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This article first appeared in a slightly different form in *Construction News*, 28 October 2010

DIRECTORS AND COMPETITION LAW – INACTION IS NO LONGER AN OPTION

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Directors who should have been aware of their company's breach of competition law now face as much of a disqualification risk as directors who have actively participated in the breach.

This statement, in new Office of Fair Trading (OFT) guidelines issued in June 2010, represents a real gear change in policy. Although its competition disqualification powers are not new, the OFT has not yet used them. That will change – now it will make active use of these powers as part of its enforcement armoury.

Director disqualification is one of two competition law risks for individuals. It applies to any breach of competition law, unlike the second sanction, the cartel offence: directed only at cartel arrangements, this entails up to five years' imprisonment and unlimited fines for any employee. Both sanctions, in force since June 2003, can apply at the same time. The stance they reflect is that imposing financial and other penalties on companies is not a sufficient deterrent – directors and employees need to be incentivised individually to comply with competition law.

To disqualify a director, the OFT must apply to the High Court for an order, on the basis that the individual is unfit to be a director. The order may disqualify the director from directorship of any company – not just the infringing company – for up to fifteen years. To avoid an order, directors may give undertakings in the same terms. Not only actual directors, but also shadow directors (eg, a major lender that directs the company's policy) and non-director individuals acting as directors, are at risk.

Two factors will determine whether the OFT uses its powers – the seriousness of the breach committed by the director's company and the director's own responsibility for the breach. A 'serious' breach is one that has attracted – or could attract – a financial penalty.

Evidence of director responsibility that is likely to form a basis for disqualification is wider in scope. It clearly includes evidence that a director took active steps to plan, implement or direct the infringement or had reasonable grounds to suspect infringement, eg, through being asked to approve funds for implementing the breach, but took no steps to stop it. Now that the OFT will also pursue directors who ought to have known of the breach, it also includes evidence of the director's role in the company, experience and skillset, relationship with the infringers or access to relevant information. Although directors responsible for a company's compliance are not automatically at risk, the new policy imposes an added burden on them– the OFT will take into account their efforts to create a compliance culture and avoid breach.

The OFT will also consider mitigating

factors, eg, swift remedial action and uncertainty whether the activity constituted a breach. However, the new policy is clear that no director can argue a lack of competition law knowledge. All company directors are expected to appreciate the importance of competition law compliance and to know that price fixing, market sharing and bid rigging are likely to breach competition law.

With the OFT's September 2009 decision to fine over 100 construction companies for cover pricing – currently under appeal – the new disqualification policy not only increases directors' risks but also pushes the need for visible, active competition compliance to the top of companies' "must do" lists.

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0192con
November 2010