On 31 July 2019, the UK's Competition and Markets Authority ("CMA") publicised the disqualification of three individuals from acting as directors, as a consequence of their company's involvement in an infringement of UK competition law.

This announcement, together with the recent public statements of senior CMA officials:

- reiterates that the CMA will continue to hold directors personally responsible for competition law compliance;
- confirms that individuals risk personal sanctions in the UK, including director disqualification for periods of up to 15 years, where organisations infringe UK and/or EU competition law; and
- emphasises the CMA's expectation that directors will implement and maintain effective competition law compliance procedures within their organisations.

This update considers the role of personal sanctions within the CMA's enforcement activities, and the extent of the CMA's director disqualification powers.

It also outlines the benefits of an effective compliance culture, and the steps that the CMA considers directors should take to create and maintain an effective culture of competition law compliance within their organisations.

Personal sanctions in the UK for competition law infringements
In recent months, senior CMA officials have confirmed the authority’s intention to ensure that directors continue to face personal consequences for infringements of UK and/or EU competition law committed by their organisations.

In May 2019, the CMA’s Director of Litigation, made clear in a blog post that:

"…we now consider whether to pursue director disqualification in all cases where competition law has been broken - scrutinising the responsibility of individual directors to see whether they contributed to the breach, or had reason to suspect it but failed to stop it, or ought to have known about it"[1] (emphasis added).

Similarly, in June 2019, the CMA’s Executive Director, Enforcement, stated that:

"…we have - as we said we would - ramped up our activity in seeking the disqualification of directors …We are determined to …send a clear message about the personal responsibility that business people have for ensuring compliance with competition laws"[2] (emphasis added).

To put into context this "ramping up" of the CMA’s activity, since it began actively using its director disqualification powers in late 2016:

- **twelve individuals** have each given a legally binding competition disqualification undertaking ("CDU") which has been accepted by the CMA, with periods of director disqualification ranging from 1.5 to 7.5 years;
- **nine of these individuals** have given CDUs during the seven month period from 1 January 2019 to 31 July 2019; and
- **one individual** currently faces an application by the CMA to court seeking to obtain a competition disqualification order ("CDO") against the individual in question.

Details of these twelve CDUs are summarised within Table 1 below. The differing durations of the CDUs reflect the different facts of each case, including the differing extent of the individuals' involvement in the infringement in question.

<table>
<thead>
<tr>
<th>Date CDU accepted by the CMA</th>
<th>Duration of CDU</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>30 November 2016</td>
<td>5 years</td>
<td>Online sales of posters and frames</td>
</tr>
<tr>
<td>21 March 2018</td>
<td>3.5 years</td>
<td>Residential estate agency services</td>
</tr>
<tr>
<td>3 April 2018</td>
<td>3 years</td>
<td>Residential estate agency services</td>
</tr>
<tr>
<td>Date CDU accepted by the CMA</td>
<td>Duration of CDU</td>
<td>Supply of precast concrete drainage products</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>----------------</td>
<td>---------------------------------------------</td>
</tr>
<tr>
<td>26 April 2019</td>
<td>6.5 years</td>
<td>Supply of precast concrete drainage products</td>
</tr>
<tr>
<td>26 April 2019</td>
<td>2 years</td>
<td>Design, construction and fit-out services</td>
</tr>
<tr>
<td>29 April 2019</td>
<td>5 years</td>
<td>Residential estate agency services</td>
</tr>
<tr>
<td>29 April 2019</td>
<td>2.5 years</td>
<td>Design, construction and fit-out services</td>
</tr>
<tr>
<td>9 May 2019</td>
<td>5 years</td>
<td>Design, construction and fit-out services</td>
</tr>
<tr>
<td>29 July 2019</td>
<td>4.75 years</td>
<td>Design, construction and fit-out services</td>
</tr>
<tr>
<td>29 July 2019</td>
<td>2.75 years</td>
<td>Design, construction and fit-out services</td>
</tr>
<tr>
<td>29 July 2019</td>
<td>1.5 years</td>
<td>Design, construction and fit-out services</td>
</tr>
</tbody>
</table>

Importantly, although director disqualification has been a focus of the CMA’s recent enforcement activities, this is not the only sanction individuals may face.

As we have considered previously, the CMA is also able to prosecute individuals under the criminal "Cartel Offence" in relation to specific competition law infringements. Where individuals are convicted of the Cartel Offence on indictment, they face a maximum of five years imprisonment, and/or an unlimited fine. Notably, reforms to the Cartel Offence made in April 2014 have reduced the evidential burden upon the CMA, with the aim of increasing the number of successful criminal prosecutions brought.

**The CMA’s director disqualification powers**

The CMA is able to apply to court for a CDO against an individual, or otherwise accept a legally binding CDU offered by an individual, with the maximum period of disqualification being 15 years.

**Applying to court for a CDO**

Under the Company Directors Disqualification Act 1986 (the “CDDA 1986”), the CMA can seek the disqualification of an individual from holding company directorships, where that individual is a current or former director of a company that has infringed UK and/or EU competition law.
For the purposes of the CDDA 1986:

- a "director" includes an individual holding the position of director (irrespective of their title), and includes the position of a shadow director, as well as a de facto director;[7]
- the definition of a "company" includes companies registered in Great Britain under the Companies Act 2006, as well as unregistered companies (which may include companies registered outside Great Britain).[8] The CDDA 1986 also applies to building societies, incorporated friendly societies, NHS foundation trusts,[9] as well as to limited liability partnerships.[10]

If the CMA’s application is successful, the individual may be prevented for a period of up to 15 years[11] from:

- being a company director;
- acting as a receiver of a company’s property; or
- being concerned directly or indirectly with the promotion, formation, or management of a company, without first obtaining permission from the court.[12]

Significantly, an individual commits a criminal offence if they breach a CDO.[13] 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.[14]

**Circumstances in which a CDO must be made against an individual**

Following an application, the court must make a CDO against an individual where:

- an undertaking which is a company of which the individual is a director has infringed UK and/or EU competition law;[15] 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.[16]

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; or
- the individual did not know, but ought to have known, that the company’s conduct was infringing UK and/or EU competition law.[17]

The court may also have regard to the conduct of the individual as a director of a company in connection with any other breach of competition law.[18]
The CMA's powers to accept a CDU from an individual

Under the CDDA 1986, director disqualifications can also be effected by the CMA accepting a CDU offered by an individual:

The CMA may proceed to accept the CDU instead of making (or progressing) an application for a CDO where:

- the CMA thinks that an undertaking which is a company of which the individual is a director has infringed (or is infringing) UK and/or EU competition law, and the conduct of the individual as a director makes them unfit to be concerned in the management of a company; and
- the individual offers to give a CDU to the CMA.

An individual can offer a CDU at any time. If an individual offers a CDU in terms acceptable to the CMA, the CMA will generally consider reducing the disqualification period.

If the CMA accepts a CDU, the CDU has the same legal effect and consequences as a CDO, and may be accepted for a maximum period of 15 years.

A culture of competition law compliance

Where an organisation has an effective culture of competition law compliance, this can serve to protect the organisation, its staff, and its directors, including by:

- first and foremost, preventing infringements of UK and/or EU competition law from occurring; and
- if an infringement has occurred, ensuring that this is promptly brought to the attention of senior management, who can then take appropriate action to manage the risks resulting from this incident.

This may include seeking to obtain immunity by self-reporting the infringement. For example, where an organisation is granted immunity under the CMA's leniency programme, it will receive:
  - immunity from financial penalties;
  - immunity from criminal prosecution for any of its cooperating current or former employees or directors; and
  - protection from director disqualification proceedings for all of its cooperating directors.

The CMA's risk-based approach to competition law compliance

As an advocate of competition law compliance, the CMA has jointly published "Competition Law Risk: A Short Guide" with the Institute of Risk Management, which is intended to help businesses comply with competition law.

The publication promotes a proactive risk-based approach to compliance, tailored to the individual activities of each organisation, and underpinned by a "top down" commitment to compliance.
In this context, the CMA makes clear that while the board and senior management have overall responsibility for instilling a commitment to compliance, managers at all levels of an organisation also need to demonstrate this commitment.[26]

Building upon this "top down" commitment, the CMA advocates a four step, risk-based approach to competition law compliance:

- **Step 1 - Identify the risks**: identify the key competition law compliance risks facing the organisation, which will depend upon aspects including the organisation's activities, its size, and the characteristics of the sector(s) in which it is active.
- **Step 2 - Analyse and evaluate the risks**: assess the seriousness of the identified risks, including determining which employees are engaged in "high risk" areas.
- **Step 3 - Manage the risks**: establish appropriate training, policies, and procedures to ensure that (i) the identified risks do not occur; or (ii) if they do occur, they are detected and addressed.
- **Step 4 - Monitor and review**: regularly review the organisation's commitment to compliance, as well as the actions taken under Steps 1 to 3, in order to ensure that there is (and there remains) an effective culture of competition law compliance.[26]

In relation to directors, the publication provides that directors are responsible for ensuring that their organisations have taken adequate measures to ensure that relevant staff know, and are reminded regularly:

- that the organisation must comply with competition law, with staff understanding what this means; and
- that staff are required to report any incidents or suspicions in relation to competition law compliance to a designated, independent and trusted individual within the organisation.[27]

**Engaging with compliance concerns at an early stage**

In view of the CMA’s commitment to enforcement action, and to ensuring that directors are held personally responsible for competition law compliance, individuals and organisations should:

- proactively consider the extent of any potential exposure they may face, including with regard to the robustness and the effectiveness of their compliance culture and approach to competition law compliance; and
- take appropriate action and advice at the earliest opportunity to ensure that relevant risks are effectively managed and minimised.

Our EU, Trade & Competition team advises clients upon achieving their commercial aims in compliance with UK and EU competition law. The team also acts on high profile competition law investigations, and frequently advises clients upon making immunity and leniency applications. With our dedicated Dawn Raid Response Unit of specialists across our UK offices, and our track record of successfully delivering client-focussed outcomes, organisations ranging from publicly listed companies to family-owned
businesses rely upon us to safeguard their interests when faced with the threats posed by competition law investigations.

Footnotes


[3] Date of the CMA’s announcement of the CDU being accepted; the date of acceptance is not publicly available.

[4] Date of the CMA’s announcement of the CDU being accepted; the date of acceptance is not publicly available.


[6] In addition to the CMA, the following "specified regulators" are also able to exercise these powers: the Office of Communications; the Gas and Electrical Markets Authority; the Water Services Regulation Authority; the Office of Rail and Road; the Civil Aviation Authority; NHS Improvement; the Payment Systems Regulator; and the Financial Conduct Authority (see, section 9E(2) CDDA).

[7] See, section 22(4) CDDA, and section 9E(5) CDDA.

[8] See, section 22(2) CDDA.

[9] See, sections 22A - 22C CDDA.


[12] See, section 1(1)(a) CDDA. In addition, during the period of the CDO, the individual will be unable to act as an insolvency practitioner (see, section 1(1)(b) CDDA).

[13] See, section 13 CDDA.

[14] See, section 15(1) CDDA.

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

[16] See, sections 9A(1) - (3) CDDA.

[17] See, section 9A(6) CDDA.

[18] See, section 9A(5) CDDA.

[19] See, section 9B(2) CDDA.

[20] See, section 9B(1) CDDA.


[22] See, section 9B(5) CDDA.

[23] See, for example, www.gov.uk/guidance/cartels-confess-and-apply-for-leniency


NOT LEGAL ADVICE. Information made available on this website in any form is for information purposes only. It is not, and should not be taken as, legal advice. You should not rely on, or take or fail to take any action based upon this information. Never disregard professional legal advice or delay in seeking legal advice because of something you have read on this website. Gowling WLG professionals will be pleased to discuss resolutions to specific legal concerns you may have.

Related Competition & Antitrust, EU, Trade & Competition, ThinkHouse

Author(s)

Samuel R Beighton
Partner - London

Email
samuel.beighton@gowlingwlg.com

Phone
+44 (0)20 3636 7972

vCard
Samuel R Beighton

Bernardine Adkins
Partner - Head of EU, Trade and Competition, London

Email
bernardine.adkins@gowlingwlg.com

Phone
+44 (0)37 0733 0649

vCard
Bernardine Adkins