Director Accountability for Breach of Competition Law: Practical Lessons from the CMA's increased use of Disqualification powers by Chijioke Chijioke-Oforji[1]

Abstract

In recent times, the Competition and Markets Authority (CMA) – the UK's Competition Regulator has sought to disqualify Company Directors for Breach of Competition Law using a little-known power in the Company Directors Disqualification Act 1986. This power, introduced in the early 2000s, has been invoked in, at least, thirteen cases over the last four years. The practical effect of the CMA's disqualification regime is the prohibition of concerned persons from carrying out functions of the kind exercised by an ordinary company director. This article attempts to draw key lessons from the CMA's director disqualification regime. It also highlights practical difficulties for the CMA in maximising the deterrent potential of the regime.

Keywords: Director Disqualifications, Corporate Governance, Competition Law, Individual accountability.

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Introduction

The legal regime for the Disqualification of Company Directors in the UK is governed by a seminal piece of legislation – the Company Directors Disqualification Act 1986 (CDDA 1986).[2] Under the CDDA 1986, persons holding the position of company director may be disqualified on a number of grounds including conviction for an indictable offence,[3] fraudulent trading,[4] insolvency[5] and breach of competition law[6] among others. When disqualified, the concerned individual(s) loses the ability to act as company director or insolvency practitioner for a definite period, which can up to 15 years.

In comparison to other grounds, disqualification for breach of competition law is relatively unknown. It has its roots in a 2003 amendment to the CDDA 1986 which granted the now defunct Office of Fair Trading (OFT) powers to bring disqualification actions against company directors for infringement of UK and EU Competition Law.[7] Rather inexplicably, the powers were unused throughout the lifetime of the OFT – a decision that has attracted significant criticism.[8] The OFT's successor – the Competition and Markets Authority (CMA) has however signalled its intention to consider disqualification actions in almost every case it investigates[9] and has, in the last four years, secured thirteen of such disqualifications.

This article draws key lessons from the CMA's increasing reliance on disqualification powers in a four-part discussion. The first part considers the features of the disqualification regime. Following this is a summary of the disqualification proceedings brought so far by the CMA. The penultimate section examines the underlying logic for director disqualification. It is argued here that personal

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[2] Adrian Walters 'Directors' disqualification after the Insolvency Act 2000: the new regime' [2001] 3 Insolvency Lawyer 86-96.

[3] Company Directors Disqualification Act 1986 (CDDA 1986) s2.

[4] Company Directors Disqualification Act 1986 (CDDA 1986) s4.

[5] Company Directors Disqualification Act 1986 (CDDA 1986) s6.

[6] Company Directors Disqualification Act 1986 (CDDA 1986) s9A.

[7] Andreas Stephan 'Disqualification Orders for Directors involved in Cartels' (2011) CCP Working Paper 11-8, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879784> Accessed 20 February 2020.

[8] Lindsay Fortado 'CMA enforcement chief vows to be tougher on cartels' *Financial Times* (London, 12 November 2015) <https://www.ft.com/content/ce0b1592-8878-11e5-9f8c-a8d619fa707c> Accessed 20th February 2020. See also: Michael Grenfell, 'Speech' (Thomson Reuters competition law conference, London, 27 November 2017) <https://www.gov.uk/government/speeches/uk-competition-enforcement-where-next> Accessed 28 March 2020.

[9] Tim Castorina and William Langdrige 'Personal responsibility for cartels in the UK hits home with a wave of director disqualifications' (Linklaters Blog, 15 August 2019) <https://www.linklaters.com/en/insights/blogs/linkingcompetition/2019/july/personal-responsibility-for-cartels-in-the-uk-hits-home-with-a-wave-of-director-disqualifications> Accessed 20 March 2020.

sanctions such as disqualifications can be rationalised on public interest, deterrence and enforceability grounds. The final section offers final thoughts on the practical lessons and implications of this enforcement approach for the CMA, UK Companies and persons undertaking the role of company director.

Overview of the CMA Disqualification Regime

The CMA's disqualification regime is built around two main pillars. The first involves a formal application by the Authority to the High Court for a Competition disqualification order (CDO) against a director.[10] The second pillar, by contrast, allows disqualifications to be effectuated without court order by way of a negotiated undertaking which, in effect, strips an individual of the capacity to act as company director.[11]

The CDO imposition process typically begins with a determination by the CMA on whether to commence proceedings. This decision rests on the facts and circumstances of the particular case, the evidence available and the public interest in seeking the disqualification of the director.[12] The CMA also considers other factors in reaching its judgement.

For one, it considers whether a company of which the person is a director has committed a breach of competition law.[13] This assessment is followed by other considerations including the nature of the alleged infringement and its impact on markets and customers, the conduct of the company during the investigatory process and the director's own involvement in the infringing conduct.[14] The possible deterrent effect of a CDO on the wider market is also considered.[15] The CMA further considers whether the concerned company is subject to leniency or immunity arrangements, in which case, the regulator will normally decide against an application for a CDO.[16] These factors are by no means exhaustive, meaning that the CMA retains full discretion in deciding whether to investigate the conduct of a director or to apply for a CDO.

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[10] Competition and Markets Authority, 'Guidance on Competition Disqualification Orders' (2019), 3 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/776913/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A_v2.pdf> Accessed 30 March 2020.

[11] Ibid. p.6.

[12] Competition and Markets Authority, 'Guidance on Competition Disqualification Orders' (2019), 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/776913/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A_v2.pdf> Accessed 30 March 2020.

[13] Ibid.

[14] Ibid.

[15] Ibid at 8.

[16] Ibid.

Where a court receives an application for a CDO, it must make such an order if satisfied that a company led by the said director has committed a breach of competition law;[17] and that the director's conduct makes him or her unfit to be concerned in the management of a company.[18] The first criteria covers any breach of competition law and applies in principle to cartels and other forms of anticompetitive agreement. The second limb, on the other hand, is more complex and entails a judicial inquiry into the individual's propriety for the position of company director. For these purposes, the CDDA 1986 prescribes a number of factors to be considered by the court in assessing the fitness of directors.

Key considerations include whether the director's conduct contributed to the breach of competition law. [19] The court is also invited to consider whether the director had reasonable grounds to suspect the breach and took no steps to prevent it[20] and whether the director ought to have known of the conduct that led to the breach of competition law.[21] All three factors clearly capture a range of actions and omissions that may reasonably occur on the watch of company directors, creating a considerably wide dragnet.[22]

Besides making an application for a competition disqualification order, the CMA may also exercise its disqualifying powers by agreeing disqualification undertakings (DU) with directors without leave of the court.[23] These are negotiated settlements between the regulator and the director, usually proposed by the latter in place of formal court proceedings.[24] When agreed, DUs have an equivalent effect to competition disqualification orders (CDOs) under S9A since they ban concerned individuals from exercising the functions of a company director for a definite period.[25]

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[17] Section 9A(2) CDDA 1986.
[18] Section 9A(3) CDDA 1986. 'director' for these purposes includes a de facto director and a shadow director.
[19] Section 9A(6)(a) CDDA 1986.
[20] Section 9A(6)(b) CDDA 1986.
[21] Section 9A(6)(c) CDDA 1986.
[22] Bernardine Adkins and Samuel Beighton 'Director disqualification and the CMA: Encouraging a "top down" compliance culture in the UK' (Kluwer Competition Law Blog, 1 May 2018) <http://competitionlawblog.kluwercompetitionlaw.com/2018/05/01/director-disqualification-cma-encouraging-top-compliance-culture-uk/?doing_wp_cron=1586364779.2334940433502197265625#_ftn15> Accessed 1 March 2020.
[23] Competition and Markets Authority, 'Guidance on Competition Disqualification Orders' (2019), 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/776913/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A_v2.pdf> Accessed 30 March 2020.
[24] Ibid. See also: Jonathan Grimes 'A change of direction in director disqualification for breaches of competition law?' (Kingsley Napley, 11 December 2019) <https://www.kingsleynapley.co.uk/insights/blogs/directors-and-officers/a-change-of-direction-in-director-disqualification-for-breaches-of-competition-law> Accessed 29 January 2020.
[25] Ibid.

Undertakings therefore represent a swift means of resolving disqualification matters, which, in effect, relieves the CMA of the burden of litigating the issue in court.[26] As such, there are practical benefits attached to DUs. For instance, in return for a DU, the CMA may agree to a reduction in the period of the director's disqualification depending on a number of factors including his or her cooperation and conduct.[27] Also, where a DU is accepted, the CMA will not normally recover costs from the individual (in contrast to the position where a CDO is made).[28] This positions the DU as the path to least resistance and offers clear incentives for directors and the CMA.[29]

The benefits aside, DUs are not without controversy. Critics argue that these measures are agreed between a powerful regulator like the CMA and directors of companies' subject to enforcement action without appropriate judicial scrutiny.[30] The lack of judicial oversight is said to mean that DUs may be negotiated in opaque conditions with a probable risk of abuse.[31]

Summary of CMA Disqualifications to date

Using the abovementioned powers, the CMA has secured a number of disqualifications over the last four years. These actions typically take the form of DUs as opposed to CDOs, highlighting a preference for swift resolution of disqualification matters on the part of the regulator.[32]

The first disqualification took place in 2016 as part of the authority's enforcement action against Trod Ltd, an online poster company found to have participated in cartel activities with other online

[26] Bernardine Adkins and Samuel Beighton 'Director disqualification and the CMA: Encouraging a "top down" compliance culture in the UK' (Kluwer Competition Law Blog, 1 May 2018) <http://competitionlawblog.kluwercompetitionlaw.com/2018/05/01/director-disqualification-cma-encouraging-top-compliance-culture-uk/?doing_wp_cron=1586364779.2334940433502197265625#_ftn15> Accessed 1 March 2020.

[27] Competition and Markets Authority, 'Guidance on Competition Disqualification Orders' (2019), 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/776913/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A_v2.pdf> Accessed 30 March 2020.

[28] Ibid.

[29] Bernardine Adkins and Samuel Beighton 'Director disqualification and the CMA: Encouraging a "top down" compliance culture in the UK' (Kluwer Competition Law Blog, 1 May 2018) <http://competitionlawblog.kluwercompetitionlaw.com/2018/05/01/director-disqualification-cma-encouraging-top-compliance-culture-uk/?doing_wp_cron=1586364779.2334940433502197265625#_ftn15> Accessed 1 March 2020.

[30] Ibid.

[31] Ibid.

[32] An application for a CDO was, however, made in March 2020 against four directors over competition infringements at their firms. At the time of writing these applications remain before the high court. See: Competition and Markets Authority 'Residential estate agency services in the Berkshire area: director disqualification' (2020) <https://www.gov.uk/cma-cases/residential-estate-agency-services-in-the-berkshire-area-director-disqualification> Accessed 10 April 2020.

poster firms.[33] In sanctioning Trod Ltd, the CMA accepted a DU proposed by its managing director Daniel Aston.[34] Aston acknowledged that he was aware of the company's attempts to fix prices of online poster frames. He also admitted to taking steps to implement a proscribed agreement.[35] Aston further conceded that this conduct rendered him unfit to be concerned in the management of a company and was disqualified for a period of five years.[36]

Following the Aston case was the disqualification of two directors, David Baker and Julian Frost whose companies had entered into agreements to set a minimum commission fee for the provision of residential sales services in the Somerset area of the UK.[37] Both directors admitted to the said conduct and a number of malpractices including participating in the negotiation and implementation of an agreement contrary to the Competition Act 1998.[38] They earned a disqualification period of three and half and three years respectively.[39]

The third disqualification came three years later in April 2019 and relates to the second.[40] The case arose again from proceedings brought by the CMA against Saxons PS Ltd as part of the Somerset residential sales price fixing scandal.[41] The concerned director, Graham Thompson initially declined to offer an undertaking after the conclusion of the CMA's investigation into his company.[42] This changed months later, forcing the CMA to discontinue its application to the High Court for a CDO. The director was disqualified for a period of five years. [43]

In May and December 2019, the CMA further secured the disqualification of six directors of office design companies found to have engaged in cartel activities designed to confer an unfair

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[33] Competition and Markets Authority 'CMA issues final decision in online cartel case' (2016) <https://www.gov.uk/government/news/cma-issues-final-decision-in-online-cartel-case> Accessed 2 February 2020.

[34] Competition and Markets Authority 'Online sales of posters and frames: Director Disqualification' (2016) <https://www.gov.uk/cma-cases/online-sales-of-posters-and-frames-director-disqualification> Accessed 3 February 2020.

[35] Competition and Markets Authority 'Disqualification Undertaking Re: Trod Limited (In Administration)' (2016) <https://assets.publishing.service.gov.uk/media/583ff903e5274a1303000040/daniel-aston-director-disqualification-undertaking.pdf> Accessed 20 February 2020.

[36] Ibid.

[37] Competition and Markets Authority 'Residential estate agency services in the Burnham-on-Sea area: Director Disqualification' (2018) <https://www.gov.uk/cma-cases/residential-estate-agency-services-in-the-burnham-on-sea-area-director-disqualification> Accessed 20 February 2020.

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Competition and Markets Authority 'Residential estate agency services in the Burnham-on-Sea area' (2018) <https://www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anti-competitive-arrangements> Accessed 20 March 2020.

[42] Ibid.

[43] Ibid.

competitive advantage on a specific supplier.[44] All six directors admitted to conduct contrary to the Competition Act 1998 and were disqualified for periods ranging from one to five years.

The penultimate disqualification brought by the CMA concerned two directors of a Northern Ireland construction firm, CPM Group Ltd, said to have engaged in cartel activity in relation to the supply of pre-cast concrete drainage products.[45] Directors of the company, Philip Stacey and Robert Smillie each offered undertakings for conduct contrary to the Competition Act 1998 and were disqualified for periods of six and a half and seven years respectively. [46]

Following this was the disqualification of Phillip Hallwood a director of a pharmaceutical firm, King Pharmaceuticals in March 2020.[47] The action arose as part of the CMA's investigation into his company. The regulator found that King Pharmaceuticals had exchanged commercially sensitive information with the aim of establishing and maintaining anti-competitive agreements with other companies in the pharma industry.[48] In sanctioning King Pharmaceuticals, the CMA accepted an undertaking from Hallwood for his role in negotiating and implementing the said agreement.[49] Hallwood undertook not to act as a director or insolvency practitioner of a UK Company for a period of seven years.[50]

The Rationale for Director Disqualification

Disqualifications are traditionally rationalised on public interest grounds.[51] Public interest theorists suggest that personal actions against directors found to have committed forms of misconduct is necessary to protect the public from abuses of the corporate form.[52] These accounts see the corporation as a social and economic institution capable of creating positive or negative effects.[53]

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[44] Competition and Markets Authority 'Design, construction and fit-out services: director disqualification' (2019) <https://www.gov.uk/cma-cases/design-construction-and-fit-out-services-director-disqualification> Accessed 20 March 2020.

[45] Competition and Markets Authority 'Supply of precast concrete drainage products: director disqualification' (2019) <https://www.gov.uk/cma-cases/supply-of-precast-concrete-drainage-products-director-disqualification> Accessed 28 March 2020.

[46] Ibid.

[47] Competition and Markets Authority 'Suppliers of antidepressants: director disqualification' (2020) <https://www.gov.uk/cma-cases/suppliers-of-antidepressants-director-disqualification> Accessed 3 April 2020.

[48] Ibid.

[49] Ibid.

[50] Ibid.

[51] Andrew Hicks 'Director disqualification: can it deliver?' (2001) Journal of Business Law 433, 438. Stephen Griffin, 'The Disqualification of Unfit Directors and the Protection of the Public Interest' (2002) 53 Northern Ireland Legal Quarterly 207. See also: Caron Beaton-Wells and Brent Fisse, 'U.S. Policy and Practice in Pursuing Individual Accountability for Cartel Conduct: A Preliminary Critique' (2011) 56 Antitrust Bulletin 277, 294.

[52] Richard Williams 'Disqualifying Directors: A Remedy Worse than the Disease?' (2007) 7(2) Journal of Corporate Law Studies 213, 218.

[53] Stephen Griffin, 'The Disqualification of Unfit Directors and the Protection of the

Positive effects include a corporation's contribution to the domestic economy and the jobs that it creates among others.[54] Negative externalities on the other hand include the myriad costs of corporate failure and abuses of limited liability.[55]

Public interest scholars see positive effects as benefits that may be harnessed. They also call for appropriate measures to protect the public against probable negative externalities occasioned by a corporation's activity.[56] Among these are disqualifications which restrict the ability of unfit directors to expose the public to a risk of loss from further misconduct on their part.[57]

These notions feature prominently in the CMA's disqualification regime. In, at least two instances, the regulator's guidance notes that it is informed by the public interest in deciding whether to bring disqualification actions against a director.[58] Public interest ideas are also embedded into the meaning of 'unfitness' within the regime under which a director's personal conduct may be scrutinised. The CMA has also sought to explain enforcement decisions against company directors drawing from public interest narratives. For instance, following the disqualification of Daniel Aston of Trod Ltd, Michael Grenfell, the CMA's enforcement director noted that the regulator acted to prevent harm to 'consumers, businesses and overall economic performance.'[59] This clearly channels public interest considerations in explaining the regulator's enforcement.

Besides protecting the public interest, disqualifications also follow a deterrence rationale. These perspectives perceive disqualifications as key instruments in dissuading directors from infractions of Competition Law. Underlying this idea is a much-debated theory of deterrence which presumes that the severity of costs or punishment attached to an offence is related to a reduction or elimination of wrongdoing.[60] Deterrence theory thus assumes that a director will weigh the expected costs and benefits of non-compliance with a behavioural rule before deciding whether

Public Interest' (2002) 53 Northern Ireland Legal Quarterly 207.

[54] Ibid.

[55] Ibid.

[56] Ibid.

[57] Ibid at 208.

[58] Competition and Markets Authority, 'Guidance on Competition Disqualification Orders' (2019), 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/776913/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A_v2.pdf> Accessed 30 March 2020.

[59] Competition and Markets Authority 'CMA secures director disqualification for competition law breach' (2016) <https://www.gov.uk/government/news/cma-secures-director-disqualification-for-competition-law-breach> Accessed 20th March 2020.

[60] Jonathan Galloway 'Securing the Legitimacy of Individual Sanctions in UK Competition Law' (2016), 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2884418> Accessed 20 February 2020.

to comply with it.[61] In other words, the higher the costs of non-compliance, the more likely it is that a director will obey the rule.

This view is supported by Ginsburg and Wright who argue that disqualifications impose a high and direct opportunity cost upon director in ways that deter undesirable conduct.[62] For Ginsburg and Wright, the deterrent effect of disqualifications stem from the likelihood that a person's career prospects and immediate earning power may be affected in the event of debarment.[63] Similarly, Stephan argues, in the CDO context, that the career and financial implications of disqualification, although less sobering than tougher measures such as criminal prosecutions, may be key in altering the strategic calculations and behaviour of directors.[64]

These views underscore a key rationale for director disqualifications which is that they force persons at the heart of the corporate hierarchy to internalise the costs of wrongdoing in a uniquely personal way – through the loss of jobs or earning potential – as opposed to entity-level penalties that target the corporation and not individuals responsible for objectionable conduct.[65] Although an important part of enforcement toolkits, entity-level sanctions such as corporate fines are widely regarded as insufficient in deterring breaches of competition law owing to their inability to resolve deep-seated agency problems at the heart of corporations.[66] Disqualifications are thus touted as viable supplements.[67]

The above sentiments are supported by a 2007 report commissioned by the CMA's predecessor, the OFT, which found that 202 interviewed UK companies perceived the threat of director disqualification as a credible deterrent second only to criminal penalties.[68] Below the scale were options such as adverse publicity, corporate fines and private damage actions. The OFT Report

[61] Robert Baldwin, 'The New Punitive Regulation' (2004) 67(3) Modern Law Review 351, 371.
[62] Douglas Ginsburg and Joshua Wright 'Antitrust Sanctions' (2010) 6(2) Competition Policy International 3,20.
[63] Ibid.
[64] Andreas Stephan 'Disqualification Orders for Directors Involved in Cartels' (2011) 2(6) Journal of European Competition Law & Practice 529, 530.
[65] Douglas Ginsburg and Joshua Wright 'Antitrust Sanctions' (2010) 6(2) Competition Policy International 3,20.
[66] Florence Thépot, 'Leniency and Individual Liability: Opening the Black Box of the Cartel' (2011) 7(2) Competition Law Review 221, 227. See also: Andreas Stephan 'Disqualification Orders for Directors Involved in Cartels' (2011) 2(6) Journal of European Competition Law & Practice 529, 530.
[67] Andreas Stephan 'Disqualification Orders for Directors Involved in Cartels' (2011) 2(6) Journal of European Competition Law & Practice 529, 530.
[68] Office of Fair Trading 'The deterrent effect of competition enforcement by the OFT: A report prepared for the OFT by Deloitte' (2007), 10 <https://webarchive.nationalarchives.gov.uk/20140402181127/http:/www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf> Accessed 28 February 2020.

concluded that several of the respondents believed that 'a greater use of this sanction would improve deterrence.'[69]

A further OFT report also lays bare the potential efficacy of disqualifications in deterring director misconduct.[70] This report noted that respondent businesses regarded personal sanctions such as disqualifications as a potential driver of compliance with competition law.[71] Respondents also noted that personal sanctions were more likely to drive a top-down approach to corporate compliance.[72] Going by the above narrative, it would appear that the CMA's actions in disqualifying delinquent directors is likely to alter the decision making of directors who may otherwise engage in anti-competitive practices.

Alongside the public interest and deterrence explanations, disqualifications may also be rationalised on enforceability grounds. This is reflected in the comparative ease of disqualifying directors for breaches of competition law as opposed to pursuing tougher measures such as criminal prosecutions. Although far more effective in addressing misconduct, criminal penalties are often subject to a higher evidential standard and are thus difficult to effectuate.[73] This is, however, not the case for disqualifications which may be readily enforced without the same prosecutorial expense. As we have seen, the CMA only needs to show actual or constructive notice of a breach of Competition Law by a director to secure a CDO whereas prosecutors may have to discharge the criminal burden of proof while prosecuting the s188 Cartel offence.

This crucial difference is also illustrated by the fact that only three successful criminal prosecutions have been brought under the s188 Cartel offence.[74] By contrast, the CMA has secured at least thirteen disqualifications in the space of four years. The seemingly small success rate for criminal prosecutions demonstrates why disqualifications are a practical and potentially important frontline line option for the CMA while holding the prospect of further criminal prosecutions in reserve.

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[69] Ibid at 86.

[70] Office of Fair Trading 'Drivers of Compliance and Non-compliance with Competition Law – An OFT report (2010), 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf> Accessed 20 March 2020.

[71] Ibid.

[72] Ibid.

[73] Andreas Stephan 'Disqualification Orders for Directors involved in Cartels' (2011) CCP Working Paper 11-8, 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879784> Accessed 20 February 2020

[74] Samet Caliskan 'Individual Behaviour, Regulatory Liability, and a Company's Exposure to Risk: The Deterrent Effect of Individual Sanctions in UK Competition Law' (2019), 12 <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3431143> Accessed 14 April 2020.

Lessons and Implications

A great many lessons can be drawn from the CMA's disqualification regime but the most obvious is the regulator's seeming willingness to consider these measures in almost every case it now investigates. This marks a sharp departure from the position of its predecessor which barely used disqualification powers to much criticism.[75] The CMA is helped in this regard by a regime that grants it considerable leeway in bringing to account directors that engage in or blindly allow market distorting practices on their watch.

Alongside the change of approach, the regulator's actions seem to proceed by way of disqualification undertakings as opposed to formal applications to the Hight Court for a competition disqualification order (CDO). Indeed, all thirteen disqualifications have thus far been effectuated by way of a DU, showing a preference for negotiated settlements on the part of the CMA and directors.

Directors in consumer-intensive sectors also appear to be very much in the crosshairs of the regulator. It is no coincidence that majority of disqualifications have occurred in these sectors where the impact of non-competitive activity may be more pronounced. This is no reprieve, however, for directors in other sectors of the economy who will be well advised to keep within the regulator's rules and to design compliance systems that are fit for purpose.

A further lesson is the regulator's focus on small and medium-sized corporations. This is the case in almost all the disqualification actions which have, for the most part, affected smaller firms ranging from estate agents to online poster firms. The CMA has sought to defend this, arguing that its enforcement approach seeks to address non-competitive activity wherever they arise.[76] This however raises a number of practical difficulties including the risk of creating a false sense of immunity for directors of larger firms.

The more interesting point however is whether the regulator's approach exerts a strong deterrent influence on directors and ultimately reduces infractions of UK Competition Law. This appears to be a distinct possibility, owing to the intensely personal costs borne by disqualified directors through the loss of career and earning potential. Yet there are certain developments that may 'mute' the deterrent effect of the regime.

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[75] Samet Caliskan 'Individual Behaviour, Regulatory Liability, and a Company's Exposure to Risk: The Deterrent Effect of Individual Sanctions in UK Competition Law' (2019),6 <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3431143> Accessed 14 April 2020.

[76] Cleary Gottlieb 'UK Competition Law Newsletter' (2018) <https://www.clearygottlieb.com/-/media/files/uk-competition-law-newsletters/uk-competition-newsletter-april-2018-pdf.pdf> Accessed 1 March 2020.

One challenge is the relatively low levels of competition law awareness among company directors. Research conducted by the CMA shows that competition law risk remains very low on the boardroom agenda with just eighteen percent of respondents suggesting that their businesses had senior level discussions about competition law – a figure that trails far behind awareness of health & safety and employment law.[77] Such poor levels of awareness risks undermining the CMA's deterrence agenda given that ignorant directors may carry on with anti-competitive activities without higher levels of understanding. This presents a residual challenge for the regulator in bringing directors up to speed about their responsibilities in competition law which may be addressed through targeted compliance and education campaigns.

Conclusion

The frequency by which the CMA has pursued director disqualifications has become a matter of public attention. At least thirteen disqualifications have been secured in the last four years alone with many more seemingly to follow. Prior to the increased use of disqualification powers, the regulator relied mostly on corporate fines which targeted corporations and not the natural persons responsible for corporate decision-making. This appears to have undergone serious change with personal sanctions like disqualifications now considered alongside corporate fines.

This article attempted to draw key lessons from the CMA's disqualification regime. It argued that the regulator's increasing reliance on disqualification powers signals a greater focus on individual accountability under which company directors may be held to account for anti-competitive practices occurring on their watch. It also sought to rationalise these instruments on public interest, deterrence and enforceability grounds.

The public interest perspective sees disqualifications as a crucial instrument in protecting the public from abuses of limited liability. This fits very much with the CMA's regulatory action against directors that steer their companies towards abuses of private markets. The deterrence argument on the other hand perceives disqualifications as capable of aligning the incentives of directors and companies to comply with competition law through an increase in the personal costs borne by directors. This is followed by the enforceability narrative which zones in on the relative ease of enforcing disqualifications as opposed to tougher measures such as criminal penalties. This allows regulators like the CMA to evade the many procedural challenges associated with prosecuting

[77] Jessica Radke 'Director disqualification: an increasing risk' (CMA Blog 22 May 2019) <https://competitionandmarkets.blog.gov.uk/2019/05/22/director-disqualification-an-increasing-risk/> Accessed 20 March 2020.

directors through the criminal justice system. The article further argued that the CMA's shift towards personal accountability shows significant promise. It however highlighted a number of outstanding challenges that may limit the deterrent effect of the regime.