

Competition Disqualification Orders

Draft guidance

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1. Introduction

- 1.1 This guidance relates to the exercise of powers of the Competition and Markets Authority (CMA) under the Company Directors Disqualification Act 1986 (CDDA).¹ It does not offer any commentary on court procedure relating to competition disqualification orders (CDOs).
- 1.2 This guidance provides an overview of the legal framework for the CMA's powers to seek CDOs or accept Competition Disqualification Undertakings (CDUs) and the CMA's approach to the exercise of its powers.
- 1.3 Chapter 2 of this guidance provides an overview of the CMA's statutory powers to apply for CDOs. Chapter 3 outlines the statutory basis for CDUs. Chapter 4 sets out an indication of the factors which the CMA will consider when deciding whether to apply for a CDO. Chapter 5 outlines the procedure which the CMA will follow before applying to the court² for a CDO.
- 1.4 This guidance was published and came into effect []. It replaces the CMA's previous guidance – *Director disqualification orders in competition cases OFT510*.

¹ Sections 9A to 9E CDDA. The following 'specified regulators' can also exercise these powers: the Office of Communications; the Gas and Electrical Markets Authority; the Water Services Regulation Authority; the Office of Rail and Road; the Civil Aviation Authority; NHS Improvement; the Payment Systems Regulator; and the Financial Conduct Authority. See section 9E(2) CDDA.

² In England and Wales 'court' means the High Court. In Scotland 'court' means the Court of Session (section 9E(3) CDDA).

2. Competition disqualification orders

2.1 Under the CDDA, the court **must** make a CDO against a person if the court considers that the following two conditions are satisfied in relation to that person:

- an undertaking which is a company of which that person is a director commits a breach of competition law; **and**
- the court considers that person's conduct as a director makes him or her unfit to be concerned in the management of a company.³

Condition 1 – an undertaking which is a company of which that person is a director commits a breach of competition law

2.2 An 'undertaking' for the purposes of section 9A of the CDDA has the same meaning as it does for the purposes of the Competition Act 1998 (CA98) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).⁴ An undertaking includes any natural or legal person carrying on commercial or economic activities relating to goods or services, irrespective of legal status. It follows that a sole trader, partnership, company or a group of companies can each be an undertaking.

2.3 A CDO can only be made against a **director** or a **former director of a company**. A 'director' for these purposes includes a de facto director and a shadow director.⁵

2.4 A company means a registered company but also includes any unregistered company that is capable of being wound up under Pt V of the Insolvency Act 1986.⁶ Further the term 'company' also encompasses building societies,⁷

³ Sections 9A(1) to (3) CDDA

⁴ Section 9A(11) CDDA

⁵ Section 22(4) CDDA which provides that a 'director ... includes any person occupying the position of director, by whatever name called'. Further section 9E(5) which provides that 'director includes shadow director'. A shadow director is any person in accordance with whose directions or instructions the directors of a company are accustomed to act (section 22(5) CDDA). A person shall not be deemed to be a shadow director by reason only that the directors act on the advice given by that person in a professional capacity (section 22(5) CDDA). Director also includes a shadow director or officer of a building society, a member of the committee of management or officer of an incorporated friendly society, a director or officer of an NHS foundation trust and a member or shadow member of a limited liability partnership.

⁶ Section 22(2) CDDA.

⁷ Section 22A CDDA.

incorporated friendly societies,⁸ NHS foundation trusts⁹ and limited liability partnerships.¹⁰

2.5 A breach of competition law for the purposes of section 9A CDDA means an infringement of **any** of:

- the Chapter I prohibition of the CA98;
- the Chapter II prohibition of the CA98;
- Article 101 of the TFEU; and
- Article 102 of the TFEU.

2.6 The Chapter I prohibition is established by section 2(1) of CA98 and provides that:

‘... agreements between undertakings, decisions by associations of undertakings or concerted practices which:

(a) may affect trade within the United Kingdom; and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom are prohibited ...’.

2.7 The Chapter II prohibition is established by section 18 of CA98 and provides that:

‘... any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom’.

2.8 Article 101 of the TFEU provides that:

‘(1) The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market ...’.

2.9 Article 102 of the TFEU provides that:

⁸ Section 22B CDDA.

⁹ Section 22C CDDA.

¹⁰ Limited Liability Partnerships Regulations 2001 (SI 2001/1090 reg.4(2)).

‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States’.

Condition 2 – the court considers that person’s conduct as a director makes him or her unfit to be concerned in the management of a company

2.10 When deciding whether the second condition is satisfied, the court:

- **must** have regard to whether:
 - the director’s conduct contributed to the breach of competition law;¹¹
 - the director’s conduct did not contribute to the breach but he or she had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it; or
 - the director did not know but ought to have known that the conduct of the undertaking constituted the breach.
- **may** have regard to his conduct as a director of a company in connection with any other breach of competition law.
- **must not** have regard to any of the matters specified in Schedule 1 of the CDDA.¹²

Effect of a CDO

2.11 Unless the person has the permission of the court, during the period in which a person is subject to a CDO, it is a criminal offence for him or her to:

- be a director of a company;
- act as a receiver of a company’s property; and
- in any way, whether directly or indirectly, be concerned in or take part in the promotion, formation or management of a company.¹³

2.12 That person can also not act as an insolvency practitioner.¹⁴

¹¹ See paragraph 2.5 above for ‘breach of competition law’.

¹² Sections 9A(5) and (6) CDDA. Schedule 1 CDDA specifies matters to be considered when determining unfitness of directors in non-CDO cases.

¹³ Sections 1(1)(a) and 13 CDDA.

¹⁴ Section 1(1) CDDA.

2.13 The maximum period of disqualification is 15 years.¹⁵

2.14 In addition, 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.¹⁶

¹⁵ Section 9A(9) CDDA.

¹⁶ Section 15(1)(a) CDDA. Similarly, a person involved in the management of a company who acts or is willing to act on instructions given without leave of the court by a person whom he or she knows at that time to be the subject of a CDO will also be personally liable for all of the relevant debts of the company (section 15(1)(b) CDDA).

3. Competition disqualification undertakings

- 3.1 The CMA may accept a Competition Disqualification Undertaking (CDU) from a director either **instead** of applying for a CDO or, where a CDO has been applied for, **instead** of continuing with the application for a CDO.¹⁷
- 3.2 A CDU has the same effect as a CDO. For the period specified in the undertaking the person will not:
- be a director of a company;
 - act as a receiver of a company's property;
 - in 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.¹⁸
- 3.3 The maximum period which may be specified in a CDU is 15 years.¹⁹ Breach of a CDU has the same consequences as a breach of a CDO.²⁰
- 3.4 A director can offer to give a CDU at any time during an investigation or during court proceedings.
- 3.5 If an undertaking is accepted before court proceedings are commenced the CMA will not recover any costs of their investigation from that director.
- 3.6 Once court proceedings have been commenced, a director may still offer to give a CDU. If the CMA accepts the CDU, the court proceedings will stop. However, the court may order that the director pay the legal costs that the CMA has incurred up to the date of the CDU.
- 3.7 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.

¹⁷ Section 9B(2) CDDA.

¹⁸ Section 9B(3) CDDA. However, a CDU may provide that a prohibition covering the categories in the first three bullet points not apply if the person first obtains the permission of the court.

¹⁹ Section 9B(5) CDDA.

²⁰ Sections 13 and 15 CDDA. See also paragraphs 2.11 and 2.13 above.

4. Applications for competition disqualification orders

4.1 The CMA has the power to apply to the court for a CDO.²¹

Investigative powers

4.2 In addition to relying on information obtained for the purpose of an investigation under section 25 of the CA98 or otherwise, the CMA may also use any or all the information-gathering powers in sections 26 to 28 of the CA98 specifically for the purposes of deciding whether to apply for a CDO.²²

General principles

4.3 The CMA will decide whether to investigate the conduct of a director and whether to apply for a CDO by reference to the facts and circumstances of each individual case, the evidence available and the public interest in the disqualification of the director. In making this assessment, the CMA will consider the factors described at paragraphs 4.4 – 4.8 amongst others.

4.4 The CMA will consider whether a company of which the person is a director (and which is an undertaking) has committed a breach of competition law.²³ Other factors relating to the breach of competition law that the CMA may take into account include:

- the nature and seriousness of the infringement;²⁴
- the duration of the infringement;
- the impact or potential impact of the infringement on consumers;
- the conduct of the undertaking during the CMA's investigation; and
- any previous breaches of competition law committed by the undertaking.

4.5 The nature and extent of the director's responsibility for, or involvement in, the breach, whether by action or omission will be considered by the CMA in order to assess whether the director is unfit to be concerned in the management of a

²¹ Section 9A(10) CDDA.

²² Section 9C(2) CDDA.

²³ This is the first condition for making a CDO (see paragraph 2.1).

²⁴ As explained in paragraph 2.5, the CMA may pursue a CDO application in respect of any infringement of Chapter 1 CA98; Chapter 2 CA98; Article 101 TFEU; or Article 102 TFEU (section 9A(2) and (4) CDDA).

company. In all cases the CMA must, as directed by section 9A CDDA, consider whether:

- the director's conduct contributed to the breach of competition law;
- the director's conduct did not contribute to the breach of competition law but he or she had reasonable grounds to suspect that the undertaking's conduct constituted a breach and took no steps to prevent it; or
- the director did not know but ought to have known that the undertaking's conduct constituted a breach.

4.6 The CMA will consider other matters going to unfitness such as the conduct of the director during the CMA's investigation into the breach of competition law and whether the director co-operated with the CMA during the investigation.

4.7 The CMA will consider whether the director has been involved directly or indirectly in previous breaches of competition law.

4.8 The deterrent effect of a CDO in the relevant market, and more widely, will also be taken into account by the CMA recognising the importance of the public interest in deterring breaches of competition law.

4.9 The above principles and factors are not exhaustive. The CMA retains full discretion when deciding whether to investigate the conduct of a director, to apply for a CDO, or to accept a CDU.

Directors of parent and subsidiary companies

4.10 An undertaking may in some cases constitute a group of companies (treated for the purposes of competition law as a 'single economic entity') and more than one company in the same group may be liable for a breach of competition law by the undertaking. When considering whether to apply for a CDO against the director of a company or companies which constitute the undertaking, the CMA will carefully consider the director's conduct in relation to the breach of competition law in accordance with the principles outlined at paragraphs 4.4 – 4.9 above.

Immunity and leniency

- 4.11 Subject to paragraph 4.13 below, the CMA **will not** apply for a CDO against any current or former director of a company that has benefitted from leniency in respect of the activities to which the grant of leniency relates.²⁵
- 4.12 'Leniency' for these purposes means immunity from, or any reduction in, financial penalty in the manner described in the *CMA's Guidance as to the Appropriate Amount of a Penalty* (the Penalties Guidance)²⁶ or that described in the European Commission *Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*,²⁷ or any publications replacing them. 'Reduction' for these purposes does not mean a reduction in the amount of financial penalty imposed for a breach owing to the application of any mitigating factors or circumstances discussed in the Penalties Guidance or the European Commission *Guidelines on the Method of Setting Fines*,²⁸ or to the application of a settlement or early resolution discount.
- 4.13 However, the CMA may consider applying for a CDO against:
- a director who has at any time been removed or has otherwise ceased to act as a director of a company owing to his or her role in the breach of competition law in question or for opposing the relevant application for leniency; or
 - a director who fails to co-operate with the leniency process – that is, a director who fails to maintain continuous and complete co-operation throughout the CMA's investigation (including any criminal investigation by the CMA) and until the conclusion of any action taken by the CMA as a result of its investigation irrespective of whether the relevant company has been granted immunity or leniency by the CMA or the European Commission.²⁹
- 4.14 To minimise the risk of a CDO application being made against them, company directors whose companies have been involved in cartel activities should therefore seek to ensure that their companies approach the CMA and, if appropriate, the European Commission for leniency.

²⁵ The CMA's policy on leniency is set out in *Applications for leniency and no action in cartel cases, OFT's detailed guidance on the principle and process*, July 2013 OFT1495 ('**Leniency Guidance**').

²⁶ *CMA's guidance as to the appropriate amount of a penalty*, CMA73.

²⁷ OJ 2006 C298/11.

²⁸ OJ 2006 C210/02.

²⁹ See the Leniency Guidance.

Cooperation

- 4.15 In cases where a director does not qualify for leniency, the CMA may take into account the extent to which the director has provided material assistance and co-operation to the CMA in its investigations, both when considering whether or not a director is unfit to be concerned in the management of a company and, if so, whether such co-operation merits a reduction in the period of disqualification either in the form of a CDU or a recommendation to the court when it is making a CDO.

5. Procedure

5.1 Before making an application for a CDO against a person, the CMA will give notice to the person likely to be affected by the application (a 'section 9C notice').³⁰

5.2 The section 9C notice will include the following information:

- that the CMA proposes to apply for a CDO against that person;
- the consequences for that person of a CDO being made against him or her;
- the grounds for the proposed application;
- a summary of the evidence that the CMA will rely on in support of its proposed application, together with an index of relevant documents;
- that the person may request a copy of any of the documents listed in the index of relevant documents that are not already in his or her possession, and a deadline by which any such request should be made;³¹
- that the person has an opportunity to make written representations prior to the CMA making the proposed application, and a deadline by which that person should submit written representations;
- that the person's representations may be made by a legal advisor on the person's behalf;
- that the person may wish to offer the CMA a CDU, which, if accepted by the CMA, would mean that the CMA would not make the application for a CDO;
- an assurance that, if a CDU offered by that person is accepted by the CMA before proceedings are issued, the CMA will not seek to recover any costs from that person; and
- a statement that once a CDO application has been made to the court, the award of costs will be at the discretion of the court and that the general principle is that costs will be awarded against the unsuccessful party.

³⁰ Sections 9C and 16(1), CDDA.

³¹ Any documents which are provided may be subject to excisions for reasons of confidentiality.

6. Publication

The CMA will register CDOs and CDUs at Companies House, which is required to maintain a register of all disqualified directors. The Companies House register of disqualified directors can be accessed through their website: www.gov.uk/search-the-register-of-disqualified-company-directors.

The CMA will publish CDOs and CDUs on the relevant pages of its website and will make announcements, including informing media organisations, at key stages during a case such as the issue of court proceedings, the acceptance of a CDU and the making of a CDO. Further detail on the CMA's policy and approach to transparency and disclosure can be found in *Transparency and disclosure: Statement of the CMA's policy and approach*, CMA6.