



# Enterprise Act 2002

## 2002 CHAPTER 40

### PART 7

#### MISCELLANEOUS COMPETITION PROVISIONS

##### *Directors disqualification*

#### **204 Disqualification**

- (1) The Company Directors Disqualification Act 1986 (c. 46) is amended as follows.
- (2) The following sections are inserted after section 9 (matters for determining unfitness in certain cases)—

##### *“Disqualification for competition infringements*

#### **9A Competition disqualification order**

- (1) The court must make a disqualification order against a person if the following two conditions are satisfied in relation to him.
- (2) The first condition is that an undertaking which is a company of which he is a director commits a breach of competition law.
- (3) The second condition is that the court considers that his conduct as a director makes him unfit to be concerned in the management of a company.
- (4) An undertaking commits a breach of competition law if it engages in conduct which infringes any of the following—
  - (a) the Chapter 1 prohibition (within the meaning of the Competition Act 1998) (prohibition on agreements, etc. preventing, restricting or distorting competition);

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- (b) the Chapter 2 prohibition (within the meaning of that Act) (prohibition on abuse of a dominant position);
  - (c) Article 81 of the Treaty establishing the European Community (prohibition on agreements, etc. preventing, restricting or distorting competition);
  - (d) Article 82 of that Treaty (prohibition on abuse of a dominant position).
- (5) For the purpose of deciding under subsection (3) whether a person is unfit to be concerned in the management of a company the court—
- (a) must have regard to whether subsection (6) applies to him;
  - (b) may have regard to his conduct as a director of a company in connection with any other breach of competition law;
  - (c) must not have regard to the matters mentioned in Schedule 1.
- (6) This subsection applies to a person if as a director of the company—
- (a) his conduct contributed to the breach of competition law mentioned in subsection (2);
  - (b) his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it;
  - (c) he did not know but ought to have known that the conduct of the undertaking constituted the breach.
- (7) For the purposes of subsection (6)(a) it is immaterial whether the person knew that the conduct of the undertaking constituted the breach.
- (8) For the purposes of subsection (4)(a) or (c) references to the conduct of an undertaking are references to its conduct taken with the conduct of one or more other undertakings.
- (9) The maximum period of disqualification under this section is 15 years.
- (10) An application under this section for a disqualification order may be made by the OFT or by a specified regulator.
- (11) Section 60 of the Competition Act 1998 (c. 41) (consistent treatment of questions arising under United Kingdom and Community law) applies in relation to any question arising by virtue of subsection (4)(a) or (b) above as it applies in relation to any question arising under Part 1 of that Act.

## **9B Competition undertakings**

- (1) This section applies if—
- (a) the OFT or a specified regulator thinks that in relation to any person an undertaking which is a company of which he is a director has committed or is committing a breach of competition law,
  - (b) the OFT or the specified regulator thinks that the conduct of the person as a director makes him unfit to be concerned in the management of a company, and
  - (c) the person offers to give the OFT or the specified regulator (as the case may be) a disqualification undertaking.

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- (2) The OFT or the specified regulator (as the case may be) may accept a disqualification undertaking from the person instead of applying for or proceeding with an application for a disqualification order.
- (3) A disqualification undertaking is an undertaking by a person that for the period specified in the undertaking he will not—
  - (a) be a director of a company;
  - (b) act as receiver of a company's property;
  - (c) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company;
  - (d) act as an insolvency practitioner.
- (4) But a disqualification undertaking may provide that a prohibition falling within subsection (3)(a) to (c) does not apply if the person obtains the leave of the court.
- (5) The maximum period which may be specified in a disqualification undertaking is 15 years.
- (6) If a disqualification undertaking is accepted from a person who is already subject to a disqualification undertaking under this Act or to a disqualification order the periods specified in those undertakings or the undertaking and the order (as the case may be) run concurrently.
- (7) Subsections (4) to (8) of section 9A apply for the purposes of this section as they apply for the purposes of that section but in the application of subsection (5) of that section the reference to the court must be construed as a reference to the OFT or a specified regulator (as the case may be).

### **9C Competition investigations**

- (1) If the OFT or a specified regulator has reasonable grounds for suspecting that a breach of competition law has occurred it or he (as the case may be) may carry out an investigation for the purpose of deciding whether to make an application under section 9A for a disqualification order.
- (2) For the purposes of such an investigation sections 26 to 30 of the Competition Act 1998 (c. 41) apply to the OFT and the specified regulators as they apply to the OFT for the purposes of an investigation under section 25 of that Act.
- (3) Subsection (4) applies if as a result of an investigation under this section the OFT or a specified regulator proposes to apply under section 9A for a disqualification order.
- (4) Before making the application the OFT or regulator (as the case may be) must—
  - (a) give notice to the person likely to be affected by the application, and
  - (b) give that person an opportunity to make representations.

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### **9D Co-ordination**

- (1) The Secretary of State may make regulations for the purpose of co-ordinating the performance of functions under sections 9A to 9C (relevant functions) which are exercisable concurrently by two or more persons.
- (2) Section 54(5) to (7) of the Competition Act 1998 (c. 41) applies to regulations made under this section as it applies to regulations made under that section and for that purpose in that section—
  - (a) references to Part 1 functions must be read as references to relevant functions;
  - (b) references to a regulator must be read as references to a specified regulator;
  - (c) a competent person also includes any of the specified regulators.
- (3) The power to make regulations under this section must be exercised by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.
- (4) Such a statutory instrument may—
  - (a) contain such incidental, supplemental, consequential and transitional provision as the Secretary of State thinks appropriate;
  - (b) make different provision for different cases.

### **9E Interpretation**

- (1) This section applies for the purposes of sections 9A to 9D.
  - (2) Each of the following is a specified regulator for the purposes of a breach of competition law in relation to a matter in respect of which he or it has a function—
    - (a) the Director General of Telecommunications;
    - (b) the Gas and Electricity Markets Authority;
    - (c) the Director General of Water Services;
    - (d) the Rail Regulator;
    - (e) the Civil Aviation Authority.
  - (3) The court is the High Court or (in Scotland) the Court of Session.
  - (4) Conduct includes omission.
  - (5) Director includes shadow director.”
- (3) In section 1(1) (general provision about disqualification orders) for “section 6” substitute “ sections 6 and 9A ”.
  - (4) In section 8A (variation etc of disqualification undertaking) after subsection (2) there is inserted the following subsection—
 

“(2A) Subsection (2) does not apply to an application in the case of an undertaking given under section 9B, and in such a case on the hearing of the application whichever of the OFT or a specified regulator (within the meaning of section 9E) accepted the undertaking—

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- (a) must appear and call the attention of the court to any matters which appear to it or him (as the case may be) to be relevant;
  - (b) may give evidence or call witnesses.”
- (5) In section 8A for subsection (3) there is substituted—
  - “(3) In this section “the court”—
    - (a) in the case of an undertaking given under section 9B means the High Court or (in Scotland) the Court of Session;
    - (b) in any other case has the same meaning as in section 7(2) or 8 (as the case may be).”
- (6) In section 16(3) for “the Secretary of State or the official receiver or the liquidator” substitute “ a person falling within subsection (4) ”.
- (7) In section 16 after subsection (3) there is inserted the following subsection—
  - “(4) The following fall within this subsection—
    - (a) the Secretary of State;
    - (b) the official receiver;
    - (c) the OFT;
    - (d) the liquidator;
    - (e) a specified regulator (within the meaning of section 9E).”
- (8) In section 17 (applications for leave under an order or undertaking) after subsection (3) there is inserted the following subsection—
  - “(3A) Where a person is subject to a disqualification undertaking accepted at any time under section 9B any application for leave for the purposes of section 9B(4) must be made to the High Court or (in Scotland) the Court of Session.”
- (9) In section 17(4) for “or 1A(1)(a)” substitute “ 1A(1)(a) or 9B(4) ”.
- (10) In section 17 after subsection (5) there are inserted the following subsections—
  - “(6) Subsection (5) does not apply to an application for leave for the purposes of section 1(1)(a) if the application for the disqualification order was made under section 9A.
  - (7) In such a case and in the case of an application for leave for the purposes of section 9B(4) on the hearing of the application whichever of the OFT or a specified regulator (within the meaning of section 9E) applied for the order or accepted the undertaking (as the case may be)—
    - (a) must appear and draw the attention of the court to any matters which appear to it or him (as the case may be) to be relevant;
    - (b) may give evidence or call witnesses.”
- (11) In section 18 (register of disqualification orders and undertakings) for subsection (2A) substitute—
  - “(2A) The Secretary of State must include in the register such particulars as he considers appropriate of—
    - (a) disqualification undertakings accepted by him under section 7 or 8;

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- (b) disqualification undertakings accepted by the OFT or a specified regulator under section 9B;
- (c) cases in which leave has been granted as mentioned in subsection (1)(d).”

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