

Disqualification Undertakings and Permission to Act

Deba Das

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Freshfields Bruckhaus Deringer

Disqualification undertakings

Section 9B CDDA

1. [...]
2. The **Competition and Markets Authority** 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 [...]' (emphasis added)

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COMPANY DIRECTORS DISQUALIFICATION ACT 1986

DISQUALIFICATION UNDERTAKING

IN RE: AMILCO LIMITED ("AMILCO")

CASE 50455: CMA INVESTIGATION INTO THE SUPPLY OF FLUDROCORTISONE ACETATE TABLETS IN THE UK

I, **AMIT HASMUKH RAOJIBHAI PATEL**¹ of [REDACTED]

[REDACTED] hereby undertake to the Competition and Markets Authority ("the CMA"), on the basis set out in the schedule attached to this disqualification undertaking, that in accordance with section 9B of the Company Directors Disqualification Act 1986 ("CDDA 1986"):

I WILL NOT for a period of **5 years**:

- a) be a director of a company, act as a receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) I have the leave of the court; or
- b) act as an insolvency practitioner.

Further, I will use my best endeavours to cooperate with, and assist, the CMA in its director disqualification investigations in relation to Case 50455 and any related proceedings.

The scope and effect of the disqualification undertaking that I hereby give have been explained to me in the CMA's letter of 11 May 2020.

Further, I understand that if I act in contravention of the above disqualification undertaking:

- a) I may be prosecuted for a criminal offence (CDDA 1986 section 13); and
- b) I may be personally responsible for all the relevant debts of a company (CDDA 1986 section 15).

The CMA has explained that I may seek legal or professional advice on the effect of this undertaking and I was given the opportunity to do so before signing this undertaking.

Signed

[REDACTED]

Amit Hasmukhbhai Patel

[REDACTED]

Date

¹ Also listed on Companies House as **AMIT HASMUKHBHAI PATEL**.

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SCHEDULE TO THE DISQUALIFICATION UNDERTAKING GIVEN BY

AMIT HASMUKH RAOJIBHAI PATEL

Solely for the purpose of the CDDA 1986 and for any other purposes under the provisions of the CDDA 1986 and other legislation consequential to the giving of a disqualification undertaking, I admit the following matters:

A. BREACH OF COMPETITION LAW

1. The CMA provisionally found in its Statement of Objections in case 50455 issued on 3 October 2019 (**"the SO"**) that Amilco infringed the prohibition imposed by section 2(1) of the Competition Act 1998.
2. As detailed in the SO, the CMA provisionally found that Amilco infringed competition law by entering into a supply and distribution agreement (**"the SDA"**) with two other parties, Aspen² and Tiofarma³ (together, with Amilco, **"the Parties"**) from 1 March 2016 to 19 October 2016 (**"the Relevant Period"**) which had the object and effect of restricting competition in the market for the supply of fludrocortisone acetate 0.1 mg tablets for human use in the UK.
3. I accept the provisional findings made by the CMA in the SO. In particular, I accept that:
 - a. Amilco and Tiofarma, working together, were potential competitors to Aspen in the relevant market for the supply of fludrocortisone acetate 0.1 mg tablets for human use in the UK as at the moment of entering into the SDA and during the Relevant Period;
 - b. Under the SDA, Amilco received significant monthly value transfers from Aspen principally in exchange for not entering the market independently. Specifically, Aspen paid Amilco a fixed 30% profit margin calculated on the basis of Aspen charging a list price for ambient storage fludrocortisone acetate 0.1 mg tablets more than 1,800% higher than its price for its cold storage fludrocortisone acetate 0.1 mg tablets product prior to the SDA;
 - c. Under the SDA, Amilco and Tiofarma agreed not to independently enter the market and Aspen's list price for Fludrocortisone Acetate Tablets increased to £30 per pack;
 - d. As such, the SDA had the object and effect of restricting competition in the manner described in the SO; and
 - e. Amilco acted intentionally or at least negligently in entering into the SDA.

² The CMA provisionally found that, during the Relevant Period, Aspen Pharmacare Holdings Limited, Aspen Global Inc., Aspen Europe GmbH, Aspen Pharma Ireland Limited and Aspen Pharma Trading Limited formed part of the single undertaking referred to herein as **"Aspen"**.

³ The CMA provisionally found that, during the Relevant Period, Tiofarma Beheer B.V. and Tiofarma B.V. formed part of the single undertaking referred to herein as **"Tiofarma"**.

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4. Amilco, Aspen and Tiofarma implemented the SDA during the Relevant Period.
5. During the Relevant Period described above, Amilco breached competition law by entering into the SDA.
6. I have been a director of Amilco since 11 December 2013 and am presently the sole director of Amilco. I was therefore the director of Amilco throughout the Relevant Period.

B. MATTERS OF UNFITNESS – CASE 50455

7. On 3 October 2019, the CMA issued the SO to Amilco in which the CMA provisionally found that Amilco participated in the SDA.
8. Amilco was incorporated on 11 December 2013 and was therefore active during the Relevant Period.
9. I accept that I was the sole director of Amilco throughout the Relevant Period and in the following respects my conduct as a director of Amilco was such as to make me unfit to be concerned in the management of a company:
 - a. As the sole director of Amilco, I directly contributed to the infringement by actively engaging in the negotiations to conclude all aspects of the SDA insofar as they related to Amilco, and by actively complying with the SDA and monitoring compliance throughout the Relevant Period.
 - b. My intention in contributing to the SDA was to restrict competition between the Parties in the UK fludrocortisone market by agreeing not to enter the market for the supply of fludrocortisone acetate 0.1 mg tablets for human use in the UK independently, and in exchange, Aspen would make significant value transfers to Amilco in the manner described in paragraph [3(b)] above.
 - c. Market sharing is amongst the most serious types of competition law breaches.
 - d. As a result of the breach, I directly contributed to Amilco being liable for a penalty under the Competition Act 1998⁴.

⁴ Whilst liable for such a penalty, no financial penalty may be imposed on Amilco owing to the business having zero turnover.

Disqualification period discounts

CMA's Guidance on Competition Disqualification Orders

'The **CMA will normally consider a reduction in the disqualification period** where a director offers a CDU in terms acceptable to the CMA. **The stage in the proceedings at which the CDU is offered will be a relevant consideration** when the CMA is considering whether to accept a reduction in the disqualification period and, if so, the extent of any such reduction.' [3.7] (emphasis added)

'Need' and 'public protection' balancing exercise

Application for leave under an order or undertaking

'Where a leave application is made the court has a balancing process to undertake

In favour of a grant of leave is the '**need**' **criterion**: the need of the disqualified director to earn a living, and (a different matter, and usually more important) the need of some other person, typically another company, to have his services.

Against the grant of leave may be the factors which I mentioned in the foregoing paragraph as purposes which the legislation is intended to serve: **protecting the public** [...] keeping off the road a person whose past conduct has fallen short of the standards to be expected; deterring other directors from similar misconduct; and maintaining and improving standards of integrity.'

Sir Andrew Park in Re Morija plc; Kluk v Secretary of State for Business and Regulatory Reform [2008] 2 BCLC 313 [34],
(emphasis added)

Re Fourfront Group Ltd

Deputy Insolvency and Companies Court Judge Baister – on ‘need’

‘I am persuaded, in so far as is necessary, that **need has been made out in these cases**. I mean third party need, that of the companies concerned, rather than the need of the claimants.

Mr Scott’s first affidavit [...] sets out the relevant material as regards Mr Stamatis, who, he says, plays a key, strategic role in the Fourfront Group. He is said to be essential to the culture of the organisation. Mr Chandler [...] says that Mr Davies has spent his whole career in the market and it would be difficult to replace him; the London team is loyal to him.’

I should add that I was told that the companies are bearing the costs of the claimants’ applications, a sign that they are serious about their need for the claimants’ continued involvement in the capacities for which permission is sought.’

[45] (emphasis added)

Re Fourfront Group Ltd

Deputy Insolvency and Companies Court Judge Baister – on ‘public protection’

‘The following factors also fortify me in the view that **there is not likely to be a repeat of the conduct in issue:**

- a. The **reorganisation** of the companies and of the boards of directors.
- b. The introduction of the **policies and training** I have described above.
- c. The presence of Mr Rintoul as a **non-executive director. I regard this as crucial.** Mr Rintoul may not have much experience of competition law, but he knows the industry and has management experience [..] **That means he is likely to smell a rat if one is about. As a solicitor, he will be especially careful to ensure that there is no future misconduct.**
- d. Finally, the various conditions that are already in force and which will continue go a considerable way to ensuring that the **public can be adequately protected.**’

[49] (emphasis added)

Re Fourfront Group Ltd

Deputy Insolvency and Companies Court Judge Baister – concluding remarks

- ‘There can be no question of the gravity of what has occurred being minimised in the future, nor should the court countenance anything that gives the impression that the granting of permission in circumstances such as these is a rubber stamp. It is not.’ [47]
- ‘I emphasise to Mr Stamatis and Mr Davies that I have not reached that decision easily or taken it lightly.’ [51]

'Need'/'public protection' or a proportionality test?

CMA v Michael Christopher Martin

- [..] proportionality is achieved first, by the exercise of the court's discretion when deciding the period of disqualification (subject to any statutory minimum and maximum periods, although there is no minimum period for section 9A). **Second, by the CDDA conferring power upon the court to grant leave to act.**
- **An application for leave will enable the court to carry out a fair balancing exercise between the Article 8 rights of the individual and achieving the aims of sections 6 and 8 of the CDDA for the benefit of the general public.** This is evident from the matters considered on an application for leave (see paragraph 107(a) above), which are the same matters as those required to achieve the fair balance of proportionality in an individual case. This is not a case where words need to be read into the statute to give effect to Convention rights as occurred [..]

[110] (emphasis added)

Robin Davies v CMA

S.17 Order

2. The above Permission shall be conditional on the Claimant maintaining the following compliance measures in respect of the Companies throughout the period of the Permission:
 - a. Maintaining the statement of commitment to competition law compliance (as set out at **page 5 of RD1**) on any website maintained by any of the Companies from time to time;
 - b. Maintaining the 'Disciplinary Policy & Procedure' (as set out at **pages 6 to 12 of RD1**) as part of the contract for all existing and new employees of any of the Companies;
 - c. Providing annual competition law compliance training for new joiners and existing staff of each of the Companies (in accordance with the slides set out at **pages 13 to 33 of RD1**, which should be updated each year by Alissa's external legal advisors).
6. The Claimant shall make no public statement in respect of these proceedings unless such statement has been agreed in advance by the Defendant.
3. The above Permission shall also be conditional on the appointment of Bill Ray as non-executive director of each of the Companies on terms including the following:
 - a. The appointment shall be for the total period of the Permission;
 - b. Within one month of appointment, Mr Ray shall undergo a short intensive programme of competition law compliance training and familiarisation delivered by suitable external legal advisers;
 - c. Mr Ray shall commit to work two working days per month at the rate agreed between the Companies and Mr Ray;
 - d. Mr Ray shall have specific responsibility for competition law compliance matters within Alissa;
 - e. Mr Ray shall have the right and responsibility to review relevant papers, make enquiries of the business and its management, attend board meetings and provide guidance; and
 - f. Mr Ray shall have such budget as is reasonably necessary to enable him to refer *ad hoc* competition and other regulatory compliance queries to suitable external legal advisers, to ensure that he is fully able – on an ongoing basis – to discharge his supervisory and advisory functions effectively and on a properly supported basis.

Re Fourfront Group Ltd

S.17 Order

- 2.5 throughout the period of the Second Claimant's disqualification, Mr Rintoul, or his replacement, shall:
- (a) supervise compliance with competition law by Area and the Second Claimant; and
 - (b) report to Mr Scott every quarter, and the CMA on reasonable request with no less than 14 days' notice, on compliance with competition law by Area and the Second Claimant;
- 2.6 the Second Claimant shall procure that for staff employed by Area face to face competition law compliance training is conducted annually for staff in the group identified as high risk in the Fourfront Group's Compliance Policy – Competition Law and online ethics training, which includes a competition law component, is conducted annually for staff in the group identified as medium risk in the Fourfront Group's Compliance Policy – Competition Law;
- 2.7 Group shall ensure that throughout the period of the Second Claimant's disqualification searches of all email servers within the custody or control of Area are searched for high risk terms relating to potential competition breaches at the discretion of, and under the supervision of, Mr Rintoul or his replacement;
- 2.8 the Second Claimant shall procure that Area holds minuted monthly board meetings at which (i) its compliance with competition law, and (ii) any concerns raised by Mr Rintoul or his replacement are considered.

Disqualification periods

Re Sevenoaks brackets

- i. **over 10 years** for **particularly serious** cases;
- ii. **six to 10 years** for **serious cases** which do not merit the top bracket;
- iii. **two to five years** where the case is, relatively, **not very serious**.

Thank you

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