification of directors in a civil case. The first, in December 2016, also involved a hard-core price-fixing cartel between small businesses.[9] The CMA found that online poster suppliers agreed not to undercut each other's prices on Amazon, and that manging director Daniel Aston had personally contributed to the infringement. Mr. Aston gave a disqualification undertaking preventing him from acting as a director of any UK company for a period of five years.

A New Direction in Enforcement?

The CMA is well aware of the deterrent power of director disqualification. In a 2007 report prepared for the OFT, Deloitte performed a survey of over 200 UK companies, and found that director disqualification was perceived as the second most important sanction available for breaches of competition law, ahead of fines, and behind only criminal penalties. Deloitte found that "*the threat of director disqualification is seen as a serious one by both lawyers and companies.*"[10] Similarly, the OFT's report of compliance with competition law highlighted the importance of director disqualifications as an enforcement tool, with a director the OFT interviewed noting that "*when somebody's personal reputation is at stake, that makes them think twice, without doubt.*"[11]

The recent focus on director disqualification may reflect the difficulties the CMA (and OFT) has faced in securing cartel criminal convictions. Following the investigation into the galvanised steel tanks cartel, the CMA brought criminal proceedings against the company directors under the cartel offence in the Enterprise Act. After a

[6] CMA, *Avoiding disqualification: advice for company directors*, January 2017.

[7] OFT, *Director Disqualification Orders in Competition Cases*, 2010, para. 4.14.

[8] The CMA's press release in the first case of director disqualification noted that a voluntary undertaking "*will normally result in some discount in the period of disqualification which the CMA is prepared to accept.*" See CMA, *CMA secures director disqualification for competition law breach*, 1 December 2016.

[9] CMA Case 50223, *Online sales of posters and frames*, 12 August 2016.

[10] Deloitte, for the OFT, *The deterrent effect of competitor enforcement by the OFT*, November 2007.

[11] OFT, *Drivers of Compliance and Non-compliance with Competition Law*, May 2010, para. 4.1.7.

trial at Southwark Crown Court, the jury acquitted two directors because they were not persuaded the directors had acted dishonestly. The case was reported as "*an embarrassing court blow*" for the CMA.[12] A third director – who pled guilty, cooperated in bringing the prosecution, and gave evidence against the two defendants – was given a 6 month suspended prison sentence.[13]

Despite the subsequent amendment to the Enterprise Act, which means that it is no longer necessary for the prosecution to prove that individuals acted dishonestly, the CMA has brought no further criminal proceedings against cartelists. The CMA may consider that the use of director disqualifications – where the CMA can obtain disqualification by agreement rather than risk litigation – represents a more predictable route to achieve a commensurate deterrent.

If the CMA's public statements can be taken as a guide, there is a good chance further disqualifications may follow as part of a two-pronged approach involving both disqualifications and criminal proceedings. In its most recent annual plan, the CMA has stated that it will "*continue to seek disqualification of directors of companies that breach competition law, [..] and in the most serious cases, [it] will pursue criminal prosecutions.*"[14]

Future Trends: Should Directors be Worried?

In a recent panel discussion hosted by Cleary Gottlieb, the CMA's Director of Enforcement Michael Grenfell noted the importance of smaller competition law cases, including the CMA's investigation into estate agents, which culminated in the recent disqualifications. He observed that such cases are not just economically important given the significant role of small businesses in the British economy, but also resonate with the public and demonstrate the relevance of the CMA's work. In that context, director disqualifications may become increasingly frequent as part of the CMA's enforcement. That said, both instances of director disqualification to date have resulted from small companies engaging in price fixing behaviour with the directors concerned taking an active role. It is unclear whether the CMA will seek this individual penalty where the director did not participate in the cartel, but ought to have known it was taking place; or where the director manages a larger company, and was less closely connected with the cartel conduct.

As to compliance, guidance originally published by the OFT made clear that directors are not expected to have "*specific expertise in competition law*," but should ensure they "*appreciate the importance of competition law compliance.*" At a minimum, directors "*ought to know that price-fixing, market sharing and bid-rigging agreements are likely to breach competition law.*"[15] The CMA published supplementary guidance in January 2017 recommending that company directors:[16]

— Ensure they are sufficiently informed about their company's affairs to be able to promptly identify and intervene in any illegal practices;

— Investigate any suspected illegal practices;

— Take immediate steps to stop any anticompetitive practices that they become aware of; and

— Familiarise themselves and their staff with competition law risks.

After Brexit, the CMA may have more opportunities to pursue director disqualifications. At present, although the CMA can pursue directors who were involved in breaches of EU law where the case against the company has been brought by the EU Commission, there are practical difficulties in doing so, including securing access to evidence against the director. After Brexit, the CMA will be able to pursue parallel investigations with the EU

[12] The Independent, *Two directors cleared of price-fixing charges*, 25 June 2015.

[13] The CMA, and its predecessor, the OFT, has not won a contested case imposing criminal sanctions. In the *Marine Hose* cartel, the three directors entered plea arrangements with the US Department of Justice, allowing them to return to the UK to plead guilty and serve custodial sentences there. In the *Fuel Charges* cartel, the criminal case collapsed shortly before trial, when it was discovered the OFT had not disclosed potentially relevant material to the defendants. *See* P. Gilbert, *Changes to UK Cartel Offence–Be Careful What You Wish For*, 4 December 2014.

[14] CMA, *Annual Plan 2018 to 2019*, 29 March 2018.

[15] OFT, *Director Disqualification Orders in Competition Cases*, 2010, para 4.23.

[16] CMA, *Avoiding disqualification: advice for company directors*, January 2017.

Commission, making it easier to use enforcement powers against the individuals involved.

In short, regardless of whether the recent director disqualifications indicate a more aggressive approach by the CMA to pursue company directors for breaching competition rules, company directors should – at a minimum – take the steps discussed above to ensure their companies comply with competition laws.

Judgments, Decisions, and News

Court Proceedings

Peugeot S.A. v NSK Ltd. and others. On 30 April, claimants led by French car manufacturer Peugeot withdrew a claim relating an EU Commission decision fining companies, including the Japanese parts manufacturer NSK Ltd., for participating in the automotive bearings cartel. Trial was listed to begin on 24 April, but the CAT ordered the full withdrawal of the claim on 30 April, on the basis that the parties had settled the case.

Antitrust/market studies

CMA opens investigation into musical instruments and equipment. On 17 April, the CMA announced that it had opened five investigations into alleged anticompetitive agreements in the musical instruments and equipment sector. No parties are named publicly. The investigation is in its early stages – the CMA has not yet decided whether sufficient evidence exists to issue statements of objections to the concerned parties.

Asset management market assessment. On 5 April, the FCA published rules on the duties of asset managers as the agents of investors in their funds. The rules require asset managers to: (i) make annual assessments of value of their funds, and (ii) appoint two independent directors to their own executive boards. The rules are part of a package of remedies designed to ensure that "*fund managers compete on the value they deliver, and act in the interest of the millions of entrust them with their savings.*"

Digital Advertising inquiry recommendation. The House of Lords has recommended that the CMA conduct a market study of the online advertising market to ensure that competition is working well. The House of Lords noted the potential for advertising fraud, advertising appearing next to inappropriate content, the strong market position of certain players, and mislabelled advertising.

Merger Developments

PHASE 2 INVESTIGATIONS

Vanilla Group/Washstation. On 16 April, the CMA referred the completed acquisition of Washstation by Vanilla Group to a Phase 2 investigation. The parties provide managed laundry services to universities and student accommodation providers. The CMA raised concerns with the parties' combined market share of more than 90%.

SSE Retail/Npower. On 26 April, the CMA announced its intention to open a Phase 2 investigation into the proposed merger of SSE Retail and Npower, unless the parties offer acceptable undertakings. The CMA concluded following its Phase I investigation that the merger could lead to higher prices for customers, since competition between large energy companies, including SSE and Npower, affect the way in which these companies set tariffs.

Fox/Sky. On 1 May, the CMA announced that it had sent a report to Matt Hancock, Secretary of State for Culture, Media and Sport, on the proposed acquisition by Twenty-First Century Fox of the 61% of Sky plc that it does not already own. In January 2018, the CMA provisionally found that the transaction was not in the public interest due to media plurality concerns. As of yet, the final report – which provides a recommendation to the Secretary of State to allow or prohibit the transaction – remains outside the public domain. The Secretary of State is not obliged to follow the CMA's recommendation. The Secretary of State has 30 working days from receiving the report to make a decision, suggesting a deadline of 13 June 2018.

PHASE 1 CLEARANCE DECISIONS

Co-operative Group/Nisa Retail. On 23 April, the CMA cleared the acquisition of Nisa Retail Limited by the Cooperative Group.

Tarmac Trading/Breedon Group. On 26 April, the CMA announced its intention to open a Phase 2 investigation into the proposed acquisition by Tarmac Trading Limited of 27 ready-mix concrete plants from Breedon Group plc. On 10 May, the CMA announced that it considers that there are reasonable grounds for believing that undertakings offered by the parties fully address competition concerns.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision due date
Flogas/Countrywide LPG	27 June
Informa/UBM	25 June
Meadow Foods/Roilvest	23 June
Rentokil Initial/Cannon Hygiene	18 June
Nielsen/Ebiquity	13 June
Horizon Global Corporation/ Brink International B.V.	12 June
Trinity Mirror/Northern & Shell Media Group	7 June
Medtronic/Animas Corporation	6 June
Tiancheng International Investment/ Biotest AG merger inquiry	23 May

Other Developments

New CMA Chairman. On 11 April, the CMA announced the nomination of a new Chairman, with Andrew Tyrie – former MP, Chair of the Treasury Select Committee, and Chair of the Parliamentary Commission of Banking Standards – succeeding Lord Currie. Andrew Tyrie is expected to oversee a ramping up of CMA activity as the UK's withdrawal from the EU approaches.

CMA publishes guidance on appropriate penalty calculation. The CMA published revised guidance on calculating financial penalties under the Competition Act 1998. This does not change the substance of the six-step penalty calculation mechanism set out in the OFT's 2012 guidance, but provides further clarification and reflects the CMA's recent decisional practice.

Concurrency Report 2017. On 30 April, the CMA published its annual report on the operation of the concurrency arrangements that have been in force since April 2014 between the CMA and sector regulators. The report highlights the increasing number of cases in the regulated sectors (four in the 12 months under consideration), and the close practical cooperation between the CMA and sector regulators. The report draws attention to the close cooperation between the CMA and relevant sector regulators in some high-profile cases, including the role of Ofcom in the *Fox/Sky* merger, and Ofgem in *SSE/Npower*, both ongoing.

CMA antitrust enforcement powers under review. The Government published a Consumer Green Paper indicating the CMA's antitrust enforcement powers are to be reviewed by April 2019. The Paper envisages that the focus should be on inadequate competition in low-productivity sectors, and suggests that regulators may need greater powers to tackle competition issues surrounding "*dominant digital platforms.*"

CMA publishes new advice on joint ventures. In December 2017, the CMA fined two suppliers of laundry services that had entered into a market-sharing agreement as part of a joint venture. On 12 April, partly in response to that decision, the CMA published a short guide for businesses concerning joint ventures.

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