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MESSAGE FROM THE EDITORS

We hope everyone is staying healthy and safe. As the world evolves and as we adapt to changing work environments, we hope that the publication of a new volume of the International Antitrust Bulletin evokes a sense of normalcy.

Please enjoy this new issue of the Bulletin and, as always, we welcome your comments and suggestions. We are currently seeking additional contributions for our upcoming issue and look forward to your proposals for future articles. In addition to our regular *What In The World Did I Miss?* columns, courtesy of our regional experts reporting from around the globe, this issue of the Bulletin features a review of issues in private antitrust litigation in China, an analysis of various European approaches to applying competition laws to the digital economy, a detailed report on the UK CMA's use of its director disqualification power, and a close look at Costa Rica's road to becoming an OECD member through the strengthening of its competition laws.

Cindy Richman & Joshua Chad
Editors

IN THIS ISSUE

What In The World Did I Miss?

A summary of the world's major competition law developments in the past quarter.

Asia

Europe

Central America

Director Disqualification and the UK Competition Regulator

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Since 2003, the UK Competition and Markets Authority (the CMA) has had the power to disqualify directors of companies that have been found to have infringed competition law. It is a power that had scarcely been exercised—as of the end of 2018, only three directors had been disqualified through its use. However, in 2019, a further nine directors were disqualified, and five cases are now proceeding through the courts for the first time. With the new CMA Guidance on Competition Disqualification Orders issued in February 2019, the CMA itself stated that it has been "ramping up how we use our disqualification powers and as a result, the risk of director disqualification to those who break the law has never been higher." This is therefore a power that the CMA is now actively using and is one that all companies operating in the UK market should be aware of.

The power to disqualify directors on the basis of competition law infringements is contained in the Company Directors Disqualification Act 1986 (CDDA), which applies to England, Wales, and Scotland, and the Company Directors Disqualification (Northern Ireland) Order 2002.

Under the CDDA, a director or former director can be disqualified for up to 15 years, with any breach of that disqualification punishable by a fine and/or up to two years imprisonment. This includes acting as a "shadow" director, so directors in family businesses have to be particularly careful not to create any perception of influencing family members who remain involved in the management of the business.

Disqualification can be effected in two ways: (1) a voluntary but binding competition disqualification undertaking (a CDU) may be given by a director; or (2) the CMA can apply to a court for a competition disqualification order (a CDO). To date, all disqualifications have been by way of a CDU, although the CMA has applied for CDOs in three instances. One settled with a CDU before trial, and the others are due to be heard in 2020.

When deciding whether to apply for a CDO, the CMA will take into account the seriousness of the infringement, its duration, the impact (or potential impact) on consumers, the company's conduct during the course of the investigation, and whether the company had previously breached competition law. Cases to date have involved "hardcore" anticompetitive conduct, such as price-fixing or bid-rigging.

For a CDO to be made, two conditions must be satisfied:

1. The company for which they are a director must have committed a breach of competition law; and
2. The court must consider that their conduct as a director makes them unfit to be concerned in the management of a company.

Whilst the first condition suggests—but does not require—that the CMA will have issued an infringement decision before it is satisfied, the CMA has recently amended its procedural guidance, to allow it to open CDDA proceedings before the main investigation into any anti-competitive conduct has been concluded. Previously, the CMA stated it would use its disqualification power only after the conclusion of any appeal. This approach changed in June 2018, as the CMA now considers it to be more efficient for a CDO to assessed at the same time as any infringement or penalty. While there may be efficiency gains (at least where the breach of competition law is clear-cut and highly likely to lead to an infringement finding), this also gives the CMA a procedural advantage of placing parties to investigations under increased pressure. The experience of the authors is that the CMA is adopting its new process in at least some of its current cases.

For the second condition, the Court must take into account whether the director's conduct contributed to the breach; if it did, it is immaterial whether they knew that the conduct was contrary to competition law. Alterna-

tively, if a director's conduct did not contribute to the breach, the legal test is whether the director had reasonable grounds to suspect that the conduct constituted a breach and took no steps to prevent it, or whether s/he did not know but ought to have known that the conduct constituted a breach.

An individual can avoid court proceedings by offering a CDU. A CDU has the same effect as a CDO, but the CMA has noted that the offering of CDUs has resulted in a shorter period of disqualification than would have been sought under a CDO procedure before the Court.

Given the profile of the companies for which directors have offered CDOs to date (many of which are micro-businesses), it is not surprising that cases have concluded in this manner. This is an area which remains untested in the courts, with what seems a relatively low bar for disqualification and thus a high risk for cost consequences. The initial competition proceedings alone will undoubtedly have had an effect on the companies with regard to time and cost invested, as well as the payment of fines alongside reputational damage. The "plea bargaining" nature of the CDU process is also likely to create an incentive to accept the disqualification on an assumption that it will be for a shorter period than under any CDO which may be ordered. However, concerns remain around the approach of the CMA to making time-limited CDU offers to try to coerce directors into giving the undertaking. In the authors' view, this is contrary to the presumption of innocence and risks being procedurally unfair.

One of the key differences between insolvency-based disqualifications and competition disqualifications is that in the latter case the company is likely to still be active. While this does not affect the disqualification process itself, it is likely to be important in any application for permission to act as a director (the court can give dispensation to directors to act in specific roles, notwithstanding the disqualification). Indeed, in the first decision relating to permission to act following a competition law infringement handed down in December 2019, the High Court gave permission to act, in view of the strategic importance of the individuals to the companies in question and the potential for adverse impacts on those companies without the individuals being in place (*In the Matter of Fourfront Group Ltd & Ors* [2019] EWHC 3318 (Ch)). As well as the impact the removal of those directors would have on their respective companies, the Court also took into account the fact that other steps had been taken to mitigate the risk of retaining the directors in place: for example, by appointing additional, legally qualified, directors and by introducing policies and training to reduce the risk of a recurrence of anticompetitive conduct. The Court therefore found that the requirement of public protection had been met.

While this ruling may somewhat temper the CMA's new enthusiasm for its power, directors should be looking to ensure that they protect themselves against breaches of competition law, by attending regular competition training and maintaining a top down compliance culture; the key is not to become experts in competition law but to demonstrate a commitment to diligence. National authorities of some—but not all—other EU member states have chosen to implement a disqualification regime, and directors should familiarise themselves with the personal risks associated with each jurisdiction.

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