

CMA DIRECTOR DISQUALIFICATION ORDERS & UNDERTAKINGS

CMA secures further director disqualification in an increased focus on individual responsibility for competition breaches

On 4 March 2020, the Competition and Markets Authority ("**CMA**") announced that it had secured a director disqualification undertaking from a director in connection with a breach of competition law by a pharmaceutical company (see [here](#)). As part of this undertaking, the director has agreed not to act as a director of any UK company for a period of 7 years.

The CMA (and other concurrent competition regulators) can apply for an order disqualifying an individual from being a director (or fulfilling other relevant roles) for up to 15 years under the Company Directors Disqualification Act 1986 (the "**CDDA98**"). 'Director' can include de facto directors and shadow directors.

The court may make an order against a person if two conditions are met: (1) the company of which he or she is a director infringes competition law (Articles 101/102 TFEU and Chapters I/II of the Competition Act 1998), and (2) the court considers that the director's conduct makes them unfit to be concerned in the management of the company. In considering whether a director is unfit, the Court will consider whether the director's conduct contributed to the breach of competition law. Even if the director's conduct did not contribute to the breach, the court will consider whether the director had reasonable grounds to suspect that the director had reasonable grounds to suspect the breach and took no steps to prevent it or whether the director ought to have known that the conduct constituted a breach (s.9A(6) CDDA98). It is immaterial whether the person knew that the conduct constituted a breach.

The CMA (or other concurrent competition authorities such as the Financial Conduct Authority), can accept a disqualification undertaking from a person, instead of applying to court for an order. In addition, the CMA has made clear in its Guidance ([here](#)) that it will not pursue a disqualification order/undertaking against any former or current director of a company that has obtained leniency. It will also normally consider a reduction in the period of disqualification where an individual offers an undertaking.

The consequences of a disqualification order/undertaking are significant for the individual involved. The individual cannot be a director of a company, an insolvency practitioner, act as a receiver or in any way be concerned with the promotion, formation or management of a company without permission from the court for a period of up to 15 years. If they breach the order/undertaking they may be prosecuted for a criminal offence and liable to imprisonment of up

Key issues

- The CMA has the power to seek to disqualify an individual from being a director for up to 15 years.
- The CMA has stepped up its use of these powers, with 10 of the 13 orders/undertakings to date having been issued in 2019.
- This fits with the CMA's increased focus on "individual responsibility."
- In proposals made last year, the CMA has also suggested that personal responsibility could be "further bolstered" if they were able to impose fines directly on individuals for competition law.

to 2 years and/or a fine (S. 13 CDDA98). In addition, a breach of the order/undertaking may result in the disqualified person being held personally liable for the relevant debts of a company, on a joint and several basis (S. 15 CDDA98). When signing an undertaking the individual also will also be required to use their best endeavours to cooperate with the CMA in relation to any related proceedings. In addition, the order/undertaking will be published on the CMA's website together with a document which sets out what the individual has admitted.

While these powers have been available to the CMA (or its predecessor the OFT) since 2003, they were used for the first time in December 2016. There has been a significant acceleration in the use of these powers recently, with 10 of the 13 orders/undertakings to date having been issued in 2019. This fits with the CMA's increased focus on "individual responsibility" as set out in the proposals of Lord Tyrie (the CMA Chair) to the Secretary of State for Business, Energy and Industrial Strategy published in February 2019 ([here](#)). In that letter, the CMA suggested that personal responsibility could be "further bolstered" if the CMA were also able to impose fines directly on individuals for serious competition law infringements. Although, the CMA acknowledged that this would be a significant change and that a "good deal of further work" would be required to assess the merits of such a change. In addition, the CMA suggested measures to establish a clear line of responsibility to the boards of public companies for competition and consumer law compliance. Some of the measures suggested included a requirement to appoint a board director with responsibility for assessing and reporting on competition/consumer law compliance risks.

It remains to be seen whether these new proposals will increase the consequences for individuals of breaches in competition law. However, even under the current regime, the consequences for directors of breaches of competition law can be significant.

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