Disqualification Orders for Directors Involved in Cartels

Andreas Stephan

CCP Working Paper 11-8

This is an early draft of a paper forthcoming in Journal for European Competition Law & Practice.

Abstract: This paper examines the importance of director disqualification to effective cartel enforcement. It reviews Competition Disqualification Orders in the UK, sets out the justification for such orders and considers their main shortcomings. The paper then asks whether they would be a recommended practice for the European Commission.

***Acknowledgements*:** The support of the Economic and Social Research Council (UK) is gratefully acknowledged.

Contact Details: Andreas Stephan, UEA Law School and ESRC Centre for Competition Policy, University of East Anglia, NR4 7TJ. Email a.stephan@uea.ac.uk

ISSN 1745-9648

Introduction

Director disqualification provides a civil sanction against individuals involved in cartel practices, while circumventing the complexity and uncertainty of a criminal process. This sanction is gaining increasing importance in light of concerns that even very high levels of corporate fines are failing to deter cartels. Corporate fines tend to be imposed many years after an infringement was instigated, with little or no direct effect on the individual decision makers responsible. Disqualification could be of particular significance in Europe because there are no criminal sanctions at the EU level. In addition, national criminal offences have failed to complement civil cartel enforcement, by the European Commission, of the most serious multi-jurisdictional infringements.

This paper will first review the design of Competition Disqualification Orders (CDOs) under the UK enforcement regime. It will then set out the justification for such orders and consider some of their potential shortcomings, in protecting against recidivism and enhancing deterrence. Finally, the paper asks whether CDOs would be a recommended practice for the European Commission, considering the willingness and capacity for such orders to become a reality.

Director Disqualification Orders in the UK

The Competition Act 1998 and Enterprise Act 2002 marked a transformation in the UK's competition law enforcement regime. Cartel conduct in the UK went from receiving a regulatory 'slap on the wrist' to attracting corporate fines of up to 10 per cent of annual turnover and prison sentences of up to five years for those responsible. At this time, the government believed 'it was also in the public interest that directors who have engaged in serious breaches of competition law should be exposed to the possibility of disqualification on that ground alone'.[1] Interestingly, this was not proposed in the context of deterrence, but rather under the umbrella of 'redress for harmed parties and protection of the public from future infringements'. This is perhaps a little surprising given it was recognised that employees of cooperating firms should be protected from CDOs to avoid a significant weakening in the incentive to self-report.[2] However, at the time there was an expectation that a healthy number of criminal cases would be successfully completed to strengthen deterrence. The UK's Office of Fair Trading today sees CDOs as equally important to both objectives, viewing them as complementary.[3]

[1] Department for Trade and Industry, *A World Competition Regime* (Cm. 5233, July 2001) at 8.24
[2] Ibid at 8.27
[3] OFT, 'Director disqualification orders in competition cases: Summary of responses to the OFT's consultation and OFT's conclusions and decision document' (May 2010) at 2.8

S. 204 Enterprise Act amended the Company Directors Disqualification Act 1986 (CDDA) inserting new ss. 9A-9E.[4] This created the 'Competition Disqualification Order' with a maximum period of 15 years. Although CDOs are essentially a civil penalty, the UK's competition authority does not have the power to directly impose disqualifications on individuals. They must make an application to the court, who will decide whether the CDO should be granted. The relevant court is the High Court or the Court of Session (Scotland). By contrast, the authority can impose corporate fines without any independent adjudication before appeals, just as the European Commission can.

In relation to the individuals concerned, there are two conditions which must be satisfied in order for a CDO to be made. First, they must be a director of a company which commits a breach of competition law. Second, the court must consider that their conduct as a director makes them unfit to be concerned in the management of a company.[5] The breach of competition law can be either a breach of Article 101 TFEU or its domestic equivalent in UK law (Chapter 1, Competition Act 1998). CDOs can also be sought for abuse of dominance under Article 102 TFEU and Ch 2 CA98.

Once a breach of competition law by the undertaking has been established, it is in principle very difficult to defend against disqualification. The amendments to the CDDA mean that the director must either have contributed to the breach of competition law, had reasonable grounds to suspect that the conduct of the undertaking constituted a breach, or *ought* to have known as much.[6] It is indeed, 'immaterial whether the person knew that the conduct of the undertaking constituted a breach'.[7]

During the period in which the person is subject to the CDO, it is a criminal offence to act as a company director, act as a receiver of a company's property, or in an any way, 'whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company', or act as an insolvency practitioner.[8] S. 9B CDDA also allows the competition authority to accept a 'disqualification undertaking' from the director instead of applying for an order from the court. The effect of a disqualification undertaking is the same as that of a CDO approved by the court.

The Rationale for Disqualifying Directors Involved in Cartels

Restrictions on an individual's career are not as punitive or as sobering as a prison sentence. Yet the personal financial implications of CDOs have the potential to have a strongly

[4] For a discussion of how Competition Disqualification Orders compare to other company law provisions which engage company directors, see: P Hughes, 'Directors' Personal Liability for Cartel Activity under UK and EC Law: A Tangled Web' (2008) ECLR 29(11) 632-648.
[5] ss. 9A (1)-(3) Company Directors Disqualification Act 1986, as amended by s.204 Enterprise Act 2002.
[6] Ibid s. 9A (6)
[7] Ibid s. 9A (7)
[8] S. 13 Company Directors Disqualification Act 1986.

dissuasive influence on executives considering whether to pursue a collusive arrangement with their competitors. In particular, they may damage reputation and adversely affect career and earning potential. They also have the advantage of being cheaper to enforce than criminal sanctions (which include the cost of incarceration) and are harder for the employer to indemnify, as compared to personal fines. The potential significance of CDOs to effective deterrence has been enhanced in recent years by two factors: the realisation that corporate fines do not directly punish individual decision makers; and the failure of national criminal offences to complement enforcement at the EU level.

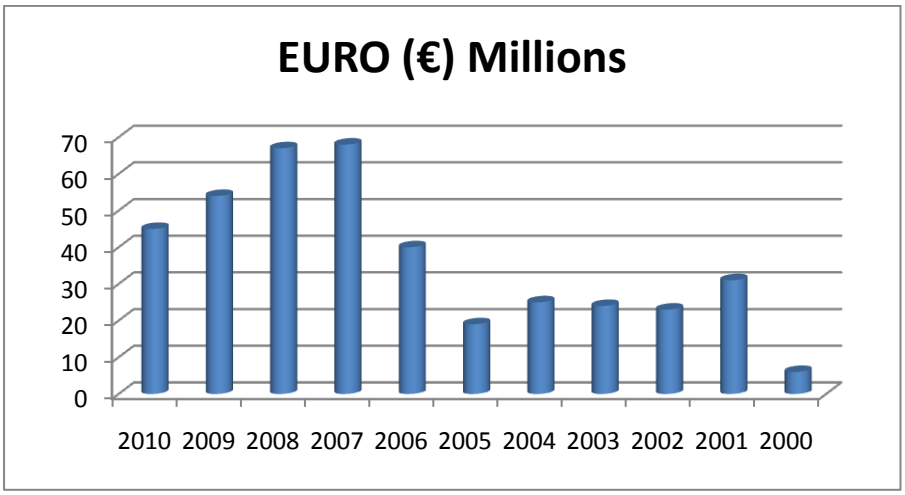

Table 1 – Average EU Cartel Fine (excluding immunity recipients) 2000 - 2010

As illustrated in Table 1, corporate fines in cartel cases have increased to levels which would have been considered unthinkable a decade ago. These play a number of important roles, such as signalling the seriousness of cartel infringements to the business community and motivating firms to engage in serious compliance efforts and internal auditing of their contacts with competitors. High fines also enhance the detection of agreements. The greater the difference between the immunity prize under leniency and the fine otherwise imposed, the stronger the incentive to come forward and report an infringement.

The problem is in the timing of corporate fines and their impact. A cartel will normally have operated for some years before being detected. In addition, a competition authority's investigation will take a further number of years to complete, although the European Commission and the OFT are trying to streamline their procedures with systems of direct settlement.[9] Table 2 below shows the length of time between the start of the cartel

[9] 'Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases' OJ [2008] C 167; For a discussion on the use of settlements in the EU and US see: A. Stephan, 'Direct Settlement of EC Cartel Cases' (2009) ICLQ 58: 627-654; See also A Stephan, 'OFT Dairy Price-fixing Case Leaves Sour Taste for Cooperating Parties in Settlements' (2010) ECLR 30(11) pp.14-16.

(according to the final decision) and when the fine was imposed, in EU cartel cases completed between 2008 and 2010.

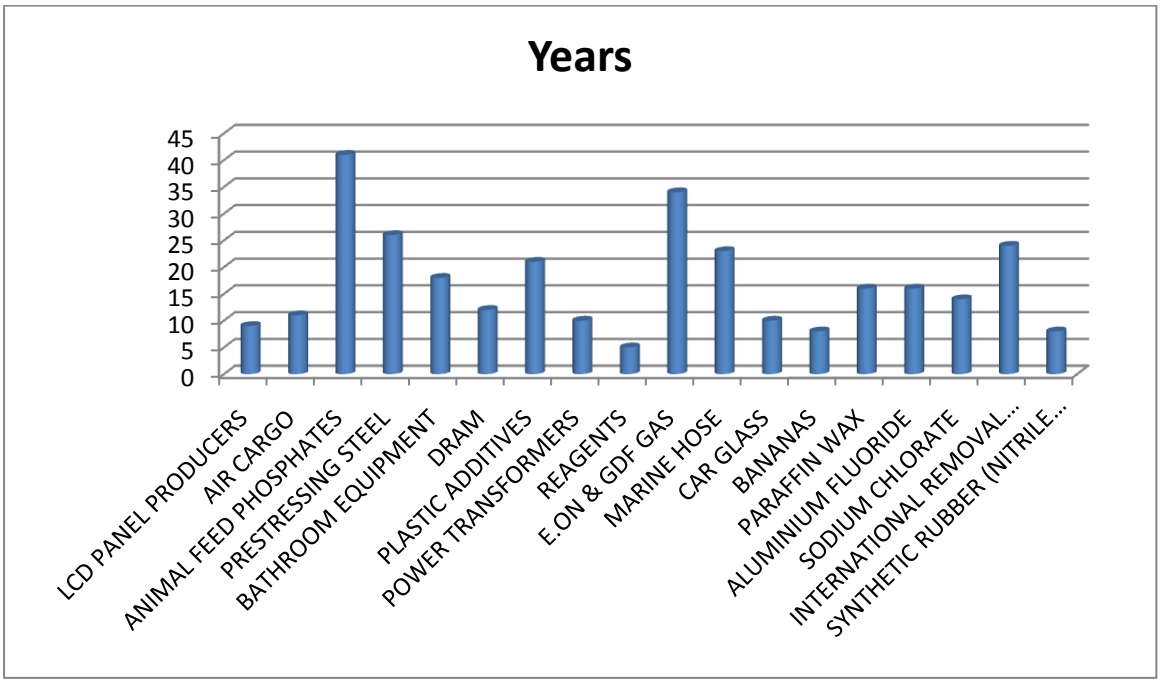

Table 2 Years between start of cartel and final EU decision imposing fines (Cases completed between 2008 and 2010).

Even the average time between the cartel *ending* and the fine being imposed is over five years for the same period. In addition, these figures do not include the lengthy appeals which typically follow each cartel decision, adding as much as six years to the final completion of each case. It is also notable that the start date contained in a decision sometimes reflects how far back the Commission feels it can confidently prove the existence of an infringement, not the actual start date of the cartel.[10] When fines are finally imposed, it is current shareholders and employees who are likely to pay the price for the illegal conduct of a small number of individuals.[11] Those who actually instigated the collusive conduct may have moved to another firm or industry, or may even have retired or died.

Concerns about the ineffectiveness of a fines-only approach motivated the criminalisation of cartel laws in the UK under ss.188-90 Enterprise Act 2002. It was hoped that this would ensure punishment was focused in the right place, sending a powerful message to the business community and wider public about the seriousness of cartel infringements. There was also scope for the UK criminal offence to complement EU administrative enforcement against the firm, as the European Commission is unable to impose criminal penalties against individuals. Cartel conduct has always been treated as a criminal matter in the US and

[10] For example the price fixing of graphite products can be traced back to the 1930s. See *Graphite Electrodes* – Commission Decision of 18 July 2001 (Case 36.490) OJ [2002] L 100 at 70

[11] This was acknowledged in the OFT's consultation document 'Competition disqualification orders: proposed changes to the OFT's Guidance' (August 2009), p7

Canada. It has recently been criminalised in a number of jurisdictions within and beyond the EU. Some member states also have criminal penalties which apply only to bid-rigging of public tenders.

Unfortunately, the UK cartel offence has only resulted in one successful case. Three Hull based businessmen, arrested in the US and repatriated as part of a plea bargain with the Department of Justice, pleaded guilty in 2008.[12] A second case concerning four British Airways executives allegedly involved in fixing fuel surcharges, collapsed at trial in 2010.[13] The two cases highlighted the difficulty of securing criminal convictions in cartel cases in the absence of a US style system of plea bargaining. In particular, they proved costly, time consuming and unpredictable compared to administrative enforcement against undertakings. The requirement of showing that the parties *dishonestly* entered into a cartel agreement appears to have left the UK's offence without bite and credibility.[14] It is also notable that none of the EU member states who have criminalised their cartel laws have thus far prosecuted individuals involved in the more serious international cartels investigated by the European Commission (Marine Hoses was essentially a US case). Instead, countries like Ireland have focused on individuals involved in smaller domestic infringements.[15]

The OFT responded to the problems associated with enforcing the criminal offence by placing greater importance on CDOs. On 29 June 2010, they published their revised guidance on director disqualification for breaches of competition law. Senior OFT officials signalled an intention to make greater use of disqualifications as part of their enforcement efforts.[16] Unlike in its original 2003 guidance, the OFT now appears to be as willing to seek a CDO where a director ought to have known of competition law breaches, as where they are personally involved.[17] There were concerns that the previous guidance, that the OFT 'does not rule out applying for a CDO' where the director ought to have known about the breach, did not sufficiently encourage directors to take positive steps to uncover potential anticompetitive behaviour.[18] A second notable change is that the authority will now seek CDOs, 'in some exceptional cases where the breach of competition law has not already been proven in a relevant decision or judgement'.[19] This refers to cases subject to appeals which only contest the size of the fine, and where the OFT does not reach a formal decision

[12] OFT Press Release, 'Three imprisoned in first OFT criminal prosecution for bid-rigging' (11 June 2008); OFT Press Release, 'OFT brings criminal charges in international bid rigging, price fixing and market allocation cartel' (19 December 2007).
[13] OFT Press Release, 'OFT withdraws criminal proceedings against current and former BA executives' (10 May 2010).
[14] A Stephan, 'How Dishonesty Killed the Cartel Offence' (2011) Crim. L. R. *forthcoming*
[15] PK Gorecki and D McFadden, 'Criminal Cartels in Ireland: the Heating Oil Case' (2006) ECLR. 27(11), 631-640
[16] See for example comments by Ali Nikpay, OFT Senior Director of Policy: OFT Press Release, 'OFT considers wider use of director disqualification powers' (18 August 2009).
[17] OFT, 'Director Disqualification Orders in Competition Cases: an OFT guidance document' (2010) at 2.9.
[18] OFT, 'Competition Disqualification Orders: Proposed changes to the OFT's Guidance' (2010) at 4.20
[19] OFT (n 17) at 3.

because the company has been liquidated or is too small to be subject to fines. The OFT must still convince the court that a breach of competition law has occurred.

Importantly, CDOs can be sought irrespective of whether a criminal prosecution has taken place and regardless of whether the director was aware that agreements were in breach of EU or UK competition law. As we have seen, the application of CDOs is potentially very wide, with no need for a trial or for the competition authority to demonstrate a mental element such as dishonesty. The potential deterrent effect of CDOs also has empirical backing. Survey work carried out among businesses and competition lawyers on behalf of the OFT, found that,

> 'the threat of director disqualification is seen as a serious one by both lawyers and companies, and many thought that a greater use of this sanction would improve deterrence'[20]

Further, it is notable that firms taking part in the study ranked factors which motivated compliance in the following order (from those with the most to those with the least influence)[21]:

1. Criminal Penalties
2. Disqualification of Directors
3. Adverse Publicity
4. Fines
5. Private Damages Actions.

Interestingly, competition lawyers held different perceptions, placing fines as second most important ahead of CDOs.[22] This difference perhaps reflects the ability of most large firms to absorb antitrust fines and treat them as a *cost* rather than a penalty.

CDOs also appear to have stronger public support than criminal sanctions. In a 2007 public survey, conducted in the UK by the ESRC Centre for Competition Policy, members of the British public were asked which punishment (if any) they felt was appropriate for individuals. 48 per cent supported 'a ban from holding senior managerial positions in businesses' compared to only 11 per cent who felt imprisonment was appropriate.[23]

The Shortcomings of Director Disqualifications

[20] 'The deterrent effect of competition enforcement by the OFT, a report prepared for the OFT by Deloitte (November 2007). Para 5.117; See also: F Gordon and D Squires, 'The Deterrent Effect of UK Competition Enforcement' (2008) De Economist 156:411-432
[21] Deloitte Report (n 20) FN 3
[22] Deloitte Report (n 20) Table 5.11
[23] A Stephan, 'Survey of Public Attitude to Price-Fixing and Cartel Enforcement in Britain' (2008) Comp. L. R. 5(1) pp123-145 at 133.

Competition Disqualification Orders cannot be seen as a silver bullet. There are a number of problems associated with their use and deterrent effect, as evidenced by the fact there have been no CDOs in the UK to date, under the amendments made by the Enterprise Act. The three individuals who were imprisoned in the *Marine Hoses* case received CDOs under the separate provision contained in s.2 CDDA, which allows disqualification of directors who have committed a criminal offence. In 2010, the OFT stated that,

> 'The OFT has not used its CDO powers to date for a number of reasons – for example because the conduct in question pre-dated the CDO power, because the relevant individuals benefited from immunity from CDOs under the leniency regime, or because of a lack of evidence'.[24]

In response to the OFT's consultation, many felt that the 2003 guidance was sufficient and asked why the authority was seeking to increase their powers for a sanction that had never even been used. [25] There was also strong opposition to the OFT's move to seek CDOs where a breach of competition law has not already been proven in a relevant decision or judgement. Respondents argued that if the conduct was not serious enough to attract a decision or judgement, then a CDO was not appropriate. It was also pointed out that where a decision is appealed just in relation to the size of the fine, that fine can still be set aside entirely. A notable dissenting voice came from the Institute of Directors, who argued that CDOs did not have a deterrent effect and that they would disproportionately impact on small business where it is easier to argue that the director 'ought to have known' about the illegal conduct.[26] The OFT nevertheless pressed forward with these changes, mindful perhaps in relation to the latter, of the lengthy multiple appeals which typically follow cartel decisions.

A significant obstacle to the use of CDOs is their relationship with leniency, as hinted in the OFT statement above. Unlike the criminal offence, where immunity is only likely to be granted to the employees of the revealing firm, the OFT 'will not apply for a CDO against any current director of a company whose company benefited from leniency in respect of the activities to which the grant of leniency relates'. [27] The problem is that most firms involved in a cartel infringement will want to cooperate once that cartel has been uncovered. Indeed, the greater the level of cooperation, the more quickly the authority can conclude its investigation and move its limited resources onto the next case. The threat of a CDO in this context may encourage cooperation, but may not directly enhance deterrence. This is because it allows directors to collude, safe in the knowledge that they will benefit from a guarantee against a CDO so long as they cooperate after being caught – regardless of whether they have been beaten to the immunity prize for fines. There is in fact some

[24] OFT (n 3) at 2.6
[25] OFT (n3)
[26] Ibid at 2.5
[27] OFT (n 17) at 4.14.

evidence to suggest that leniency is only used by firms to tame the end-game once the cartel has failed, with only limited examples of leniency breaking up active cartels.[28]

As part of its consultation, the OFT proposed seeking CDOs for directors of firms benefiting from a leniency discount, but not immunity.[29] There was strong opposition to this in responses to the consultation and the proposal was not implemented. It was argued that such a move would create uncertainty thereby undermining leniency and that it would make company directors less willing to cooperate or reveal an infringement. Leniency policy as applied to the criminal offence was distinguished because the offence will only be invoked in a narrow set of serious infringements. CDOs by contrast have the potential for wider application. The OFT will still seek a CDO where the director ceased acting for the firm (whether fired or resigned) or where they refuse to cooperate with the leniency process.[30]

Even where a CDO is imposed, there are a number of reasons why the sanction's effect could be muted. First, they cannot be used against non-directors who have been directly involved in a cartel infringement, leading in some cases to the unsatisfactory result of only punishing those vicariously responsible for the misbehaviour of their employees.[31] Second, the deterrent effect of CDOs is likely to depend on how close the director is to retirement.[32] This is especially a problem given the number of years that are likely to have passed between the formation of the cartel and the time at which the director is disqualified. There is also likely to be a time lag between when the cartel is discovered and when the disqualification order is granted. Disqualifications in the context of insolvency (s.6 CDDA) typically occur 2-7 years after an initial business failure, for example.[33] Finally, the company may choose to indemnify the individuals through a generous severance package or early retirement. [34] The decision by British Airways to stick by (and indeed promote) one of its executives pending trial for price fixing, is a reminder that the firm's loyalty towards senior executives should never be underestimated.[35]

Although CDOs are a relatively recent innovation in cartel policy, director disqualification orders have been around for some time. It is worth looking briefly at the debate which has occurred within the company law and corporate finance literature about their effectiveness. Successive UK governments enthusiastically pushed for more disqualifications as an effective way of protecting the public from unfit company directors, especially in the

[28] A Stephan, 'An Empirical Assessment of the European Leniency Notice' (2009) *Journal of Competition Law & Economics* 5(3):537-561
[29] OFT (n 3) at 5.7-5.13
[30] OFT (n 17) at 4.14
[31] WPJ Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 117 at 147
[32] Ibid.
[33] A Hicks, 'Director Disqualification: Can It Deliver?' (2001) JBL, Sept 433-460, 231
[34] Wils (n 31)
[35] M Peel, 'BA sales chief on price-fixing charge to join the board' *Financial Times,* November 28, 2008; The case against the BA employee in question was dropped in May 2010.

context of insolvency. [36] Empirical evidence in the 1990s suggested that only 58 per cent of company directors in the UK had ever heard of the CDDA or its provisions relating to disqualification.[37] There are also problems associated with enforcing disqualifications and ensuring that individuals do not go on to take up senior positions of responsibility within the firm. A study conducted in 1997 suggested that disqualification was not in itself a major impediment to finding work.[38] The willingness of firms to employ executives, who have served jail sentences for antitrust offences in the US, shows the retained value of their expertise and skills in the job market.[39] The insolvency study also suggested that the threat of a CDO had little effect on how directors ran their businesses and that there was a widespread perception that a disqualified director could be involved in running a company without much chance of being caught. Further studies on disqualifications in the context of insolvency show very limited preventative effect.[40]

Are Disqualifications a Recommended Practice for the European Commission?

Although CDOs are a UK innovation, director disqualification and equivalent penalties under company law exist throughout the EU. In 2006, the Directorate General for Internal Market and Services completed a consultation and hearing on the modernising of company law and corporate governance in the European Union. [41] One of the proposals was the adoption of a new EU legislation on directors' disqualification. 70 per cent of respondents were opposed to this, pointing to the heterogeneous nature of such provisions in national law and highlighting possible constitutional challenges to harmonisation.[42] Currently there is not even an effective system of information exchange between member states. This means that a director disqualified in one country has the possibility of acting as director for a firm elsewhere in the EU.[43] There was stronger support among respondents for greater cooperation between national company registers to help address this problem. [44]

Unfortunately, European competition disqualification orders would require careful legislative change. Regulation 1/2003 only provides for fines imposed on 'undertakings and associations of undertakings'. In addition, jurisdictions like the UK would require court

[36] Hicks (
[37] National Audit Office, Insolvency Service Executive Agency, Company Directors Disqualification 1992/3 House of Commons 907 at 2, cited in K Ong, 'Disqualification of Directors: A Faulty Regime?' (1998) Comp. Law. 19(1) 7-10, FN 7.
[38] Hicks (n 36) 436
[39] A. Stephan, 'The UK Cartel Offence: Lame Duck or Black Mamba? (2008) CCP Working Paper 08-19, p30
[40] R Williams, 'Disqualifying Directors: A Remedy Worse Than the Disease?' (2007) 7 *Journal of Corporate Law Studies* 213, 228.
[41] Directorate General for Internal Market and Services, *Consultation and Hearing on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union* (2006).
[42] DGIMS (n 41) p14
[43] The UK's Companies Act 2006 (ss. 1182-87) introduced a provision for the recognition of foreign disqualification orders in English law, but there is no active monitoring of foreign disqualifications.
[44] DGIMS (n 41) p15

approval of the sanction, even if it is a civil enforcement tool. In a recent interview with the editor of *World Competition*, the Competition Commissioner Joaquín Almunia was asked whether he would consider complimentary administrative measures such as CDOs, to ensure the incentives of companies and individuals were aligned. He responded by saying,

> "As laid down in the Treaty and Regulation 1/2003, the EU antitrust enforcement system provides for pecuniary sanctions on undertakings only. […] While a number of EU Member States have introduced sanctions on individuals for competition infringements, the enforcement against undertakings remains the core principle at EU level."[45]

There thus appears to be neither the capacity nor the desire for the adoption of CDOs against individuals at the EU level.

Powell and McKelvey set out some ideas of how an EU-wide system of director disqualification could be put in place as a complement to the current fining policy.[46] The first possibility is along the lines of EU company law, discussed above. Article 50 TFEU provides the simplest legislative base for an EU competition disqualification order. It is concerned with freedom of establishment and empowers the EU to adopt, 'to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms …with a view to making such safeguards equivalent throughout the Union'. A new directive would require member states to disqualify directors for misconduct, including knowledge that their firm was involved in an infringement of EU competition rules. This might also be possible under Article 114 TFEU. Other alternatives include the harmonisation of director disqualification throughout the union as a *criminal* sanction, under Article 83(2) TFEU. [47]

Informal harmonisation could also occur through the European Competition Network (ECN) with pressure exerted by the European Commission and the OFT. The ECN could also provide a forum for information exchange, to ensure that a competition disqualification order is given effect throughout the EU. However, for national competition authorities to seek follow-on CDOs in connection with European Commission decisions, the authority may have to be more careful about how it collects evidence. Article 12(3) Regulation 1/2003 states that exchanged information can only be used to impose sanctions on natural persons if, 'the information has been collected in such a way that it respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority'.[48]

[45] 'José Rivas' Interview with Commissioner Almunia' (2011) 34 *World Competition* pp. 1-10.
[46] M Powell and G McKelvey, 'Director Disqualification as a Complement to EU Antitrust Fines: Towards a More Balanced Sanctions Policy' (December 2010) *CPI Antitrust Journal* 1.
[47] Ibid p7
[48] Ibid p8

In the context of public procurement policy, there is increasing concern within the EU that competition rules are not effectively dealing with bid-rigging and customer sharing. The Commission's Green Paper on the modernisation of public procurement policy moots the possibility of stricter debarment in cases of bid-rigging.[49] Firms fearing debarment orders might be encouraged to take action against directors themselves. It could also discourage other firms from employing them. One problem with debarment orders in relation to bid-rigging is that, for a collusive arrangement to be profitable, there usually must be some involvement of most or all the firms. Excluding them from future bids may thus only serve to reduce competition further. For example, in 2009 the OFT fined 103 construction companies for their involvement in bid-rigging and 'cover-pricing' activities. Many of the potential victims in this case were local authorities. They reacted by blacklisting from future contracts those firms which were subject to the decision. In response, the OFT communicated a recommendation to the local authorities that the companies 'should not be automatically excluded from future tenders on the grounds that they are parties to the Decision'.[50]

Concluding Remarks

The continued frequency with which the European Commission is uncovering cartel infringements suggests that a fines-only approach is failing to achieve effective deterrence. Corporate fines (however high they may be) largely punish the wrong people. They are important in changing business attitudes and encouraging compliance efforts. Yet they do not directly punish the individual decision makers responsible, many of whom may have left the firm or retired by the time the sanction is imposed.

The disqualification of company directors involved in cartels provides the possibility of aligning the incentives of directors and undertakings, to comply with cartel laws. They have the particular attraction of being a civil sanction which circumvents many of the problems and costs associated with a criminal offence. In the UK, the Office of Fair Trading has placed greater importance on disqualification in the wake of its failure to bring criminal cases to trial. Assuming the directors are not close to retirement, CDOs could potentially have a significant deterrent effect. As Wils points out, 'While not being an equally effective alternative to imprisonment, director disqualification would [be] a defensible second best'.[51] However, in order for this deterrent effect to be felt, disqualifications must be applied and enforced effectively.

The UK's 'Competition Disqualification Orders' provide a useful model to guide other member states in the adoption of their own competition disqualification regimes. Its

[49] European Commission, 'Green Paper on the modernisation of EU public procurement policy towards a more efficient European procurement market' (2011) p32

[50] OFT, 'Information note to procuring entities in the public and private sectors regarding the OFT's decision on bid-rigging in the construction industry' (22 September 2009).

[51] W Wills, *Efficiency and Justice in European Antitrust Enforcement* (Oxford: Hart 2008) at 583

notable weakness is in not enforcing CDOs against individuals who are cooperating as part of the leniency programme. This is one of the main reasons why there have been no CDOs imposed to date in the UK. The argument that such a move would cause uncertainty and discourage leniency applications seems illogical. A starker difference between complete immunity and the sanctions otherwise faced by firms and individuals, can only serve to intensify the race to be first through the door. Cooperation by directors of the second or third firm to come forward can be reflected in the length of the disqualification order sought. Under the current system, directors can collude safely in the knowledge that they will not be disqualified so long as they fully cooperate once the cartel is discovered.

Turning back to the European context, a situation where CDOs are applied in domestic cases but not in the most serious international infringements is simply indefensible. The European Commission needs to show greater leadership in acknowledging the need for a mixed approach to cartel enforcement, which focuses on individuals as well as firms. Owing to the problems of adopting an EU competition disqualification order, the Commission should work more closely with national competition authorities through the ECN. They must encourage the adoption of disqualification orders and their harmonisation across the EU. The Commission must also work more closely with NCAs to ensure that individuals involved in EU cartel infringements are as susceptible to CDOs as those involved in domestic cases. The ECN can play a key role in facilitating information exchange, to ensure that a disqualification from one member state has EU wide effect.

Disqualifications are not without cost or possible shortcomings. As this paper has outlined, there are reasons why a deterrent effect might be muted and there is great scepticism about the effectiveness of disqualifications in the context of insolvency. Disqualifications also remove from the economy individuals who might otherwise be very capable managers with high value to an industry in terms of expertise.[52]However, CDOs provide the most realistic alternative to criminalisation in EU cartel policy. Without a sanction against individuals, corporate fines imposed by the Commission will become subject to increasing criticism and diminishing legitimacy. Moreover, in an area of law where we are happy to give immunity to one guilty firm, while imposing a multi-hundred million euro fine on another, CDOs are a relatively uncontroversial innovation which could significantly strengthen enforcement.

[52] J Fingleton *et al* 'The fight against cartels: is a 'mixed' approach to enforcement the right answer' in B Hawk (ed), *International Antitrust Law and Policy: Fordham Competition Law*, (New York: Juris 2006) 9-23.