



Enterprise Act 2002

Competition law provisions – key issues for directors

Executive summary

This briefing looks at key issues for directors in the competition law provisions of the Enterprise Act 2002. The implementation date for these provisions is 20 June 2003.

Key facts

- Implementation date – 20 June 2003.
- New tests for the control of mergers.
- Increased corporate risk to third party complaint and litigation.
- Directors to be individually liable for competition law breaches.

A revised system of merger control

- Key changes:
 - key decisions in most merger cases to be taken by the Office of Fair Trading and the Competition Commission;
 - the Secretary of State for Trade and Industry will no longer be involved; and
 - mergers will be prohibited if they lead to a substantial lessening of competition (the ‘public interest’ test for mergers being abandoned).

Increased risk of complaints and private litigation

- The Act creates new exposures for companies.
 - ‘Super-complaints’ can be brought by designated bodies such as the Consumers Association. The Office of Fair Trading must investigate within 90 days.
 - A specialist tribunal – the Competition Appeals Tribunal – to consider damages claims for certain competition law breaches.
- The object of these provisions is to encourage complaints and private litigation.

Individual liability

- Directors and employees can be guilty of a criminal offence – the cartel offence.
 - Exposure – five years’ imprisonment and/or an unlimited fine.
 - The offence – two elements:
 - agreeing with competitors to fix prices, share markets, rig bids, or limit production or supply; and
 - acting ‘dishonestly’.
 - Investigation and prosecution by the Office of Fair Trading (OFT) and Serious Fraud Office.
 - A leniency scheme exists for ‘whistle-blowers’.

Note:

- the potential for conflict of interest between an individual committing the offence and his/her employing company; and
 - the OFT will be able to raid private homes, compel individuals to answer questions, monitor movement and plant bugs.
- Directors (including shadow and de facto directors) can be disqualified by means of a Competition Disqualification Order.
 - Exposure – disqualification for up to 15 years.
 - The ‘offence’ (technically it is not a criminal offence) involves two elements:
 - breach of UK or EC competition law by the company; and
 - conduct by individuals rendering them unfit to be a director of a UK company.

Note: directors can be found to be unfit when responsible for the breach, when turning a 'Nelsonian blind eye' or when they ought to have known of the breach.

Key questions for directors

Can I really be individually liable?

Yes. If you enter into an arrangement, however informal, with a competitor on prices, bid-rigging or dividing up markets and a jury thinks you were dishonest in doing so, you can go to jail. And if you allow your company to infringe any serious provision of competition law (or are negligent in allowing your company to infringe), you can be disqualified as a director for up to 15 years.

What steps can I take to remove these risks?

The only way to avoid risk is to ensure the operation of an effective compliance programme. Given that a director can be disqualified for what he/she knew or ought to have known, that compliance programme must contain procedures to ensure you are informed of possible competition law infringements so that you can deal with them.

What about past breaches of competition law?

The new law came into force on 20 June 2003. It does not have retrospective effect. If you have already introduced an effective Enterprise Act compliance scheme, you should not incur liability. If you have not, this is something to consider as a matter of urgency.

What if I discover breaches of competition law?

Leniency programmes exist. The first company to seek leniency may be able to obtain immunity from fines (and subsequent applicants to obtain substantial reductions). Where a company applies for and obtains leniency, the OFT apparently would not contemplate taking action against individual directors.

How can I ensure that the company is not exposed to claims and complaints?

Again, the only way to reduce exposure to fines and damages through the new systems of complaint and litigation is to operate an effective compliance scheme. Existing compliance schemes may be effective for this purpose but a review to take account of the new legislation is advisable.

How can I be prepared for OFT raids and investigations?

Most existing compliance schemes have sections on dealing with raids and investigations. However, old compliance schemes will need updating as they will deal only with civil raids and investigations. New sections will be needed on criminal enforcement and details of a criminal firm to call on in the event of a raid by the Serious Fraud Office should be included.

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