

Revised guidance on competition disqualification orders

Consultation document

© Crown copyright 2018

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Contents

	<i>Page</i>
1. About the consultation	2
2. Legal framework	10
3. Decision-making process	13
4. Section 9C notice and issuing proceedings	16
5. Recognition for cooperation and early resolution	21
6. Consultation questions.....	23

1. About the consultation

Introduction

- 1.1 The Competition and Markets Authority ('CMA')¹ has set out in *Director disqualification orders in competition cases OFT510* ('the Current Guidance'), guidance on its processes regarding its powers under the Company Directors Disqualification Act 1986 ('CDDA'), as amended by the Enterprise Act 2002, to investigate and make an application for the disqualification of directors of companies and other entities that have breached competition law.
- 1.2 The Current Guidance was first published by the Office of Fair Trading ('OFT') in 2010 and subsequently adopted by the CMA. The OFT did not exercise its powers under the CDDA and there have been no updates to OFT510 since 2010 save that the CMA withdrew paragraph 4.10 in June 2018 pending the outcome of this consultation.²
- 1.3 In recent years the CMA has gained experience exercising its powers under the CDDA and consequently identified scope for improving the Current Guidance to reflect efficient investigation and decision-making practice as well as the judicial nature of the director disqualification process. We therefore have therefore taken the opportunity to review the Current Guidance with a view to:
- streamlining and updating the process to reflect our developing investigative and decision-making practice;
 - facilitating procedural efficiencies that we consider will support our aim of progressing investigations and applications under the CDDA as quickly as possible, while maintaining our commitment to fair and rigorous decision-making;
 - adapting our procedures and practices to ensure appropriateness for the judicial process;

¹ The CMA is the UK's economy-wide competition and consumer authority, and works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy as a whole.

² The CMA withdrew paragraph 4.10 with effect from 4 June 2018. An explanatory statement was published on the CMA's website:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713395/OFT510_guidance.pdf. The change to paragraph 4.10 is also addressed in this consultation (see paragraphs 4.19-4.27).

- recognising that directors may have materially assisted and cooperated with the CMA during an investigation under the Competition Act 1998 ('CA98').
- 1.4 The draft revised text of the Current Guidance issued alongside this consultation paper is referred to as the Draft Revised Guidance. This consultation paper explains in detail the nature of and the reasons for the amendments to the Current Guidance that are proposed in the Draft Revised Guidance.
- 1.5 Subject to this consultation, the Draft Revised Guidance may be adopted by the specified regulators who have concurrent powers under the CDDA. These are:
- (a) the Office of Communications;
 - (b) the Gas and Electrical Markets Authority;
 - (c) the Water Services Regulation Authority;
 - (d) the Office of Rail and Road;
 - (e) the Civil Aviation Authority;
 - (f) NHS Improvement;
 - (g) the Payment Systems Regulator; and
 - (h) the Financial Conduct Authority.³

Scope of this consultation

- 1.6 This consultation seeks the views of interested parties on the CMA's proposed revisions to the Current Guidance.
- 1.7 The specific questions on which we are seeking respondents' views are set out in Chapter 6 of this consultation document.
- 1.8 This consultation is aimed at those who have an interest in the CMA's powers under the CDDA. In particular, it is likely to be of interest to directors, businesses and their professional advisers.

³ Section 9E, CDDA

Summary of changes proposed in the Draft Revised Guidance

1.9 In summary, the more substantial changes are as follows:

Subject matter	Summary of main proposal(s)	Relevant Chapter in this consultation document
Decision-making process	Decision-making: We propose to replace the five-step process in the Current Guidance with principles and factors that the CMA may take into account when deciding whether to proceed to seek the disqualification of a director. These principles and factors encapsulate much of the guidance contained in the five-step process.	Chapter 3
Section 9C notice and issuing proceedings	<p>Section 9C notice: We propose to streamline the notice issued under section 9C CDDA (which is analogous to a letter before action) by instead providing a summary of the CMA's evidence; the opportunity to make oral representations will no longer be automatic (as these may be duplicative of the director's written representations) and removing the reference to 'access to file' which is a concept imported from CA98 investigations and which sits uneasily with usual disclosure procedures in civil litigation, including those set out in the Civil Procedure Rules.</p> <p>Issuing an application for a competition disqualification order: We propose to maintain the withdrawal of paragraph 4.10 of the Current Guidance to enable the CMA to issue an application for a competition disqualification order in the High Court before the expiry of the period for the undertaking to bring an appeal in the Competition Appeal Tribunal. This gives the CMA greater flexibility to issue proceedings and will enable the CMA and/or director to ask the</p>	Chapter 4

Subject matter	Summary of main proposal(s)	Relevant Chapter in this consultation document
	High Court to transfer any dispute about infringement to the Competition Appeal Tribunal under The Section 16 Enterprise Act 2002 Regulations 2015 to be heard at the same time as the undertaking's appeal.	
Recognition for cooperation and early resolution	<p>Cooperation: We propose to take into account the material assistance and cooperation of a director with the CMA during a CA98 investigation. Such cooperation may merit a reduction in the period of disqualification either in an undertaking or on a recommendation to the court making a competition disqualification order.</p> <p>Early resolution: We update the Current Guidance to reflect our practice to agree, when an undertaking is offered by a director, a shorter period of disqualification than the CMA would otherwise accept at a later stage in proceedings or that a court might order. The reduction will vary according to the stage at which the undertaking is offered.</p>	Chapter 5

1.10 We have made changes throughout the Draft Revised Guidance to:

- (a) reflect current case practice;
- (b) update references to external organisations such as the specified regulators;
- (c) set out the CMA's publication policy; and
- (d) clarify points or simplify the drafting to reflect our experience.

1.11 We welcome stakeholder engagement and feedback on our proposals. We also welcome views on whether there are other opportunities for streamlining and clarifying the Draft Revised Guidance.

Structure of this consultation document

- 1.12 This consultation document focuses on the main proposals for change, summarised in the table above.
- 1.13 In Chapter 6 we set out the consultation questions we invite respondents to answer.

Consultation process

- 1.14 We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite responses. We welcome your comments on the changes to the Current Guidance that are proposed in the Draft Revised Guidance.
- 1.15 Please provide supporting evidence for your views where appropriate. We encourage you to respond to the consultation in writing (by email or alternatively by letter) using the contact details provided at paragraph 1.19 below.
- 1.16 When responding to this consultation please state whether you are responding as an individual or are representing the views of a group or organisation. If responding on behalf of an organisation, please make it clear who you are representing and, where applicable, how the views of the members of the organisation were assembled.
- 1.17 In accordance with its policy of openness and transparency, the CMA will publish non-confidential versions of responses on the CMA's webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please also provide a non-confidential version for publication on the CMA's webpages and explain why you regard the excluded information as confidential (see further paragraphs 1.22 to 1.25 below).

Duration

- 1.18 The consultation will run for 7 weeks, from 26 July 2018 to 13 September 2018.

Contact details

- 1.19 Responses should be submitted by post or email, by no later than 5pm on 13 September 2018 and should be sent to:

Jessica Radke / Ciara Brannigan
Litigation Group, Legal Service
Competition and Markets Authority
6th Floor
Victoria House
37 Southampton Row
London WC1B 4AD

Email: CDO.GuidanceConsultation@cma.gov.uk

Compliance with government consultation principles

- 1.20 The CMA has taken into account the [government consultation principles](#) which set out the principles that government departments should adopt when consulting with stakeholders.
- 1.21 The consultation period is seven weeks. We consider that this is appropriate in view of the extent of the proposed changes and length of the guidance.

Statement about how we use information and personal data that is supplied in consultation responses

- 1.22 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it. We are processing this personal data for the purposes of our work. This work relates to giving information or advice under section 6(1)(b) of the Enterprise Act 2002 in respect of matters relating to its functions. This processing is necessary for the performance of our functions and is carried out in the public interest in order to ensure that we properly consult on the Draft Revised Guidance before it is finalised and issued. For more information about how the CMA processes personal data, your rights in relation to that personal data,

how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our Personal Information Charter at www.gov.uk/government/organisations/competition-and-markets-authority/about/personal-information-charter.

- 1.23 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information whose disclosure would be contrary to the public interest and any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business⁴. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 1.24 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration representations you make in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under the Enterprise Act 2002.
- 1.25 If you are replying by email, this statement in paragraphs 1.23 – 1.24 overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

After the consultation

- 1.26 After the consultation, we will decide whether to make the changes proposed in the Draft Revised Guidance and whether any further changes are necessary. We will continue to engage with the sector regulators with concurrent CDDA powers on the text of the Draft Revised Guidance.
- 1.27 We will publish the final version of the Draft Revised Guidance on our webpages at www.gov.uk/cma. We will also publish a summary of the responses received during the consultation. These documents will be

⁴ The CMA's policy on disclosure is set out in *Transparency and disclosure: Statement of the CMA's policy and approach*, CMA6

available on our webpages and respondents will be notified when they are available.

The UK's exit from the EU

- 1.28 The CMA has powers to apply and enforce Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) alongside the European Commission. These two provisions are similar to the Chapter I prohibition and the Chapter II prohibition under the CA98. The main difference between the UK and the EU provisions is the geographic scope of the effect on trade. Articles 101 and 102 of the TFEU only apply to agreements and conduct which may affect trade between Member States.⁵ The Chapter I and Chapter II prohibitions apply to agreements and conduct which may affect trade within the UK.
- 1.29 Consequently, the Current Guidance contains certain references to EU competition law and EU institutions. There will therefore likely be some further textual amendment needed following the UK's exit from the EU. However, given that the full terms of the UK's exit have yet to be finally agreed, we do not consider it appropriate at this time to make changes to the Current Guidance in relation to EU exit. The extent of references to EU competition law and EU institutions in the Current Guidance is limited.

⁵ The case law of the European Court has interpreted the phrase 'may affect trade between Member States' broadly.

2. Legal framework

2.1 The competition disqualification regime is contained in CDDA sections 9A to 9E. These provisions were inserted by section 204 of the Enterprise Act 2002 and came into force on 20 June 2003.

Competition disqualification orders

2.2 The CMA has the power under the CDDA to apply to the court for a competition disqualification order ('CDO') against a person. The court must make a CDO against that person if:

- (a) an undertaking which is a company of which that person is a director commits a breach of competition law, and
- (b) the court considers that person's conduct as a director makes him unfit to be concerned in the management of a company.⁶

2.3 A CDO can be made only against a director of a company, building society, incorporated friendly society,⁷ NHS foundation trust or a member of a limited liability partnership.

2.4 A 'director' includes any person occupying the position of director, regardless of his or her title. This includes a shadow director (any person in accordance with whose directions or instructions the directors of a company are accustomed to act) and a de facto director (a person who assumes to act as a director).

2.5 A breach of competition law means an infringement of:

- (a) the Chapter I prohibition of the CA98;
- (b) Chapter II prohibition of the CA98;
- (c) Article 101 of the TFEU; or
- (d) Article 102 of the TFEU.

⁶ Section 9A(1)-(3), CDDA

⁷ In respect of an incorporated friendly society, 'director' includes a member of the committee of management or officer and excludes a shadow director.

- 2.6 When deciding whether a person's conduct as a director makes him unfit to be concerned in the management of a company the court must have regard to whether:
- (a) his/her conduct contributed to the breach of competition law;
 - (b) his/her conduct did not contribute to the breach but he/she had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and took no steps to prevent it; or
 - (c) he/she did not know but ought to have known that the conduct of the undertaking constituted the breach.⁸
- 2.7 The court may also have regard to the director's conduct as a director of a company in connection with any other breach of competition law.
- 2.8 During the period in which a person is subject to a CDO it is a criminal offence for him or her to:
- (a) be a director of a company;
 - (b) act as a 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; or
 - (d) act as an insolvency practitioner.⁹
- 2.9 Any person involved in the management of a company in contravention of a CDO is personally liable for all of the relevant debts of the company.
- 2.10 The maximum period of disqualification under a CDO is 15 years.

Competition Disqualification Undertakings

- 2.11 The CMA may accept a Competition Disqualification Undertaking ('CDU') from a director instead of applying for a CDO or, where the CMA has applied for a CDO, instead of continuing with that application.¹⁰

⁸ Sections 9(A)(5) and 9(A)(6), CDDA

⁹ Section 13, CDDA. Unless in relation to the activities in (a) to (c) the director has leave of the court (section 1(1)(a), CDDA)

¹⁰ Section 9B(2), CDDA

- 2.12 A CDU is an undertaking by a person that for the period specified in the undertaking he/she will not:
- (a) be a director of a company;
 - (b) act as a 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; or
 - (d) act as an insolvency practitioner.¹¹
- 2.13 A breach of a CDU has the same consequences as a breach of a CDO.¹²
- 2.14 The maximum period which may be specified in a CDU is 15 years.¹³

¹¹ Section 9B(3) CDDA. Unless in relation to the activities in (a) to (c) the director has leave of the court.

¹² Sections 13 and 15, CDDA.

¹³ Section 9B(5), CDDA.

3. Decision-making process

- 3.1 In this Chapter we explain the principal changes to the Current Guidance we are proposing in the Draft Revised Guidance that relate to the way in which the CMA makes decisions about whether to seek a CDO.
- 3.2 The Current Guidance (mainly in Chapter 4) sets out a five-step process which the CMA will follow when deciding whether to apply for a CDO. In summary the five steps outlined in the Current Guidance are to:
- (a) consider whether there has been a breach of competition law;
 - (b) consider the nature of the breach and whether a financial penalty has been imposed;
 - (c) consider whether the company in question benefited from leniency;
 - (d) consider the extent of the director's responsibility for the breach of competition law; and
 - (e) have regard to any aggravating and mitigating factors.
- 3.3 The experience we have gained in considering competition disqualification cases demonstrates that, while the considerations outlined in the Current Guidance remain relevant to the CMA's decision-making, the formalisation of the five-step process set out in the Current Guidance requires updating in light of our more developed thinking and practice. In some cases the 'steps' identified in the Current Guidance do no more than replicate the statutory conditions but in other cases they might be interpreted in a way that would suggest a more restrictive approach than is desirable or required under the CDDA.
- 3.4 The five-step process may also create the impression that all five steps will be of equal significance in a given case. By way of example, many of the aggravating and mitigating factors in the fifth step are likely to apply only in a small number of cases. We have found that directors in CDO cases have placed considerable emphasis on the aggravating and mitigating factors listed in the Current Guidance and have sought to treat these factors as exhaustive and hierarchical which they were never intended to be.
- 3.5 The CMA considers it more useful to assess the director's conduct in relation to the breach of competition law in the round by reference to the facts and circumstances of each individual case, the evidence available and whether or not it is expedient in the public interest to commence proceedings for a CDO. In practice the CMA takes into account a wide range of factors including the

facts and circumstances of each individual case and the evidence available. The changes we propose to the drafting of the Current Guidance would more accurately reflect this approach.

- 3.6 The approach outlined in Chapter 4 of the Current Guidance also, in our view, places restrictions on the CMA's powers under the CDDA which go beyond the limits imposed by the statute itself and beyond what is necessary to protect the director's legitimate rights. For example, the Current Guidance says that the CMA will consider whether to apply for a CDO where the relevant breach of competition law has been proven in a decision or judgment of the CMA or Regulator, the European Commission, the Competition Appeal Tribunal or the European Court but only in exceptional cases may consider seeking a CDO in the absence of such a decision or judgment. There is no such limitation in the CDDA. Section 9A(2) CDDA states that the court will determine whether an undertaking committed a breach of competition law.
- 3.7 While it is likely that the CMA will in most cases continue to rely on its decisions, or that of a Regulator, the European Commission, or of a court or tribunal to establish the breach of competition law, it is possible that there will be cases in which it is appropriate to apply for a CDO where the breach of competition law has not yet been established by a decision or judgment.¹⁴
- 3.8 The Current Guidance also states that it is not the intention of the CMA to apply for CDOs where the breach of competition law does not or did not have an actual or potential impact in the United Kingdom. Again, there is no such territorial restriction in the CDDA. While such cases are likely to be unusual, it would undermine the public protection rationale behind the disqualification regime for the CMA to rule out applying for a CDO against a director of a company that had infringed Article 101 or Article 102 of the TFEU in another territory.
- 3.9 Chapter 4 of the Current Guidance also addresses directors of parent and subsidiary companies (see paragraphs 4.4-4.5). We propose to amend these paragraphs to reflect the provisions of the CDDA and the CMA's practice more clearly. The CMA's practice is to consider the conduct of all directors of companies that constitute the undertaking when deciding whether to seek a CDO. The proposed amendments make it clear that the CMA will carefully consider all directors' conduct in relation to the breach of competition law in accordance with the principles set out at paragraphs 4.3 – 4.9 of the Draft Revised Guidance.

¹⁴ We address the proposed changes to paragraph 4.10 on appeals in Chapter 5 below.

- 3.10 In the Draft Revised Guidance we propose to set out the general principles and factors that inform the CMA's decision whether to apply for a CDO (see paragraphs 4.3 – 4.9 in the Draft Revised Guidance). We consider that these principles and factors encapsulate the considerations relevant to sections 9A(1)-(3) of the CDDA and the CMA's approach to decision-making in CDO cases. The essence of these changes is to make clear that the CMA will decide whether to commence proceedings for a CDO by reference to a wide range of considerations including the facts and circumstances of each individual case, the evidence available and the public interest in the disqualification of the director.
- 3.11 The replacement of the five-step process does not in any way diminish the high procedural standards or decision-making rigour that the CMA applies to cases, nor the rights of the director in question. On the contrary the principles and factors set out in the Draft Revised Guidance reflect the considerations that are set out in the five-step process along with many other factors. These principles and factors are carefully considered at the outset of a CDO investigation and revisited throughout the case as the CMA assesses whether it is appropriate and in the public interest to proceed to make an application for a CDO.

4. Section 9C notice and issuing proceedings

- 4.1 In this Chapter we explain the principal changes to the Current Guidance we are proposing in the Draft Revised Guidance that relate to:
- (a) the process and content of the notice issued pursuant to section 9C CDDA ('section 9C notice'); and
 - (b) the timing of the issue of the application for a CDO in the High Court.

Section 9C notice

- 4.2 If, following an investigation under section 9C CDDA, the CMA decides to apply for a CDO, the CMA must give notice to the person likely to be affected by the application and give that person an opportunity to make representations (section 9C(4) CDDA) before it makes the application.
- 4.3 The section 9C notice is a pre-action procedure akin to a letter before action in other types of civil litigation and broadly analogous to the procedure followed by the Secretary of State under section 16 CDDA in relation to other types of disqualification proceedings.
- 4.4 The pre-action procedure provided for in the Current Guidance, including as regards the section 9C notice, (see Chapter 5) goes beyond what is required by section 9C(4) CDDA. It appears that the Current Guidance was modelled on a CA98 case in which the CMA is the decision-maker. Director disqualification is a litigation based process, however, in which the CMA is merely a party (the claimant) and the court is the ultimate decision-maker. Consequently, applying the procedural safeguards afforded to a company before the CMA makes a finding of infringement and in many cases imposes a penalty in a CA98 investigation is neither necessary or appropriate in the pre-action stage of a director disqualification case. Those safeguards are built into the court process where, for example, the director has the right to a hearing and (subject to the Civil Procedure Rules and the overriding discretion of the court) the right to call and cross examine witnesses and to seek the disclosure of material.
- 4.5 The pre-action procedure in the Current Guidance also puts CDOs out of step with the procedures for other types of disqualification in the CDDA: for example, the information that the Current Guidance states that a director will receive in the section 9C notice exceeds what is routinely provided by the Insolvency Service in cases that may result in disqualification under section 6 or section 8 CDDA.

4.6 We consider, based on our recent experience of applying the Current Guidance, that the procedure and extent of the information it is envisaged will be provided to a director under that guidance is better suited to a process in which the CMA is the decision-maker, rather than in which it will make an application to the court. While the CMA will continue to provide most of the information in the section 9C notice that is envisaged by the Current Guidance, we propose to streamline the information it contains and the procedure around it in a number of important respects.

Evidence

4.7 The Current Guidance sets out that the CMA will provide the director with the evidence that it intends to submit to the court in support of its proposed application. This criterion would encompass the CMA's draft affidavit, any witness statements and all the documents referred to in the witness evidence.

4.8 The CMA's experience is that providing a full set of its evidence prior to issuing proceedings in court unnecessarily front loads the litigation, prolongs the pre-action process and results in considerable time, resources and costs being incurred by both the CMA and the director, potentially unnecessarily if the CMA does not subsequently make an application for a CDO for whatever reason (for example if the CMA decides not to proceed or the CMA accepts a CDU offered by a director). It is also inconsistent with the approach of the Insolvency Service in other disqualification proceedings.

4.9 We propose in the Draft Revised Guidance that the CMA will provide a summary of the evidence on which it proposes to rely along with an index to relevant documents. The summary of evidence will be sufficiently detailed to enable the director to understand the CMA's allegations in relation to both the breach of competition law and his or her unfitness. Further, the CMA may, where it considers it appropriate, provide a full draft of the evidence on which it intends to rely. The director may also request a copy of any of the documents in the index that are not already in their possession.¹⁵ As such, we consider that the proposed changes will streamline the process for the CMA and parties, while still achieving the purpose of the disclosure provided for in the Current Guidance.

4.10 The index of relevant documents will usually contain:

- (a) the confidential version of any infringement decision and all the documents referred to in the decision (we call these 'key documents');

¹⁵ Any documents which are provided may be subject to excisions for reasons of confidentiality.

- (b) witness interview transcripts and any other material gathered during the CDO investigation;
- (c) substantive correspondence with the director during the CDO investigation.

4.11 If the CMA commences proceedings for a CDO, the director will receive the CMA's affidavit, other witness evidence and all the supporting documents which are filed with the claim form in the High Court.

Access to 'the CDO file'

4.12 The Current Guidance provides that, if requested, a director can have access to the file concerning the proposed application (subject to any confidentiality excisions to the file). We consider that the terminology may be unhelpful as it confuses 'access to file' which is a procedure in CA98 cases with access to the evidence relating to the proposed application for a CDO. We propose to delete this provision in the Current Guidance.

4.13 The CMA will not provide the director with documents which are on the CA98 case file but which are not key documents ('non-key documents'). Non-key documents are not referred to by the CMA in its decision and, in our view, will not be relevant to director disqualification proceedings.

4.14 As explained above, the director will receive a summary of the CMA's evidence along with an index of relevant documents. This is considerably more information than required by section 9C(4) CDDA and provided by the Insolvency Service in sections 6 or 8 disqualification cases. Further, to the extent any director considers they are in any way disadvantaged by the process, for example because certain documents have not been disclosed to them, they can request these documents from the CMA or, if the CMA does not agree to disclose these documents, they will have an opportunity to make an application to the court to obtain disclosure once proceedings for a CDO have been commenced.

Oral representations

4.15 The Current Guidance provides that a director has the right to make oral representations if he or she wishes following the section 9C notice. By contrast, the CDDA provides simply that CMA must give the director an opportunity to make representations (section 9C(4) CDDA).

4.16 Our experience is that oral representations are often duplicative of written representations and involve a disproportionate amount of time, resources and

cost for limited benefit to the CMA and the director. While the CMA would, in appropriate cases, be amenable to meeting a director and his or her professional advisers in the pre-action stage to discuss the potential application for a CDO, we do not consider that an automatic right to make oral representations is necessary in circumstances where the director will have the opportunity to make full written representations to the CMA. If the CMA makes an application to the court there will be a full hearing at which the director will be represented, can give evidence in person and, subject to the permission of the court, call and cross examine witnesses.

Length of a CDU which the CMA would accept

- 4.17 The Current Guidance provides that the section 9C notice will give an indication of the length of a CDU that is likely to be accepted by the CMA. We propose to delete this provision as usually the period of disqualification in a CDU is a matter for discussion on a without prejudice basis because it is a means of settling the proposed litigation.
- 4.18 The CMA's current practice is to indicate the period of disqualification along with other terms that it would be prepared to accept from a director in without prejudice correspondence and/or discussions with the director or his/her professional advisers.

Issuing an application for a CDO

- 4.19 Paragraph 4.10 of the Current Guidance prevented the CMA from issuing director disqualification proceedings in the court whilst the decision or judgment on the breach of competition law remains subject to an appeal:

'Where an application for a CDO is made relying on a decision or judgment proving the breach of competition law, the application will not be made while the decision or judgment remains subject to appeal except in circumstances where the outcome of any appeal would not affect the relevant company's liability for the breach, for example if the appeal concerns the financial penalty only. 'Remains subject to appeal' for these purposes means either that the deadline for appeal against the decision or judgment has not yet passed, or that an appeal has been made but not yet determined.'

- 4.20 Pending this consultation, the CMA withdrew paragraph 4.10 in the Current Guidance with effect from 4 June 2018 and is now seeking views from consultees on whether the withdrawal of this paragraph should be maintained in the Draft Revised Guidance.

- 4.21 We consider that paragraph 4.10 places an unnecessary and unusual restriction on the CMA's freedom to issue proceedings at a time which it considers appropriate. Further, paragraph 4.10 would prevent the CMA, or a director from relying, in appropriate cases, on The Section 16 Enterprise Act 2002 Regulations 2015 ('the Transfer Regulations').
- 4.22 The Transfer Regulations came into force on 1 October 2015 after the Current Guidance was published. The Transfer Regulations enable the CMA and other parties to ask the High Court to transfer any challenge made by a director to the competition condition in section 9A(2), CDDA to be determined by the Competition Appeal Tribunal. This mechanism means that it will be possible for disputes about the breach of competition law – those arising in the CDO proceedings and those in an appeal against the CMA's infringement decision or the financial penalty - to be decided by the Competition Appeal Tribunal at the same time.
- 4.23 Once the Competition Appeal Tribunal delivers its judgment on the breach of competition law, the proceedings would revert to the High Court to determine whether the director is unfit and whether a CDO should be made.
- 4.24 We consider that the use of the Transfer Regulations in appropriate cases would have important procedural and cost benefits for all parties. We anticipate that in some cases a director may wish to align their professional advisers with those of their company and/or may wish to advance similar challenges to those of their company in relation to the breach of competition law.
- 4.25 Further, transferring the determination of the breach of competition law to the Competition Appeal Tribunal would militate against the risk of divergent decisions on the same breach of competition law in the Competition Appeal Tribunal and the High Court.
- 4.26 In order to make an application for the transfer of the competition condition to the Competition Appeal Tribunal, the CMA would need to issue a claim form for a CDO in the High Court earlier than is provided for under paragraph 4.10 of the Current Guidance, possibly around the time the confidential version of the Decision on the infringement is issued to the undertakings.
- 4.27 Consequently, we propose to maintain the removal of paragraph 4.10 in the Draft Revised Guidance.

5. Recognition for cooperation and early resolution

5.1 In this Chapter we explain the principal changes to the Current Guidance that we are proposing in the Draft Revised Guidance that relate to recognition for cooperation, and reductions in the period of disqualification for early agreement of CDUs.

Cooperation during a CA98 investigation

5.2 The CMA will not seek a CDO against current and former directors of companies that have benefited from leniency in respect of the activities to which the grant of leniency relates (see paragraphs 4.11 – 4.13 of the Draft Revised Guidance).¹⁶ Leniency in the Current Guidance means where the CMA has, following an application from a company, granted immunity from, or any reduction in, the financial penalty as set out in the CMA's guidance - *Leniency and no-action applications in cartel cases: OFT1495* ('the Leniency Policy') or that described in the European Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (see paragraph 4.12 of the Draft Revised Guidance).

5.3 The CMA does not at present propose to amend the provisions for immunity from CDO proceedings granted to directors of undertakings who have benefited from the Leniency Policy.

5.4 The CMA recognises that there will be cases in which the director of a company does not qualify for leniency but nonetheless personally provides material assistance to the CMA's CA98 investigation (for example, where the infringement relates to conduct that falls outside the Leniency Policy, or where a director was not a director of the company at the time of the leniency application).

5.5 We therefore propose to recognise expressly that the CMA, in respect of directors who provided material assistance and cooperated with the CMA during a CA98 investigation, may:

- (a) agree a period of disqualification in a CDU that is shorter than the CMA would otherwise accept or that a court might order in a CDO; or

¹⁶ There are exceptions which are set out at paragraph 4.13 in the Draft Revised Guidance and more generally in the Leniency Policy.

(b) make a recommendation to the court for a shorter period of disqualification than a court may be otherwise inclined to order in a CDO.

5.6 The amount of the reduction in the disqualification period would vary according to the facts and circumstances of each case.

Early resolution

5.7 The CMA's current practice is to agree a short reduction in the period of disqualification where a CDO is offered by a director at an early stage. The CMA considers that a reduction in the disqualification period is justified by the public interest in avoiding unnecessary cost and saving resource, as well as the public protection benefits of securing the disqualification of the director at an earlier stage.

5.8 We therefore propose to update the Draft Revised Guidance to reflect our current practice of agreeing to a reduction in the period of disqualification in a CDO. The reduction will vary according to the stage at which the undertaking is offered and the overall length of the period of disqualification.

6. Consultation questions

Question 1: Do you agree with the proposed changes to the Current Guidance which relate to the CMA's decision-making on whether to make an application for a CDO (described in Chapter 3)? Please give reasons for your views.

Question 2: Do you agree with the proposed changes to the Current Guidance that relate to the process and content of the section 9C notice and the timing of the issue of the application for a CDO in the High Court (described in Chapter 4)? Please give reasons for your views.

Question 3: Do you agree with the proposed changes to the Current Guidance on (a) recognition for cooperation and (b) reductions in the period of disqualification for early agreement of CDUs (described in Chapter 5)? Please give reasons for your views.

Question 4: Do you agree with the other proposed changes to the Current Guidance? Please give reasons for your views.

Question 5: Are there other aspects of the Current Guidance which you consider could be usefully clarified, and/or are there other aspects of our procedures where you think further changes could usefully be made (whether to the Current Guidance or to the CDDA)? Please explain which areas and why.