19 September 2018

Linklaters LLP Response to CMA Consultation

"Revised guidance on competition disqualification orders"

1 Introduction

1.1 Linklaters LLP ("**Linklaters**") welcomes the opportunity to comment on the Competition and Markets Authority's ("**CMA**") consultation on competition disqualification orders ("**CDOs**").

1.2 By way of general comment, we think it is important to keep in mind that CDOs were conceived as a tool to protect the public rather than a deterrence mechanism: indeed, that purpose is implicit in the unfitness standard to be applied by the Court.[1] That does not, of course, exclude their deterrence effect but it will determine the way in which the Court approaches the making of CDOs and should influence the way in which the CMA determines its policy in making such applications.

1.3 In addition, the consequences of a CDO or competition disqualification undertaking ("**CDU**") may have a very serious impact on an individual's livelihood, perhaps ending their future prospects as a director. Further, it is important to bear in mind the low level of personal responsibility, under the *Director disqualification orders in competition cases OFT510* (the "**Current Guidance**"), which can attract a CDO. CDOs are directed not only at the person directly responsible for the infringement but also at those who have a relevant supervisory responsibility. Any guidance issued by the CMA to assist directors to ensure their companies' competition law compliance and avoid being personally implicated in any competition law breach therefore needs to clearly set out the legal framework for the CMA's powers and the CMA's approach to the exercise of its powers.

1.4 It is therefore imperative that the CMA strictly observe due process standards and the Rule of Law.

1.5 As a result, while we welcome some of the CMA's proposals in *Competition Disqualification Orders: Draft guidance CMA93con* (the "**Draft Guidance**"), we have reservations about certain aspects. These issues are exacerbated by limited precedents: although this is the first time the CMA is consulting on its guidance on CDOs since having successfully obtained CDUs in two investigations under the Competition Act 1998 ("**CA98 investigations**"), there continues to be limited precedent to guide the CMA's effective use of CDOs. We discuss each of the issues raised by **Questions 1-3** of the consultation in turn below. We have no comments on **Question 4** and **Question 5**. We would be happy to discuss any aspects of our response with the CMA.

2 Decision-making process

2.1 The CMA proposes to replace the five-step decision-making process set out in the Current Guidance in lieu of a more "in the round" assessment based on the "*facts and circumstances of each individual case and the evidence available*."[2] We appreciate that the CMA feels this will better enable it to "*reflect the considerations that are set out in the five-step process*

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[1] "*In the Government's view, disqualification is not a form of punishment. It is intended to protect the public from directors whose actions or omissions have shown them to be unfit to be involved in the management of a company.*" (House of Lords, 15 October 2002, column 845).

[2] *Revised guidance on competition disqualification orders: Consultation document CMA93* (the "**Consultation Paper**"), paragraph 3.5

along with many other factors."[3] However, we are concerned that this will result in significantly less legal certainty and it is not clear that the Current Guidance does not confer the discretion the CMA seeks. For example, paragraph 4.9 of the Draft Guidance clearly states that the principles and factors contained within the Draft Guidance "*are not exhaustive*" and that the CMA retains "*full discretion*". Given the impact of a CDO on a director's career, the test for whether the CMA will apply for a CDO should be set out clearly in the CMA's guidance, and a high degree of legal certainty should attach to it.

2.2 For example, the CMA states that there may 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*."[4] Our concerns with this timing are set out in Section 4 below. However, even from a certainty perspective we foresee challenges were the CMA to adopt this approach. It is not always clear whether particular conduct is in fact anti-competitive: indeed, in the parliamentary debates concerning adoption of CDOs, it was emphasised that "*competition law is seldom easy to determine and is never black and white, there are often legitimate differences of opinion as to whether conduct is pro-competition or anti-competitive.*"[5] In most cases, it is not straightforward whether an infringement of competition law existed, let alone the extent of a director's responsibility for it and any aggravating and mitigating circumstances.

2.3 One example of this is excessive pricing, which has recently come into the focus of global competition regulators, including the CMA. The case law around determining whether a price is too high, when an infringement commenced and ceased, and whether a heightened price level stems from abusive market power is already conceptually difficult and inconsistent. The CMA's proposal to remove a clear, step-by-step decision-making process has the potential to add to this difficulty and inconsistency, to the significant detriment of directors of companies found in breach of competition law.

2.4 The CMA indicates that it considers the current five-step process to be too restrictive. Particular criticism is made of the list of aggravating and mitigating factors listed in the Current Guidance, which were never intended to be exhaustive or hierarchical. We would suggest that the CMA continues to apply flexibility in its decision-making whether to apply for a CDO via the more open-ended aspects of the five-step process. Both the fourth and fifth steps of the current five-step process allow the CMA to consider in the round all the facts and circumstances of the director's competition law culpability requiring the public to be protected from him or her.

3 Section 9C notice

3.1 Director disqualification is an important power in the CMA's competition enforcement toolkit. Despite its punitive consequences for an individual, as a civil sanction, it has both a lower standard of proof and avoids many of the difficulties for the CMA associated with the prosecution of the criminal offence. Although less intrusive than imprisonment, the disqualification may have significant implications for an individual's career.

3.2 On this basis, we consider that the director should be furnished with all of the evidence relating to the proposed application for a CDO, including those documents which the CMA may consider at the time to be "non-key documents". We note the CMA's reasoning

[3] *Ibid.*, paragraph 3.10.

[4] *Ibid.*, paragraph 3.7.

[5] House of Lords, Hansard Debates, 15 October 2002

regarding the possibility for duplication as between written and oral representations, as well as the requirements of section 9C(4) Company Directors Disqualification Act 1986 ("**CDDA**") in this regard. We do think it is important that, in line with the Draft Guidance, there is sufficient opportunity for oral representations to be made in appropriate cases. This is particularly the case given that a director disqualification may also result from a CDU; i.e. absent any court-based process.

4 Issuing proceedings

4.1 The CMA's guidance before it was updated without consultation on 4 June 2018 stated that the CMA will not make an application for a CDO "*while the decision or judgment remains subject to appeal*".[6] The CMA has deleted this paragraph such that the CMA may now pursue a CDO in relation to a decision before the deadline for appeal against the decision has passed or any appeal has been determined (except in circumstances where the outcome of any appeal would not affect liability for the breach, such as where the appeal concerns the financial penalty only). The CMA envisages that this would then allow any appeal of a CDO to be heard by the Competition Appeals Tribunal together with (or close to) the appeal on the infringement decision itself.

4.2 It is our strong view that the CMA should continue to take the approach that CDOs may only be applied for when an infringement decision or judgment is final. Before that point, issues that are raised in proceedings are likely material to the issues that would arise in the context of a CDO application. Normally, one would expect the seriousness, factual basis for and context of the infringement to form an important element in any appeal. We would also expect these issues to play an equally (if not more) important role when the court determines whether it is appropriate to impose a CDO.

4.3 We would expect that, where the circumstances are such that they merit application for a CDO, they should also be sufficiently serious to merit awaiting a final decision or judgment to be issued, and all appeals processes to have been exhausted. As described in Section 3 above, we consider it imperative that the CMA closely observes due process when issuing an application for a CDO. It is neither an unnecessary nor an "*unusual restriction on the CMA's freedom to issue proceedings*" to expect it to await a final resolved judgment before applying for a CDO.[7]

4.4 To put the point another way, the damage to an individual's reputation and standing as a result of commencement of proceedings against them cannot be reversed, unlike an infringement decision subject to appeal.

5 Recognition for cooperation

5.1 Linklaters welcomes the CMA's proposal to expressly recognise that the CMA may reward directors who have provided material assistance and cooperated with the CMA during an CA98 investigation. Further, we would encourage the CMA to treat individual directors who have coordinated closely with the CMA similarly to directors of companies that have benefitted from leniency.

5.2 Applying for leniency is often a finely-balanced decision. As stated at paragraph 2.2 above, the circumstances around an infringement of competition law can be highly complex. Added

[6] Current Guidance, paragraph 4.10 as prior to 4 June 2018.

[7] Consultation Paper, paragraph 4.21.

to this, companies often have no control over where they are in the queue for leniency and individual company directors whose companies have been involved in cartel activity may be prevented from seeking to ensure that their companies are among the first to approach the CMA. This is particularly the case for former directors who are no longer members of the board of directors when a leniency application would be appropriate, or the CMA's investigation progresses.

5.3 Extending immunity from CDOs to directors and former directors who made significant contributions to the CMA's investigation would incentivise directors to cooperate closely with the CMA from the beginning of an investigation, long before the possibility of the CMA applying for a CDO is considered.

5.4 We therefore agree in principle with the spirit of the CMA's proposed changes to the Current Guidance on the recognition for cooperation. However, we would urge the CMA to go further and to agree not to pursue current and former directors who have provided material assistance and cooperated with the CMA.

6 Recognition for early resolution

6.1 The CMA proposes to codify its current practice of agreeing to reductions in the period of disqualification where a director agrees to a CDU. In principle, we agree with this proposal of recognising and incentivising directors to work together with the CMA in accepting a CDU from a director instead of insisting upon a CDO against that person. We also see the merit of the CMA's desire to avoid unnecessary cost and resource, as well as fulfilling the deterrence aim of CDOs at an earlier stage.

6.2 However, our view is that, although it may be acceptable to use CDUs to truncate what could otherwise be a long process through the courts, individuals should never be pressured into giving a CDU. The CMA is proposing to reduce the period of disqualification where a director agrees to a CDU depending on when the director offers a CDU. We are concerned that this will put directors under undue pressure to offer a CDU too early in the process, and disincentivise a director from engagement with the CMA in later stages of the CMA's investigation.

6.3 There must be sufficient safeguards in place to ensure that this does not happen: most importantly, the process stated for CDOs (including the requirement for a decision in which fines are imposed) should be applied with equal rigour in the case of CDUs. Likewise, the CMA should never accept a CDU except in cases where it is satisfied, based on objective criteria, that a CDO would be issued by a court. This requires the CMA to only accept CDUs when their investigation is sufficiently advanced, and directors should not be penalised for cooperating at a later stage. Given a CDU is dependent on the director's positive decision to give one, he or she cannot be implicitly obliged to give one prior to an appeal. Earlier would be premature in the CMA's enforcement process.

6.4 While we agree in principle, with the proposed changes to the Current Guidance with respect to reductions in the period for disqualification for early agreement of CDUs in principle, we would urge the CMA to extract CDUs with caution to ensure that directors are not coerced into agreeing to a CDU in lieu of a longer, but more fair, process.

Linklaters LLP, 19 September 2018