

Personal liability and competition law around the world

In September 2020, the UK's competition enforcer, the Competition and Markets Authority (CMA), launched a new guidance document in conjunction with the Institute of Risk Management designed to help managers and directors understand and address competition law risk. Launching the [guide](#), Andrea Coscelli, the CMA chief executive noted, *"Individuals are far less likely to break the law if they know they may be held directly responsible for it. And the public rightly expects there to be personal responsibility for very serious wrongdoing in firms."*

This initiative to encourage senior leadership of companies came only a couple of months after the CMA had successfully secured its first contested competition disqualification order (CDO). There, the High Court imposed a seven-year ban on the director of an estate agent in Burnham-on-Sea who had been found to have engaged in price fixing with five other local estate agents.

The CMA is not alone in its focus on ensuring individual responsibility and accountability for breaches of competition law. As shown in the infographic below, laws imposing personal liability for various types of competition law breaches have become more prevalent, with many countries now assigning some form of personal civil or criminal sanction for breaching competition law. These developments highlight the [significance of effective competition law compliance](#) for the benefit of individuals.

Competition law and anti-competitive practices

Competition law is designed to protect businesses and consumers from anti-competitive behaviour in order to deliver open, dynamic markets and enhanced productivity, innovation, and value for customers. Although the precise approach of competition laws differs by jurisdiction, they typically target three types of conduct: (a) cartels; (b) other anticompetitive agreements; and (c) abuse of dominant position.

- a. **Cartels are the most serious anticompetitive agreements.** They occur when two or more businesses agree – directly or indirectly – not to compete with each other. Such practices may include price fixing; bid rigging; limiting production; market or customer sharing; or exchange or disclosure of commercially sensitive information.
- b. **Anti-competitive agreements (excluding cartels)** are less obviously injurious to competition, but nonetheless may result in a reduction of competition in certain situations. Examples include joint selling or purchasing agreements, retail price agreements between suppliers and retailers, and long exclusivity periods.
- c. **Abuse of dominant position** is a type of conduct whereby a business enjoys a dominant position in a market, and certain types of behaviour in which it engages may harm competitors or consumers.

The growing threat of personal responsibility

While the United States and Canada can trace the roots of their criminal antitrust laws back to the nineteenth century, individual liability for breaches of competition law has only proliferated globally in the twenty-first century.

The United States

In the United States, individuals may be sentenced to up to 10 years in prison and/or fines \$1 million for any anticompetitive practices. In fiscal year 2018 alone, 59 individuals were sentenced in the United States, 21 of whom were sentenced to incarceration time.

The UK

In the UK, the criminal cartel offence was introduced in 2003 by the Enterprise Act 2002 and subsequently bolstered in 2014 by removing the requirement for the offence to have been conducted 'dishonestly'. Criminal sanctions in the UK are available only in respect of cartel activity, and individuals may be sentenced to up to five years in prison and/or fined an unlimited amount.



Only four prosecutions have ever been made against individuals involved in cartel cases; these relate to the [Marine Hose cartel](#) (2008), the [Air Passenger Fuel Surcharge cartel](#) (2011), the [Supply of Galvanised Steel Tanks cartel](#) (2015), and the [Supply of Precast Concrete Drainage Products cartel](#) (2017). It is worth mentioning that in the Marine Hose cartel case, the defendants pleaded guilty in the UK to avoid a likely custodial sentence in the United States, so a jury did not hear the case, since disqualification orders are a decision solely for the judge to make.

Civil sanctions are available in the form of competition disqualification orders (CDOs). A CDO may disqualify a director from acting as a director for up to 15 years where there has been a competition law breach by the company which the individual was a director of and the director has been deemed unfit to act as a director. Of note for directors, this includes not only situations where the director participated in the competition law infringement but also where the director (1) had reasonable grounds to suspect the competition law breach and did nothing to stop it; or (2) did not know, but ought to have known that the conduct amounted to a breach. In other words, it is not sufficient for UK company directors to ignore competition law, as the CMA may pursue a CDO where a director failed to act when they should have.

Until 2018, only three directors had been disqualified; the first one was in 2016. However, the CMA has recently increased its efforts, as it now considers CDOs in all anticompetitive cases, and, consequently, in May 2020, the CMA secured its 20th disqualification of a company director, with more cases pending.

France

Rather reversely, France decriminalised anti-competitive practices in 1986, yet the decriminalisation was not absolute. Currently, persons may be penalised under Article L.420-6 of the French Commercial Code, which stipulates that if a natural person fraudulently intervenes in an anticompetitive practice in a personal and decisive manner, the person risks imprisonment for up to four years and/or a fine of up to €75,000.

In practice, these sanctions have remained rare – partly because the French Competition Authority has stated that in cases where parties benefit from the leniency programme, individuals shall not be prosecuted or fined. Since 1986 and until 2016 there have been an average of only about two criminal convictions per year, resulting mostly in fines and suspended prison sentences. More recently, there has been increased cooperation between competition and criminal authorities. From 2013 until 2017, the average conviction rate increased to 3.8 convictions per year, the average fine was about €8,000 and there were five suspended prison sentences.

Historically, these convictions usually related to cases of bid-rigging in public markets, where the individuals involved often committed additional offences such as forgery, corruption or misuse of company assets. Nevertheless, there are at least five persons reported to have actually served up to one year in prison – the first one in 1995 (possibly the first European incarceration for competition law breaches).

Germany

German law, in line with most European jurisdictions, does not criminalise any anticompetitive practices, although section 298 of the German Criminal Code criminalises bid rigging, and persons can be sentenced to up to five years in prison or fined.

However, personal administrative fines exist under section 81(4) of the Act against Restraints of Competition and section 17(2) of the Act on Regulatory Offences, which impose fines of up to €1 million for intentional competition violations or €500,000 for negligent competition violations by a person. Such fines are imposed more aggressively than average. In 2018 a total of 20 individuals were fined approximately €2 million (about €100,000 per person) from prosecutions by the German Federal Cartel Office, while 2014 was the apex year when 81 persons were fined a record total of approximately €10 million.

The threat of personal liability globally

* Click on flag for more information

Red Borders: Jurisdictions where personal liability attaches to competition law AND include a criminal regime*

Yellow Borders: Jurisdictions where personal liability attaches to competition law without a criminal regime*

Americas



Brazil



Canada



United States

Asia



Australia



Hong Kong



India



Japan

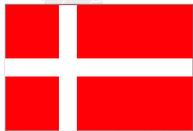


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