Who Wants to be a Director? UK Office of Fair Trading Sets a High Standard for Compliance

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In June 2011, the U.K. Office of Fair Trading (OFT) published the final versions of its competition law compliance guidance for companies and directors[1]. This followed a consultation process commenced in 2010.

The materials represent best practice in the E.U. in the area of competition law compliance, but the standard is high. The OFT expects directors to know about competition law and to take active steps to ensure compliance within their businesses. Compliance must be driven from the top and be more than mere "box-ticking".

As if this were needed, the risks and responsibilities involved with being a director in the U.K. have once again been increased.

The Background – Director Disqualification Orders

The new guidance follows the publication in June 2010 of the OFT's revised guidance on Director Disqualification Orders (CDOs) in competition law cases[2]. Under the U.K. Company Directors Disqualification Act a person can be disqualified from acting as a director of a U.K. 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. A "director" includes any person occupying the position of director, by whatever name he is called.

The CDO guidance sets out how and when the OFT will take action to disqualify directors when it uncovers evidence that a director was responsible for, or ought to have known of, competition law breaches at a company. The intention was to increase the incentives on U.K. directors to take responsibility for competition law compliance by their companies, which has now been reinforced by the June 2011 guidance.

The New Guidance

The OFT published two principal documents:

- *How Your Business Can Achieve Compliance*, is aimed at businesses and their advisors, and sets out the OFT's recommended risk-based, four-step approach to creating a culture of competition law compliance;
- *Company Directors and Competition Law*, explains the level of competition law understanding expected from directors. It outlines steps they should take to prevent, detect and stop infringements of competition law.

It is the latter document in particular which sets out the increased expectations on directors. It points out at the beginning that a director can eliminate the risk of a CDO being made against him by ensuring that his company does not infringe competition law. Further, where a director is "genuinely committed" to competition law compliance and has taken reasonable steps to ensure that the company has an effective compliance culture, it is unlikely that the OFT will apply for a CDO against him (unless he was involved in the infringement).

Against this background, the following are the main points of detail for directors to note:

- the OFT is more likely to consider making a CDO application in cases involving more serious infringements of competition law. However, this does not mean that only the most serious infringements which can involve personal criminal liability under the U.K. cartel offence are relevant;
- where the breach is suitable for a CDO application, and taking into account the general principles noted above, the OFT 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,

[1] See the materials *available at* http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/.

[2] *See* the OFT's publication "Director disqualification orders in competition cases" *available at* http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft510.pdf.

although he did not know about a breach, the director ought to have known of it. Personal involvement is therefore not necessary and in addition it is up to a director to keep himself informed;

- the director's role is relevant to the level of understanding of competition law which he should have and to the steps it is reasonable to expect him to take. A director with overall responsibility for a business area (but not immediate management responsibility over individuals responsible for an infringement) should make "reasonable enquiries" so as to seek to identify competition law breaches (presumably on a fairly regular basis). Non-executive directors similarly should make "reasonable enquiries" of the executive directors so as to satisfy themselves that the executive directors have, amongst other things, "taken appropriate steps to identify and assess the company's exposure to competition law risks";

- however, a director with responsibility for sales or for setting prices would be expected to take (or to ensure that his company is taking) steps to identify, assess and mitigate any potential areas of competition law risk. This may mean a competition law compliance programme, tailored to the company in question;

- the OFT will, when considering whether to apply for a CDO, assess a director against his actual knowledge of competition law as well as the knowledge that he is reasonably expected to have. Thus, all directors are expected to know that a cartel is illegal. This includes price fixing, bid rigging, production limitation agreements and agreements to share customers or markets. Outside this list, all directors ought to be able to recognize risk and to know when to seek advice, including in relation to abuse of dominance.

The *How Your Business Can Achieve Compliance* document sensibly recognizes that the actions at a corporate level needed to achieve competition law compliance will vary depending on a number of factors, including the size of the business and the nature of the risks identified. However, the core is a "clear and unambiguous" commitment to competition law compliance from the top down. The recommended risk-based, four-step approach consists of:

- Risk identification;
- Risk assessment;
- Risk mitigation; and
- Review.

These are of course not new concepts and are used in other areas of compliance (such as corruption). However, the OFT expects a high standard, particularly for larger companies. For example, in order to demonstrate a commitment to compliance, the OFT suggests "regular e-mail and other direct communication by chief executives . . . underlining the importance of competition law compliance" and an internal whistle-blowing system. Needless to say, risk mitigation generally should include suitable training activities and policies and procedures (but not "box-ticking"/"one-size-fits-all" training). For a larger company, this might include, for example, rewarding employees who proactively take steps to raise compliance concerns (a promotion is suggested), anonymous and/or confidential telephone lines (perhaps run by independent contractors) and active review by managers of expense claims.

Conclusion

Both OFT guidance documents are intended to increase the pressure on directors to push competition law compliance within their businesses. The *How Your Business Can Achieve Compliance* guidance reflects best practice and is required reading for anybody who is involved in competition law compliance in the E.U.

The *Company Directors and Competition Law* guidance should be studied carefully by anybody who is formally or informally a director of a U.K. business, and it is anyway best practice for directors generally. There is an implicit threat behind this document. The OFT is very keen to obtain a CDO for the first time and it could easily be the case that disqualification becomes a greater risk than being convicted of the criminal cartel offence in the U.K., given the difficulties inherent for the OFT in securing a conviction for that offence and the wider range of infringements which could result in a CDO. Directors have been warned.