

Competition Law - Directors in the Firing Line...Again

Our 8 June eZine gave a basic guide to the prohibitions of competition law, and its sanctions including directors' (or limited liability partners') disqualification.

Since then, the OFT has issued revised guidance, broadening the circumstances in which it (or sector regulators like Ofcom) will seek disqualification. From now, it may be sought not only for those involved in infringement of competition law, but also for those who knew about it, or even those who ought to have known. (The full guidance document can be viewed [here](#)).

It does not change the law. For the court to make a disqualification order, the two conditions which must be satisfied are still:

1. that the company has committed a breach of competition law; and
2. that the court considers the director's conduct makes him or her unfit to be concerned in the management of a company.

However, the circumstances in which the regulators will attempt to persuade the court of point 2 have expanded.

Ignorance of competition law does not get directors off the hook. The "ought to have known" test is an objective one. Paragraph 4.23 of the guidance says:

While the OFT and Regulators do not expect that directors should have specific expertise in competition law, they do expect that all company directors should appreciate the importance of competition law compliance. Furthermore, the OFT and Regulators expect that every director of every company ought to know that price-fixing, market sharing and bid-rigging agreements are likely to breach competition law.

Further details of the prohibitions of competition law were in our 8 June eZine [here](#).

Disqualification prevents someone being involved in any company's management (for up to 15 years), even if they are not a director in name, and the sanctions for flouting the ban are as swingeing as those for breaching competition law; including prison and personal liability for company debts.

The OFT has not actually sought any disqualifications since it was given the power by the Enterprise Act 2002; although it would seem from the revised guidance that this is not down to any lack of will. In some cases, immunity is part of the "leniency" offered in exchange for cooperation in the regulator's investigation. In others, evidence of involvement was a problem; less so now "ought to have known" suffices.

All in all, it has been a rough year for directors. In *Safeway v Twigger and Others*, Safeway (through its

new owner, Morrisons) has brought an action against its own former directors for involvement in an alleged dairy products price fixing cartel. Safeway agreed to pay up to £16½ million to settle. Morrisons wants the former directors to indemnify the penalty and legal costs; although the real target may be the directors' insurance. The case continues ...

If you have any specific concerns or would like further information, please email [Stephen Critchley](mailto:Stephen.Critchley@teacherstern.com) or phone him on **020 7242 3191**.

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