Non-executive directors and their role in competition law

This year, the UK competition authority exercised their power to disqualify directors for breaches of competition law for the second time. Non-executive directors must be aware of competition law risks and ensure that appropriate questions are being asked to challenge executive decisions where necessary.

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The role of non-executive directors in competition law

In 2011, the Office of Fair Trading (OFT) now known as the Competition and Markets Authority (CMA), published guidance emphasising that all directors of companies (whether executive and non-executive) must be aware of the importance of complying with competition laws.

Since then, the role of non-executive directors (NEDs) as independent advisers of companies who can challenge decisions and develop proposals has become more valuable for the prevention of competition infringement. NEDs are expected and encouraged by competition authorities to ask relevant questions and ensure that measures have been taken to detect and prevent company breaches of competition law. Whilst the CMA recognises that NEDs may not be privy to the specifics of company activity and transactions in the same way as executive directors, NEDs are considered to be uniquely positioned to proactively raise competition concerns with any information they do hold, given their role as neutral advisers and their ability to challenge executive directors and company decisions as part of the UK Corporate Governance Code.

Competition authorities have previously suggested the following questions for NEDs to consider when determining whether executive directors have appropriately considered competition rules, before approving company activity:

- What are the competition law risks?
- What measures are being taken to mitigate the risks?
- When are these risks being re-reviewed to ensure they have not changed?
- When will any risk mitigation activities be re-reviewed to ensure they remain effective?

In order to recognise the potential competition risks for a company, all directors are expected to understand the most serious forms of competition law infringement. These include:

- Cartels, including: price-fixing, engaging in certain information sharing, sharing customers or markets, limiting production and other anti-competitive agreements. Whilst all directors are not expected to understand detailed application of competition law, they ought to understand the principles of competition to the extent that appropriate questions can be asked.

- Abuse of a dominant position: directors holding responsibility for a company's commercial strategy are generally expected to be able to identify risks, such as whether the company is holding a dominant position in the market. Other directors are expected to be aware that additional steps are required for the compliance of competition law when the company reaches a position of dominance.

Where a company has infringed competition law in the UK and EU, the consequences are severe for both the company and its directors. These include:

- Heavy fines on the company (which can be up to 10% of the group's turnover)
- A Competition Disqualification Order from the court, under which directors can be disqualified for up to fifteen years. The court must make the order if (i) the company breaches competition law, and (ii) the court considers that a person's conduct as a director makes him or her unfit to be concerned in the management of a company. Importantly, the second condition includes circumstances where the director did not know but ought to have known that the conduct of the undertaking constituted a breach, and
- Legally binding undertakings from directors promising not to operate as a director of any UK company for up to fifteen years (although the number of years is usually reduced upon agreement with the CMA).

In both 2016 and 2018, the CMA exercised its power to disqualify directors of companies involved in breaching competition law. In these cases, directors of these companies were prevented from operating as a director for any UK company for three to five years. The CMA's Executive Director later announced that the option for disqualification "ensures personal responsibility for competition law compliance", emphasising that company directors "have an important responsibility to ensure their companies do not engage in illegal and anti-competitive practices".

Parental liability

Aside from being held liable at company level, NEDs should be aware of the concept of parental liability. In its latest judgment on parental liability, (Goldman Sachs v Commission (T-419/14)), the General Court emphasised that where one company (the parent) holds significant voting rights, shares and/or other means of influence (for example the power to appoint members of the board of directors or call shareholders' meetings) over a second company (the subsidiary), the parent is at serious risk of being described as holding a "decisive influence" over the subsidiary by the courts.

Once it has been established that a parent holds decisive influence over a subsidiary that has infringed competition law, the parent is likely to be held jointly and severally liable for those competition infringements.

Non-executive directors in competing businesses

The European Commission and the German Monopolies Commission have recently expressed concerns regarding individuals, asset managers and/or private equity firms holding minority shareholdings in competing businesses.

Whilst small equity investments are not yet sufficient to trigger merger control issues from the CMA or European Commission, there is a risk that competitively sensitive information could be exchanged when operating as an investor of multiple businesses within the same market and industry. The consequence of this may be a breach of competition law, in particular Article 101 of the Treaty on the Functioning of the European Union (TFEU). Competitively sensitive

information can generally be defined as (1) information which is not in the public domain, which (2) concerns the parameters of competition, such as price of products or services, costs and production capacity.

Additionally, it has been suggested by the European Commission that investors increasing their number of holdings in competing companies may decrease incentives to compete. European Commission chief Margrethe Vestager has warned that companies may be “getting more closely linked” through the concept of common ownership, resulting in competitive harm.

As for NEDs holding multiple positions in boards of competing companies, it is likely that the same competition risks apply. NEDs should therefore be cautious when getting involved with boards of competing companies, not only to prevent breaching any director duties to promote the success of companies and to avoid conflicts of interests, but to also avoid exchanging competitively sensitive information with their other businesses in breach of competition law and avoid de-incentivising themselves when it comes to promoting competition, particularly given the European Commission’s recent focus on this.

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