



## "Hot Topics" in International Antitrust Law

SEPTEMBER 2010

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## UK gets tough on directors involved in competition law breaches

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On 29 June 2010, the UK Office of Fair Trading (OFT) published revised guidance on director disqualification orders in competition law cases, signalling its intent to use these sanctions to deter serious anti-competitive activity.<sup>1</sup> In a statement the OFT said: "[t]he guidance should be taken as a clear message that we will actively seek disqualification of directors found to have engaged in anti-competitive behaviour or who ought have known it was going on" (emphasis added).<sup>2</sup> The intention is to increase the incentives on UK directors to take responsibility for competition law compliance by their companies.

The guidance sets out how and when the OFT and certain UK sectoral regulators (for ease, only the OFT is referred to in this article) will take action to disqualify directors where they uncover evidence a director was responsible for, or ought to have known of, competition law breaches at a company. Action will generally only be taken in cases involving "more serious breaches" of competition law, meaning those in which a fine has been imposed. This means essentially "object" infringements of competition law such as cartels, certain types of information exchange, RPM and certain parallel trade issues.

### Background

Under the UK Company Directors Disqualification Act a director can be disqualified from acting as a director of a UK company for up to 15 years if his company is involved in a breach of competition law and the court considers that he is unfit to be concerned in the management of a company as a result. During the disqualification period, it is a criminal offence for him to be a director of a company or concerned in any way in the promotion, formation or management of a company. Competition law includes Articles 101 and 102 of the Treaty on the Functioning of the European Union (respectively, the general bans on anti-competitive agreements and abuse of dominance in the EU) and the UK equivalents of these provisions.

It should be noted that the OFT's specific power to seek a disqualification order for infringements of competition law has never been used. The three individuals convicted (following guilty pleas) in June 2008 of the UK cartel offence for their involvement in the

<sup>1</sup> See the OFT's "Director disqualification orders in competition cases", available at: [http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/enterprise\\_act/offt510.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/offt510.pdf).

<sup>2</sup> See the OFT's Press Release of 28 June 2010 "OFT sets out revised approach to director disqualifications", available at: <http://www.offt.gov.uk/news-and-updates/press/2010/68-10>.

marine hose cartel were disqualified from acting as directors under the general powers available to UK courts in relation to directors who have committed a criminal offence.

### ***Key points from the revised guidance***

The revised guidance provides clarification on a number of details of the policy including that:

- Part of the OFT's analysis in considering whether to proceed against a director will be an examination of the extent of the director's responsibility for the breach. It is "likely to apply for" a disqualification order not only if the director's conduct contributed to the breach, but also if, despite having reasonable grounds to suspect a breach, the director took no steps to prevent it, and also if, although he did not know about a breach, the director ought to have known of it. In other words, the OFT will be just as concerned with each of these categories of responsibility;
- Disqualification will not be sought against a director whose company benefited from leniency, provided that the director cooperates throughout the investigation;
- Only in exceptional cases will a disqualification order be sought where there is no prior decision or judgment (such as from the OFT itself or the European Commission) on the infringement. In such cases the OFT would still have to satisfy the court that there had been an infringement of competition law.

### ***Implications***

The OFT is very keen to obtain a director disqualification order for the first time and this revised guidance is without doubt a timely reminder to UK directors of this further risk should their company engage in anticompetitive behaviour in the UK. Indeed, it could easily be the case that disqualification becomes a greater risk than being convicted of the cartel offence in the UK, given the difficulties inherent for the OFT in securing a conviction for that offence (not least the requirement to show "dishonesty" on the part of the individual charged, with this likely to be a question for an unsympathetic (to the OFT) jury).

In order to guard against this risk, and of course more generally for the purposes of competition law compliance, a UK director should regularly consider whether there may be a competition law breach of which he "ought to [know]", bearing in mind that a successful leniency application by the company will provide protection against disqualification so that swift action following discovery of any breach may be very important.

The risk of disqualification being sought varies from director to director. For example, the director responsible for sales will be more at risk than say a director responsible for R&D. A more experienced director will be more at risk than his less experienced colleagues. The guidance seems to suggest that a director responsible for compliance could be at greater risk if in practice he has not implemented an appropriate compliance programme. A director of a parent company can be treated as de facto a director of a subsidiary, so a director must consider the whole of the group for which he is responsible.

Nevertheless, in practice it is likely to be some time before we see a successful first use by the OFT of this power to seek disqualification. The OFT has to apply to court, which must agree that the director's conduct makes him unfit to be concerned in the management of a company. The OFT has recently had a very chastening experience before a UK judge. This occurred in the British Airways (BA) trial, the first full test of the cartel offence in the UK (since the four individual defendants, all current or former BA executives, had pleaded not guilty). The case collapsed on 10 May 2010 when the judge ordered the jury to acquit the defendants following the revelation that the OFT, as prosecutor, had failed to disclose evidence to the defence. The failure of the case was a serious blow to the OFT and very widely reported in the UK.