Case Comment

The CMA Secures First Director Disqualification for Breach of Competition Law

Caroline Hobson and Jacqueline Vallat

CMS Cameron McKenna LLP, London

On 1 December 2016, the Competition and Markets Authority (CMA) announced that it had secured the disqualification of an individual from acting as a director of any UK company for a period of five years. This is the first time the CMA has exercised its powers to disqualify a director for a breach of competition law under the Company Directors Disqualification Act 1986. The disqualification sought in this instance follows the CMA's decision of 12 August 2016, which found that two online resellers had infringed competition law by agreeing not to undercut each other's prices for posters and frames sold on Amazon's UK Marketplace (implemented using automated pricing software). After setting out the powers available to the CMA to apply for director disqualification and the circumstances in which it is likely to do so, we provide an overview of this remarkable case and analyse the implications of the CMA's exercise of these powers.

Director disqualification on competition grounds

Background

The power for the CMA to disqualify directors was introduced in 2003, as part of a suite of reforms brought in by the Enterprise Act 2002 ('the Act') to improve the enforcement of competition law in the United Kingdom. In addition to making procedural changes to the United Kingdom's competition enforcement framework (such as establishing the Competition Appeal Tribunal and separating the Office of Fair Trading (OFT) (as the CMA then was) from government), one of the key ambitions of the Act was to empower the UK competition authorities to take action against individuals involved in the anti-competitive behaviour of a company. This is because it was thought that the existing deterrent – fining the company concerned – was insufficient and could potentially punish innocent parties (shareholders, employees) rather than the individuals directly responsible. Accordingly, a clear personal deterrent was called for which would encourage company directors to ensure their businesses were aware of and compliant with competition law.

One way in which the Act provided this deterrent was through the introduction of the cartel offence, with criminal penalties for individuals involved in serious forms of anti-competitive behaviour, such as price-fixing, limiting production/supply, market-sharing or bid-rigging. However, given the high burden of proof required for bringing a criminal prosecution, the Act also amended the Company Directors Disqualification Act 1986 ('the CDDA') to introduce a civil penalty for directors involved in competition law breaches: disqualification from holding company directorships for a period of up to 15 years.

Competition disqualification orders

It should be noted at the outset that the power to disqualify a director on competition grounds is separate from the general power of the Crown Court to consider disqualification in the context of sentencing a criminal defendant, which would, for instance, be relevant to the cartel offence. Indeed, in 2008 in the *marine hoses* cartel,[1] the court disqualified three directors for periods of between five and seven years in connection with their conviction for the cartel offence, which was the first example of director disqualification in relation to anti-competitive activities. In that instance, however, the OFT did not apply for the disqualification in accordance with the powers explored further below.

Even in relation to disqualification on competition grounds, the power to disqualify a director does not rest with the CMA (or sectoral regulators with concurrent competition powers),[2] in the same way as infringement decisions: it lies with the courts, and in particular the High Court or, in Scotland, the Court of Session in Scotland.[3] The CMA's role is to determine whether to apply to the court to seek a competition disqualification order ('CDO') under section 9A CDDA, or whether to accept undertakings in lieu of such an order under section 9B CDDA.

Under section 9A CDDA, where the CMA seeks a CDO, the court *must* make the order against a person if it considers that the following two conditions are satisfied in relation to that person:

(1) *An undertaking which is a company of which that person is a director commits a breach of competition law.* It is important to note that CDOs are not limited to circumstances in which the cartel offence has been committed: they can apply to any breach of competition law. The OFT's Guidance on Director Disqualification Orders in Competition Cases (OFT 510), which has been adopted by the CMA ('the guidance'), specifies that a breach means an infringement of any of the following: the Chapter I and/or Chapter II

1 https://www.gov.uk/cma-cases/marine-hose-criminal-cartel-investigation.

2 For convenience, in the remainder of this article we refer only to the CMA.

3 Section 9E(3) CDDA.

prohibitions under the Competition Act 1998 and/or Article 101 and/or Article 102 of the Treaty on the Functioning of the European Union. A CDO can be made against a director or any person who occupies the position of director (whatever the position is called), a 'shadow' director and/or a *de facto* director who assumes that role.

(2) *The court considers that person's conduct as a director makes him or her unfit to be concerned in the management of a company*. The CDDA specifies matters to which the court must have regard, which are whether the director in question:

- contributed to the breach of competition law;
- did not contribute to the breach but had reasonable grounds to suspect that the conduct of the undertaking constituted the breach of competition law and he took no steps to prevent it;
- did not know but ought to have known that the conduct of the undertaking constituted the breach of competition law. The court may also have regard to his conduct as a director in relation to any other breaches of competition law.

Accordingly, a CDO may be made against a director who is negligent or incompetent: it is not limited to directors directly involved in an infringement.

A CDO may be sought for a maximum period of 15 years and breach of a CDO is a criminal offence. A person who becomes involved in the management of a company in breach of a CDO will also be personally liable for all the relevant debts of the company.

Applications for CDOs

The guidance specifies the factors the CMA will consider when deciding whether to apply for a CDO, following a five-step process:

(1) whether there has been a breach of competition law, which has the same meaning as set out above;
(2) the nature of the breach and whether a financial penalty has been imposed. According to the guidance, the CMA is more likely to consider a CDO for more serious breaches, such as where a fine has been imposed;
(3) whether the company in question benefited from leniency. The CMA will not seek a CDO against current directors of a company which has been granted leniency, in respect of the activities covered by the leniency application.[4] That said, the CMA will still consider a CDO against a director who has been removed for a competition law infringement and/or for opposing the leniency application, or who failed to cooperate during the leniency process;
(4) the extent of the director's responsibility for the breach, which informs the CMA's assessment of whether a director is unfit to be concerned with the management of a company. The CMA will consider the mandatory factors the court must have regard to under the CDDA (set out above). The key consideration is whether the director had an active role in causing the breach. The CMA expects all directors to appreciate the importance of competition compliance and to know that the most severe forms of anti-competitive behaviour (price-fixing, market-sharing, bid-rigging) are a breach. The CMA will also consider whether there is a culture of compliance; and
(5) whether there are any aggravating or mitigating factors.

Importantly, the CMA will generally not seek a CDO against a director who is being prosecuted for the cartel offence. This is because the CMA takes the view that the court before which the director is convicted is the most appropriate venue for consideration of disqualification, in accordance with the courts' general power to consider disqualification where an individual is convicted of an offence in connection with the management of a company (section 2 CDDA).

The CMA will also not apply for a CDO against any beneficiary of a no-action letter in respect of the cartel activities set out in the letter.

Competition Disqualification Undertakings

The CMA has the power to accept undertakings, either instead of applying for a CDO or, where it has been applied for, instead of continuing the proceedings, and this is the power the CMA exercised in the case considered further below. A competition disqualification undertaking (CDU) is an undertaking by a person that for a specified period he or she will not be a director, receiver or insolvency practitioner or be in any way concerned with the management of a company. A CDU can also be for a maximum period of 15 years. The guidance notes that the CDU must be proportionate to the seriousness of the case against the director, taking into consideration any aggravating or mitigating factors. In the case considered below, the CMA further noted that where a CDU is given, there will normally be a discount in the period of disqualification which the CMA is prepared to accept, with a suggestion that the reduction will be greater if the CDU is given prior to the commencement of proceedings.

The CMA's investigation into online sales of posters and frames

Overview of the CMA's investigation

The CMA's investigation into online sales of posters and frames[5] presents a number of remarkable features: the infringing agreement was implemented by means of automated pricing software; despite the regional and small size of the businesses (both had turnover of approximately £15 million), the investigation was coordinated with searches carried out by the West Midlands Police on behalf of the US Department of Justice, which is conducting a criminal investigation into sales of wall décor in the US; and the case now marks the first time the CMA sought a CDO and accepted a CDU.

The case also falls within a number of the CMA's priorities,

4 Leniency applicants should therefore be careful to ensure that their application covers all cartel activities.

5 Case 50223, *Online Sales of Posters and Frames*, 12 August 2016.

in particular online markets and raising awareness of competition law among small and/or regional businesses. The CMA has noted that making sure online and digital markets are working effectively is a particular priority for it, and following this case has launched a compliance campaign to raise awareness of competition law among online sellers. To this end the CMA has published guidance and case studies; it has written to a number of online companies to remind them of competition law compliance and engaged with online marketplace providers that are helping make the CMA's advice available to online sellers. As regards regional businesses, during 2016 the CMA conducted a campaign to raise awareness of competition law in the regions, including turning to regional law firms to assist with the campaign, and the West Midlands was the first region the CMA turned to, following a report that only 12 per cent of businesses in the West Midlands were familiar with competition law (compared to a national average of 23 per cent).

The CMA concluded the investigation in less than a year.[6] It launched the investigation in September 2015 (according to the decision) following a leniency application from GB Eye (trading as GB Posters). In December 2015, the CMA carried out unannounced searches of Trod's headquarters in Birmingham as well as the domestic premises of one of its officers, which were coordinated with searches by the West Midlands police on behalf of the US Department of Justice in relation to its separate criminal investigation in the United States. In March 2016, Trod entered into administration and its administrators were keen to explore settlement by the time of the state of play meetings in June 2016. In July 2016, Trod settled: it admitted to the infringement and agreed to pay a fine of £163,371 (reflecting a 20 per cent discount) and to cooperate to expedite the conclusion of the investigation. Trod made no representations on either the draft or final Statement of Objections. The infringement decision was issued in August 2016.

The CMA found that for a period spanning over four years from March 2011 to July 2015 Trod and GB Posters infringed competition law by agreeing not to undercut each other's prices for posters and frames sold on Amazon's UK Marketplace website[7] (sales on Amazon UK being the relevant market given the scope of the infringement in this case).

The agreement was implemented using automated pricing software. Automated repricing software monitors competitors' pricing and automatically reprices products according to price fluctuations. Such software is commonly used by Amazon sellers, particularly those with a large number of products, and can offer functionalities including minimum price calculations and optimal pricing strategies. The use of this type of software – and more generally algorithms – is likely to raise complex and novel issues for future enforcement by competition authorities, given that competition law is premised on human intention and action (for example, the 'concurrence of wills' in EU/UK competition law). The potential for such difficulties has already been highlighted by several authorities, including the European Commission and OECD.

In this instance, however, the CMA had no need to grapple with such issues given the substantial amount of written (and blatant) evidence of the parties' agreement (for example, '*Trod … have agreed not to undercut us on Amazon and I have agreed to reciprocate*'). The agreement was initially implemented manually, before the parties turned to the use of automated software to assist with the implementation and ongoing monitoring of the agreement. The parties did not use the same software but the decision shows the variety of ways such software can be configured to give effect to such an agreement. For instance, Trod implemented the agreement by adding GB Posters to an 'ignore list' so that the usual rules Trod had programmed on undercutting competitors did not apply to GB Posters.

The disqualification undertaking

In October 2016, the CMA served notice under section 9C CDDA on Trod's managing director, Daniel Ashton, setting out the grounds and evidence on which it proposed to rely to seek a CDO. The CMA heard oral and written representations from Mr Ashton and in November determined that it would bring proceedings in the event that no disqualification undertaking were given. A CDU was given and accepted on 30 November 2016.

The CMA considers that Mr Ashton's conduct in this case makes him unfit to be a company director for a period of time: he was managing director of Trod during the period of the infringement and he personally contributed to the breach of competition law. The form of undertaking shows that he (admitted that he): (a) caused Trod to implement the agreement, in particular through the use of automated software configured to that effect; (b) took steps to ensure implementation of the agreement; and (c) understood that the effect of the agreement was that both parties would not compete on the relevant market.

Further, Mr Ashton was the sole director of Trod for a large part of the infringement, meaning that at least some of the evidence reported by the CMA in its decision could be his correspondence. As highlighted above, there was a significant amount of blatant incriminating evidence in this instance, including correspondence of a 'director or senior manager' of Trod establishing the price-fixing arrangement ('*I have just checked and most of our prices have changed, if you see any that haven't just email me the [product codes] and I will have a look at them*') and monitoring the arrangement ('*I [can't] see how the new justin posters were EVER the same price, every time I have checked them since they were listed you have been undercutting us, so find it very hard to believe that every time you look at [them] we are matching price.*' The personal involvement of '[a] Director or Senior Management' of Trod was further confirmed by documentary evidence and interviews with GB Posters.

In this case, the CMA accepted a CDU from Mr Ashton instead of applying to the court for a CDO. According to the guidance, the CMA will give serious consideration to a CDU offered in response to a section 9C notice, which is likely to have been the process here. Despite the evidence and statement of his involvement in the conduct, the CMA accepted a CDU for a period of five years; the CMA noted that it took into account Mr Ashton's willingness to give an undertaking before court proceedings were commenced. It also stated that a CDU will normally result in a discount in the period of disqualification which the CMA is prepared to accept, an additional factor for

6 Or just under ten months, according to the dates on the case page, which states that the CMA launched the investigation in December 2015 rather than September 2015 (as stated in the decision).
7 The Amazon Marketplace is an online retail marketplace which allows third-party retailers to sell their products directly to consumers using the Amazon website. Amazon itself was not involved in the cartel and was not investigated by the CMA.

consideration which does not feature in the guidance. Penalties for breaching a CDU are the same as for a CDO (criminal offence and personal liability for debts).

For completeness, because GB Posters applied for leniency, its directors are protected from disqualification in respect of the matters to which the leniency relates, provided they cooperate with leniency.

Concluding thoughts

The nature and extent of incriminating evidence in this case, together with the level of director or senior management involvement in the infringement, suggest it was an ideal setting for the CMA to make use of its powers to seek director disqualification for breach of competition law for the first time since they have been on the statute book. This is all the more since the infringement takes place in the context of online selling, an area which is currently a key priority for the CMA.

The use of disqualification powers had been mooted as a possibility by the Director for Enforcement, Michael Grenfell, following his appointment in July 2015. In his first interview in that capacity, he acknowledged the need for the CMA to improve its enforcement record and vowed to take a tougher approach to cartels and focus on individuals. He reiterated this warning with the announcement of Mr Ashton's disqualification in December 2016: '*the business community should be clear that the CMA will continue to look at the conduct of directors of companies that have broken competition law*' and is '*absolutely prepared to use this power again*'.

However, the nature of the case and available evidence has led some commentators to suggest that the CMA's choice of civil jurisdiction to hold individuals to account is at odds with its stated position that bringing criminal proceedings is a key priority for it. Indeed, the facts of this case span a period from 2011 to 2015, meaning that criminal prosecution could have been brought on the grounds of the cartel offence without the need to show dishonesty, a test which was abolished in April 2014 in an effort to facilitate criminal enforcement.

Further, the CMA has also been criticised for only taking on small cases, and this case falls squarely within that bracket. The businesses involved were small and regional, and the combination of leniency and settlement (in the context of an administration) suggest the risk of the CMA being challenged were relatively low.

Nonetheless, businesses of all sizes (and in all parts of the United Kingdom) should heed the CMA's warning of its increased readiness to use such powers in future.