The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

Competition Law Committee response to OFT consultation on "Draft guidance on Company Directors and Competition"

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the OFT consultation on "Draft guidance on Company Directors and Competition" has been prepared by the CLLS Competition Law Committee.

Introduction

The Competition Law Committee ("the Committee") of the City of London Law Society ("CLLS")[1] welcomes the OFT's new draft Guidance on *Company Directors and Competition* (OFT1277) and is pleased to have the opportunity to submit comments in response to the consultation. We consider that the provision by the OFT of practical guidance on the application of competition law to directors is important in view of the serious impact which disqualification has on a person's business and professional prospects.

We begin by setting out some general comments, and then very briefly respond to the three specific questions that the OFT has put to consultees.

General

We had previously made some critical comments about the OFT's earlier draft guidance and urged the OFT to be far more specific in the advice that it gives, both in relation to the categories of director and non-director at risk of disqualification under the competition law regime, and in relation to the practical steps that can or should be taken to guard against those risks.

Our overall concern however is in providing this detail, the OFT may have overstepped the mark and effectively created a set of positive directors' duties which are outside the remit of its powers under the *Company Directors Disqualification Act 1986*. In particular, the competition law knowledge expected of directors (especially

[1] The Committee is made up of solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who advise and act for UK and international businesses, financial institutions and regulatory and governmental bodies on competition law matters.

commercial directors) and referred to in the Guidance is too high and the steps for detection and prevention expected of both executive and non-executive directors are unreasonable.

Furthermore, the Guidance ignores the fact that directors have other responsibilities and face competing demands for their attention aside from managing competition law risks.

We welcome the parallel Guidance *How your Business can Achieve Compliance* that the OFT has also published for consultation. We found it quite a useful and concise summary of the competition rules, without undue legal detail, and do not have any specific comments on its content.

In relation to both draft Guidance documents, we felt that the presentation could benefit from improvement given the audience at which both are principally directed. In order to make the documents more director-friendly we would have expected to see more tabular summaries/illustrations/diagrams rather than plain text. For instance, why cannot the examples of the knowledge directors are assumed to have, and the knowledge they cannot be expected to have, be set out in a table with two columns? The documents would thereby have much greater impact.

We welcome the clear statement at paragraph 3.6 on the importance of the distinction between executive and non-executive directors for the application of competition law, including competition disqualification orders (CDOs). We agree with the OFT's approach in placing higher expectations on executive directors as they can generally be expected to have a more detailed understanding of, and familiarity with, the way in which their companies operate on a day-to-day basis. However, we feel that the OFT has sought to impose a far higher standard of competition knowledge on non-executive directors and places too great a burden upon them with regard to the steps they are required to take to achieve compliance

We consider that the OFT has properly identified the two main factors (essentially the director's role in the company and the size of the company) which ought to be taken into account in determining the relevant degree of responsibility of an executive director and hence greater risk of being subject to a CDO. Generally speaking we take the view that paragraphs 3.8 ff. do give helpful guidance on the key factors to be taken into account, and that, as a result, directors would be able to ascertain where they stand. However, we would like to see further guidance on this, and, in particular, it would be useful if the OFT were to expressly set out the other areas within a company that it considers to be "at risk".

Conversely, however, non-executive directors do not generally get involved in day-to-day company decisions, even including pricing decisions, and they cannot be expected to probe in detail as to how pricing and other such decisions have been reached. Nor should they be expected to adopt a suspicious attitude to every single commercial decision of the company and require evidence of competition law compliance at every turn.

We agree that it is reasonable for the OFT to recommend that non-executive directors take responsibility for asking appropriate questions of the company's executives, to ensure that appropriate compliance methods have been adopted to prevent and detect breaches of competition law (paragraph 3.7). However, the suggestion that a non-executive director who failed to ask such questions could be made subject to a CDO goes far beyond what in our view the law was intended to

achieve, and beyond what is reasonable or necessary as an effective deterrent for encouraging compliance.

In our view, the standard that the draft Guidance imposes on non-executive directors to avoid a CDO is excessively high and is disproportionate having regard to the underlying statutory provisions. A court would be reluctant to make a CDO against a non-executive director unless there was present some other damning element, over and above the failure to make themselves aware of the non-compliance, making them unfit to be a director, such as evidence they were present at meetings where price fixing or commercial information exchanges were discussed and they failed to raise queries.

Although we have no objection to the OFT describing the guidance at paras. 5.16 ff. as a form of recommended best practice, and to recommend that even non-executive directors should read the parallel Guidance *How your Business can Achieve Compliance*, we suggest that the Guidance should make it clear that, for non-executive directors, CDOs will be the exception rather than the rule.

There is potentially a third class of directors, namely 'compliance' directors. At paragraphs 4.9 and 5.15 the OFT specifically confirms that compliance directors are not expected to have any greater responsibilities or deemed knowledge of the law or their company's activities than any executive director, which seems reasonable to us as an approach. *However, a cross-reference to paragraph 4.9 and the more detailed guidance at paras. 5.12 ff. might be helpful at this point.*

Q1 Does the Guidance adequately describe the level of competition law knowledge it is reasonable to expect a director to have? If not, please explain how it could be improved.

In relation to executive directors we believe Chapter 4 adequately explains how much knowledge they are expected to have of competition law and where the main exposure lies. We particularly welcome the clear statement at paragraph 4.6 that a director cannot be expected to know everything but can be held to account for failure to recognise and respond to the obvious alarm bells.

However, as we have already commented, we disagree with the excessively low threshold for deemed knowledge proposed for non-executive directors. While they should be encouraged to keep themselves informed and the OFT can recommend steps to be taken, this should not in our view be used to determine liability.

Further, we take the view that the level of competition law knowledge expected of directors responsible for dealings with commercial partners is too high. Concepts such as indirect information sharing and the antitrust assessment of JV arrangements, non competes etc. are complex, and it would be unreasonable to expect directors to understand the competition law risks posed by these practices. The same may be said for issues of market power and abuse and we urge the OFT to only consider applying for a CDO in the most obvious/ serious cases of abuse of dominance.

Q2 Does the Guidance adequately describe the steps it is reasonable for a director to take to detect and prevent breaches of competition law? If not, please explain how it could be improved.

We are not comfortable with the OFT's suggested approach to executive directors with either direct or indirect responsibility.

In relation to those with direct responsibility, the examples of the evidence that the OFT will consider are vague and inconclusive of anticompetitive behaviour. We would urge the OFT to make it clear that only where evidence effectively puts the director on constructive notice of the anticompetitive behaviour should it lead the OFT to consider applying for a CDO. Further, the OFT should be conscious of the dangers of hindsight and how easy it is once one has the full picture of the infringement to find that the director in question ought to have made more of the evidence before him or her at the time and done more in the circumstances.

Of most concern is the high standard created by the comment at 5.9: "This means that in smaller businesses, where the directors are personally involved in all day-to-day business activities, the OFT will generally take the view that the directors ought to be aware of *any* anti-competitive behaviour which is occurring".

In terms of those with overall business responsibility, we are concerned by the test outlined in 5.10. Again, the OFT needs to be aware of the dangers of hindsight in applying this test. Further, the "ought to have seen" limb establishes an "objective" standard, perhaps based on how directors in other companies would react or how the OFT would like all directors to act, which would not account for the circumstances faced by the director at the time and therefore risks being wholly unfair.

Q3 Please provide comments on any other aspect of the draft guidance you feel appropriate.

Examples

So far as the examples given at the end of the document are concerned, they are in our view helpful in illustrating the basic principles, but they are highly simplified. Our only specific comment is that in real life the arrangements will often be more complex and/or borderline.

This is certainly true for the last example on predatory pricing, since companies in that situation may not appreciate when they retaliate against a new entrant exactly what their costs are, and thus they may not be aware of the legal effects of their action. The price reduction may often be coupled with loyalty or volume rebate or bonus schemes, rather than straight price cuts. Clearly, the action is more likely to be abusive if the price reductions are targeted at specific customers that have switched or seem likely to switch suppliers, and *we suggest a further example based on such behaviour*. We would further submit, in relation to this example, that the application of a disqualification order covering potentially the entire board seems disproportionate in the circumstances.

In relation to the other examples, where it is suggested that a company should apply for leniency there is no reference to the need for the individual also to take independent advice regarding his or her own entitlement to a *'No Action' letter*, if necessary applying before the company does so on their behalf. *This could usefully be added as the Guidance is specifically directed at the individual directors and their individual exposure*.

We wonder whether it is in fact appropriate to have any examples at all in this document, or whether it might not be more appropriate to include such examples in, and refer the reader to, the parallel Guidance *How your Business can Achieve Compliance*.

Minor editing

In terms of the detailed drafting, we suggest slight improvements to the wording in the introductory Chapter where the OFT summarises the cartel offences, particularly to ensure that those coming to the subject for the first time can understand without having to turn to the examples.

In paragraphs 1.6, 2.2 and 4.6 “sharing” should be changed to “sharing out” customers as generally the relevant infringement or offence involves allocation (sharing out) of each customer to each participant in the cartel, which is quite the opposite of sharing (competition law could be seen as requiring customers to be shared customers!). The problem arises because of the statutory wording, but in a document that is meant to be readable and accessible it is justified to depart from the formal words.

At paragraph 1.6 the OFT again uses the statutory wording to refer to ”limit output” which later is better rendered as “limit production.” The phrase “production quotas” is also helpful to explain the concept.

Footnote 6 to paragraph 2.1 mentions the cartel offence but does not mention that the relevant provisions also prohibit concerted practices (which are in fact mentioned in the following paragraph) or so-called “decisions of associations of undertakings.” We suggest some tidying up, although we appreciate that this is not a text book on competition law.

As for footnote 13, while it mentions the possible overlap within the UK regime and as between the UK and the EU, it does not give out any warning that there may also be concurrent jurisdictional overlaps and enforcement risk in any number of other national jurisdictions for companies whose activities extend cross-border. Given some well publicised recent cases (*e.g.* BA, Marine Hoses and Stolt-Nielsen), this is an omission that requires correcting, even though the document is directed specifically at the possible legal consequences for directors in the UK of breaking UK or EU law.

Competition Law Committee of the City of London Law Society

28 January 2011

THE CITY OF LONDON LAW SOCIETY
COMPETITION LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

Robert Bell (Speechly Bircham LLP) (Chairman)

A. Bavasso (Allen & Overy LLP)

H. Cartlidge (Olswang LLP)

M.P. Grenfell (Norton Rose LLP)

Ms N. Kar (Linklaters LLP)

Ms J. Hulsmann (Clifford Chance LLP)

Miss D.K. Livingston (Herbert Smith LLP)

Mrs S. Mobley (Baker & McKenzie LLP)

Mrs M.A. Moore (Travers Smith LLP)

Dr A.N. Parr (Ashurst LLP)

A. Potter (Freshfields Bruckhaus Deringer LLP)

W. Sibree (Slaughter and May)

M.R. Smith (Simmons & Simmons)

P.A. Wareham (Hill Dickinson LLP)