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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Director Disqualification and Bidder Exclusion – Note by the United Kingdom

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www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm

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1. Introduction

1. This note sets out two developments in UK competition law enforcement that increase the risks for those involved in cartel activity in the UK.
2. First, we describe the UK **director disqualification regime** that the CMA has been applying in recent years. This regime protects the public from company directors who engage in illegal anti-competitive practices and places accountability for competition law compliance firmly with individuals at the top of businesses. This is in addition to our powers to investigate, and prosecute, individuals under the criminal offence for cartels.
3. Second, we explain the UK Government's legislative proposals¹ to include a **new exclusion from public procurement and debarment regime** for cartelists, and how this increases the downsides of getting caught while enhancing the incentives to apply for leniency.
4. These two developments are part of a broader drive by the CMA to deter anti-competitive behaviour by increasing and enhancing the tools available to the CMA to deter anti-competitive activity, increasing the risks that unlawful conduct is detected and, once detected, is properly sanctioned.

2. Competition disqualification orders

5. The power to seek the disqualification of directors of companies that have been found to be in breach of competition law was conferred on the UK competition authorities in 2002.² However, this power remained essentially unused until December 2016, when the CMA secured its first director disqualification. Since then, we have secured 25 director disqualifications, and we now consider whether to pursue director disqualification in all cases where competition law has been broken.
6. The primary purpose of the CMA's director disqualification regime is to protect the public from future misconduct committed by persons that the CMA considers unfit to be concerned in the management of a company.
7. In addition, the regime acts as a deterrent to the individual concerned and for other people acting as directors. The core message from the disqualification regime is that those at the top of companies will be held accountable if the businesses they control fail to comply with competition law. The CMA believes its increasing use of its director disqualification powers should motivate companies to promote a culture of compliance. This is particularly important given the finding that just 18% of those polled in our recent research into businesses in the UK³ said their business had senior level discussions about competition law.

¹ See part 3 of the provisions for The Procurement Bill (summary guide is available [here](#)) and a full copy of the draft bill is available [here](#).

² Section 204 of the Act ([Enterprise Act 2002](#)).

³ Competition & Markets Authority, *Competition Law Business Tracking Research*, May 2021

8. The application of the CDO regime also provides a powerful incentive for companies to report cartel conduct to the CMA under its leniency programme, as cooperating directors of companies that are granted leniency are typically protected from disqualification.

2.1. Competition Disqualification Orders - legal framework⁴

2.1.1. Effect of an order

9. Under the Company Directors Disqualification Act 1986 (the ‘**CDDA**’) the CMA can apply to the court to have an individual barred from directing or managing a business by means of a competition disqualification order (‘**CDO**’).⁵

10. It is a criminal offence for an individual subject to a CDO to be a director of a company or take part in any way, whether directly or indirectly, in the management of a company, unless they have the permission of the court to do so. In addition, a person involved in the management of a company in contravention of a CDO is personally liable for all of the relevant debts of the company.

11. An individual can be disqualified for up to 15 years. The length of the disqualifications secured by the CMA so far range from 18 months to 12 years (see Annex A).

2.1.2. Conditions for an order

12. A CDO can only be made against a director or a former director of a UK company. A ‘director’ for these purposes includes not only individuals registered as directors at the UK’s Companies House (‘registered directors’) but also senior employees in a company who behave and direct operations as if they are a registered director (‘de facto directors’) or if their directions or instructions are normally acted upon by directors of the relevant company (‘shadow directors’).

13. For a court to impose a CDO it must be satisfied that (i) the relevant individual was a ‘director’ of an undertaking at the time that the undertaking was involved in a breach of UK competition law and (ii) the conduct of the director (in relation to the competition law breach) makes them unfit to be involved in the management of a company.

14. CDOs may be imposed in relation to anti-competitive agreements (under Chapter I of the Competition Act 1998) as well as unilateral conduct (abuse of dominant position) under Chapter II of the Competition Act 1998.

15. A director need not be directly involved in the anti-competitive conduct to be disqualified. Rather, when considering whether the ‘*unfitness*’ condition is satisfied, the court must consider, broadly speaking, whether:

- the director’s conduct contributed to the breach of competition law;

⁴ For further information, see the CMA’s [Guidance on Competition Disqualification Orders](#) (6 February 2019, CMA102).

⁵ An individual convicted of the criminal cartel offence (section 188 of the Enterprise Act 2002) is also liable to be disqualified from being a director of a company. In these circumstances the CMA does not instigate separate proceedings seeking such an order - it is a sentencing option available to the criminal court upon the criminal conviction pursuant to sections 2 and 5 of the Company Directors Disqualification Act 1986.

- the director had reasonable grounds to suspect that undertaking was breaking competition law and took no steps to prevent it; or
- the director ought to have known that the infringement was taking place.⁶

16. In the CMA's only contested case to date under the CDDA, the court confirmed that the legislation does not require 'active' participation in any infringing conduct to establish unfitness.⁷

17. A decision by a court to impose a CDO may be subject to appeal.

2.1.3. Competition disqualification undertakings

18. The CMA may accept a Competition Disqualification Undertaking ('CDU') from a director instead of applying to the court for a CDO or, once an application has been made, instead of continuing with the proceedings. A CDU has the same effect as a CDO.⁸

19. A director can offer to give a CDU at any time during an investigation or during court proceedings. The timing of the offer can have implications both for the duration of the undertaking and for cost recovery.

20. The CMA will normally consider a reduction in the disqualification period where a director offers a CDU in terms acceptable to the CMA. The stage in the proceedings at which the CDU is offered will be a relevant consideration when the CMA is considering whether to accept a reduction in the disqualification period and, if so, the extent of any such reduction.

2.1.4. CDOs & leniency

21. As noted above, the CDO regime provides a significant incentive for businesses to apply for leniency under the CMA's cartel leniency programme and ensures that the incentives of companies and their directors are aligned when the company is considering whether to make an application for leniency and throughout the application process. More specifically, the leniency programme provides for automatic immunity for 'cooperating' current and former directors of a company that is granted leniency (whether Type A, B or C) in relation to the relevant competition law infringement. However, the CMA may apply for an order against a director who has been removed or has otherwise ceased to act as a director of a company owing to his role in the breach of competition law and/or for opposing the application for leniency. The CMA will also remove the immunity from CDO applications where a director fails to cooperate with the leniency process.⁹

⁶ The court may also have regard to his or her conduct as a director of a company in connection with any other breach of competition law, and must not have regard to any of the matters specified in Schedule 1 of the CDDA.

⁷ *CMA v Michael Christopher Martin* [2020] EWCH 1751 (Martin). See a copy of the judgment [here](#).

⁸ It is worth noting however that, while in some cases it may be possible for the CMA to settle a CDDA investigation against one or more directors of a business that is discussions to settle the Competition Act 1998 case by accepting CDUs at the same time as the settlement of the Competition Act 1998 case, where this is the case the decision to accept a CDU will be separate from the decision to settle the Competition Act 1998 case.

⁹ See paragraphs 1.8, 2.10, 2.16 and 2.25 of the CMA's guidance [Applications for leniency and no action in cartel cases](#) (OFT1495) ('CMA Leniency Guidance').

3. Proposals for public procurement exclusion and debarment

22. The UK Government has recently introduced to Parliament the Procurement Bill 2022,¹⁰ which includes a new exclusion from public procurement and debarment regime for cartelists. If enacted the legislation will mean that companies that engage in price fixing, market sharing, bid rigging or other cartel activities could face mandatory exclusion by a contracting authority from public procurements for up to 5 years. They are also at risk of being included on a central debarment register which would result in them automatically being excluded from all public procurement contracts for up to 5 years. However, those involved in cartel conduct will be protected from exclusion if they assist in the detection of wrongdoing by being the first to bring a cartel to the attention of the CMA under its leniency policy.¹¹

23. The CMA welcomes these proposed changes, as they not only provide an additional incentive for companies to comply with competition law but also protect public authorities and ultimately taxpayers from businesses that engage in anti-competitive behaviour.

3.1. The current exclusion from public procurement regime

24. The current UK public procurement rules, which were based on EU legislation, provide that a supplier may be subject to mandatory or discretionary exclusion from future tenders by a contracting authority unless it provides sufficient evidence of ‘self-cleaning’.

25. Currently, the grounds for mandatory exclusion include convictions for bribery, corruption, money laundering, and drug trafficking. Anti-competitive activity is not specified in the current regime as a ground for mandatory exclusion, although a supplier may be excluded where there are ‘*sufficiently plausible indications*’ that it has entered into agreements with other economic operators aimed at ‘*distorting competition*’ (including price fixing, collusive tendering or market sharing). The decision whether to exclude a supplier involved in ‘*distorting competition*’ is therefore left to the discretion of the individual contracting authority. A contracting authority must also consider whether a supplier has provided sufficient evidence of ‘self-cleaning’ before taking the decision to exclude them.

26. We are not aware of any supplier having been debarred by a contracting authority in the UK for ‘distorting competition’ to date.

3.2. Proposed new mandatory exclusion ground for cartel infringements

27. Under the terms of the legislative proposal, the exclusion regime would be strengthened by making participation in cartel infringements a mandatory ground for debarment.

28. More specifically, the proposal is that, where the CMA¹² has decided that:

¹⁰ A copy of the draft bill is available [here](#).

¹¹ This is subject to the confirmation that the cartelists have met all conditions for leniency and can benefit from leniency. These conditions are set out in paragraph 2.7 of the CMA’s Leniency Guidance.

¹² The mandatory exclusion also applies where a similar infringement decision has been taken either by a concurrent regulator in the UK (such as for example the Financial Conduct Authority, the Office of Communications or the Gas and Electricity Markets Authority) or by an overseas regulator.

- the prohibition on anti-competitive agreements in Chapter I of the Competition Act 1998 has been infringed by an agreement or concerted practice to which the supplier or connected person was party; and
- which was a cartel;¹³

the mandatory exclusion will apply if the contracting authority considers that the circumstances giving rise to the application of the exclusion ground are likely to occur again.

29. The Procurement Bill provides that the following matters may be taken into account by a contracting authority when considering whether *‘the circumstances giving rise to the application of the exclusion ground are likely to occur again’*:

- evidence that the supplier, associated person or connected person has taken the circumstances seriously, for example by paying compensation;
- steps that the supplier, associated person or connected person has taken to prevent the circumstances occurring again, for example by changing staff or management, or putting procedures and training in place;
- commitments that such steps will be taken, or to provide information or access to allow verification or monitoring of such steps;
- the time that has elapsed since the circumstances last occurred; and
- any other evidence, explanation or factor that the authority considers appropriate.¹⁴

30. Conduct which constitutes a breach of competition law but falls short of being a ground for mandatory exclusion, including cartel or other infringing conduct which has not been the subject of an infringement decision, will continue to be a ground for discretionary exclusion.

31. The new exclusion and debarment regime will apply to all public bodies in England, Wales and Northern Ireland. The Procurement Bill does not make provision for all public procurement in Scotland but does apply, with some exceptions, to contracting authorities in Scotland which are either cross-border bodies or exercise wholly reserved functions.

32. The Procurement Bill is unlikely to come into force before the end of 2023. However, the mandatory competition grounds have been designated as converted mandatory grounds which means that retrospective application of the mandatory competition grounds will be possible for up to 3 years prior to the Procurement Bill coming into force. This means that a cartel infringement decision made by the CMA or concurrent regulators from now or going back as far as 3 years before the Procurement Bill comes into force could lead to the mandatory exclusion of a supplier once the Procurement Bill comes into force.

3.2.1. Protection for beneficiaries of type A immunity

33. There is a protection against exclusion in the Procurement Bill for those companies that are the first to report a cartel to the CMA under its [leniency programme](#), before an investigation is opened, thus protecting and enhancing incentives to apply for leniency.

¹³ Paragraph 4(1) of Schedule 8A of the Competition Act 1998 defines cartel as *‘an agreement or concerted practice between two or more competitors aimed at co-ordinating their competitive behaviour in a market, or otherwise influencing competition in a market’*.

¹⁴ The Procurement Bill, [clause 55\(1\)](#).

34. The protection would apply to ‘type A’¹⁵ immunity recipients (and individuals with immunity from prosecution for cartel offences), who would be exempt from exclusion, whether mandatory or discretionary, in relation to the reported cartel conduct. Similar protections from exclusion will apply to successful immunity recipients under a leniency regime in another jurisdiction.

3.2.2. Central debarment regime and debarment list

35. The Procurement Bill also envisages that there will be a central debarment regime for relevant mandatory and discretionary exclusion grounds,¹⁶ including the competition law infringement ground, and creates a ‘debarment list’ overseen by central government. It is intended that the debarment list will cover both mandatory and discretionary exclusion grounds, and that both UK and overseas suppliers may be included on it.

36. Contracting authorities must exclude suppliers on the debarment list to which a mandatory exclusion ground applies (unless there are exceptional circumstances in which an overriding public interest applies) for the period that the suppliers remain on the debarment list. Contracting authorities will however retain their discretion in respect of suppliers to which a discretionary ground applies. Furthermore, contracting authorities will continue to be able to exclude suppliers not on the debarment list on a case-by-case basis.

37. The Government envisages that this central debarment regime will have the following key features:

- suppliers will be considered for debarment when they are excluded by a contracting authority during a procurement;
- certain categories of authorities will additionally be able to refer suppliers they want the Cabinet Office to consider debarring, without having excluded them;
- a new Procurement Review Unit will be responsible for considering cases, investigating evidence of misconduct and self-cleaning by suppliers, and making recommendations to the Minister;
- suppliers will be entitled to apply for early removal from the debarment list before the end of the 5-year period of exclusion, if they can show they have self-cleaned; and
- suppliers will be entitled to appeal a decision to put them on the debarment list to the court.

4. Conclusion

38. The CMA takes a hard stance on business and individuals that engage in cartel activity. In the context of a cost-of-living crisis and challenging economic conditions, it is

¹⁵ ‘Type A’ immunity is available to the first applicant to report and provide evidence of a cartel in circumstances where the CMA does not already have a pre-existing investigation and does not otherwise have sufficient information to establish the existence of the reported cartel activity. Type A immunity provides guaranteed corporate immunity from financial penalties and guaranteed individual immunity from criminal prosecution for all cooperating current and former employees and directors of the undertaking and protection from director disqualification proceedings for all directors of the undertaking. See further paragraphs 2.9 to 2.14 of the CMA Leniency Guidance.

¹⁶ The Procurement Bill, [clause 56 \(1\)](#).

even more important that people are able to benefit from competition in the form of lower prices and better choice, and that businesses are not hampered in their ability to compete, innovate and grow by anti-competitive behaviour.

39. In order to deter cartels, we have been taking a number of steps to increase the risk of significant sanctions and personal consequences for cartel participants. These include:

- investing in our ability to take forward ‘intelligence-led’ (that is, cases which are not the result of a leniency application), so as that it effectively complements leniency as a means of cartel detection;
- reviewing our penalties guidance, so as to ensure that the level of penalty ensures effective deterrence especially in cases involving large, often global, businesses;
- significantly increasing the use of our competition disqualification powers, as explained above.

40. The UK Government’s new proposals to strengthen the public procurement exclusion and debarment regime are a welcome addition to these efforts to ensure that companies that do business in the UK comply with competition law (and that those that do find themselves implicated in a cartel apply for immunity).

Annex A - Competition disqualifications secured by the CMA

<i>Competition Act 1998 case</i>	<i>Disqualification</i>	<i>Disqualification period</i>	<i>Date of disqualification</i>
Online sales of posters and frames	CDU	5 years	30 November 2016
Residential estate agency services in the Burnham-on-Sea area – Individual 1	CDU	3 years 6 months	10 April 2018
Residential estate agency services in the Burnham-on-Sea area – Individual 2	CDU	3 years	10 April 18
Residential estate agency services in the Burnham-on-Sea area – Individual 3	CDU	5 years	30 April 2019
Supply of precast concrete drainage products (civil investigation) – Individual 1	CDU	7 years 6 months	26 April 2019
Supply of precast concrete drainage products (civil investigation) – Individual 2	CDU	6 years 6 months	26 April 2019
Design, construction and fit-out services – Individual 1	CDU	2 years 6 months	10 May 2019
Design, construction and fit-out services – Individual 2	CDU	2 years	10 May 2019
Design, construction and fit-out services – Individual 3	CDU	5 years	10-May-19
Design, construction and fit-out services - Individual 4	CDU	4 years 6 months	31 July 2019
Design, construction and fit-out services - Individual 5	CDU	2 years 9 months	31 July 2019
Design, construction and fit-out services - Individual 6	CDU	1 year 6 months	31 July 2019
Nortriptyline - Individual 1	CDU	7 years	20 December 2019
Nortriptyline - Individual 2	CDU	5 years - concurrently with CDU in Fludrocortisone acetate tablets	1 June 2020
Fludrocortisone acetate tablets	CDU	5 years - concurrently with CDU in Nortriptyline investigation	1 June 2020
Residential estate agency services in Berkshire - Individual 1	CDU	6.5 years	9 June 2020
Residential estate agency services in Berkshire - Individual 2	CDU	6.5 years	26 May 2020
Residential estate agency services in the Burnham-on-Sea area – Individual 4	CDO	7 years	3 July 2020
Nortriptyline investigation: anti-competitive agreement and conduct - Individual 3	CDU	2 years	26 August 2020
Roofing materials - Individual 1	CDU	4 years	1 March 2021
Roofing materials - Individual 2	CDU	3 years	1 March 2021
Roofing materials - Individual 3	CDU	6.5 years	18 February 2021
Supply of precast concrete drainage products (civil investigation) – Individual 3	CDU	12 years	11 March 2021
Supply of precast concrete drainage products (civil investigation) - Individual 4	CDU	11 years	11 March 2021
Nortriptyline - Individual 4	CDU	4 years	12 December 2021