Baker McKenzie.

RESPONSE TO CMA CONSULTATION: COMPETITION DISQUALIFICATION ORDERS

Baker McKenzie welcomes the opportunity to comment on the CMA's consultation: Competition Disqualification Orders ("Draft Guidance"). Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on UK and EU competition law. We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

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.

1.1 In principle, we do not disagree with the CMA's proposal to remove the five-step process as set out in the Current Guidance and agree that any new guidance should be updated to reflect the CMA's recent experience of applying for and securing CDOs. However, we do not consider that the Draft Guidance provides sufficient clarity on the CMA's current practice and thinking around this. The Consultation document notes that in practice, the CMA takes into account a wide range of factors when deciding whether to apply for a CDO. However, these factors are not sufficiently described in the Draft Guidance. We acknowledge that each case will be fact-specific and depend on the individual circumstances of the director, but it would be useful to include examples of the relevant factors that might be applicable. The Current Guidance is quite helpful in this respect, under Steps 4 and 5. We note the CMA's concern that directors in CDO cases have apparently placed too much emphasis on the lists of aggravating and mitigating factors in the Current Guidance, but this concern could be addressed by adding wording to make it clear that such factors are not definitive and are examples. Given that a CDO is a serious sanction, it is essential that the CMA's policy is transparent. In our view, the proposed removal of the relevant factors that the CMA takes into account reduces transparency.

1.2 Given the serious personal consequences of a CDO, we do not consider that it is appropriate for the CMA to apply for CDOs when the related competition law infringement has not been established by a regulator's decision or court judgment. To apply for CDOs when there is no underlying finding of a breach would put the director in a very difficult position since he or she would have to address allegations levelled against the company, even though the director may have no actual personal knowledge of the alleged infringement. The director would be less able to put forward an adequate defence (and may even lack completely the support, resources and records of the infringing company to enable the director to defend himself/herself at all). There is a risk that an innocent director may opt for a shorter CDU, rather than face the complexity, expense and adverse publicity associated with CDO proceedings. In other words, the CMA may find that it has inadvertently 'coerced' directors into accepting periods of disqualification simply because those directors did not have the resources to address the substantive allegations. We therefore consider that the revised guidance should continue to make it clear that the CMA will consider whether to apply for a CDO where the relevant breach has been proved in a regulator's decision or court judgment.

1.3 We also do not agree with the proposal to remove the wording in the Current Guidance 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 impact in the UK. It would not, in our view, be appropriate to make CDO applications on the basis of foreign proceedings which lack a nexus with the UK.

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.

2.1 We agree in principle with the CMA's purpose of streamlining the procedure for issuing a section 9C notice and do not disagree with the proposal to provide a summary of the evidence on which it proposes to rely, along with an index to relevant documents. However, we consider that the director should have an automatic right to inspect the full file (including "non-key documents") if he or she wishes to do so, as a matter of protecting his or her rights of defence, and the CMA should not be able to refuse such requests.

2.2 We do not disagree with the CMA's proposal to remove the automatic right to make oral representations, as these can in practice be duplicative of written submissions. However, the revised guidance should make it clear that the director and his or her advisors are able to request a meeting with the CMA in the pre-action stage to discuss the potential CDO application.

2.3 Regarding the removal of paragraph 4.10 of the Current Guidance, which prevents the CMA from applying for a CDO whilst the relevant decision or judgment on the breach of competition law is on appeal, in our view, it is not appropriate to apply for a CDO when an appeal is on foot. This is the case even if that appeal only relates to quantum (and not liability), because there is a chance that a fine could be set aside in its entirety. CDOs constitute a very serious sanction which can have a significant impact on an individual's present and future livelihood. There is also a long-term stigmatic effect on the individual concerned. Given the personal risks involved with a CDO, in our view the CMA should re-insert paragraph 4.10.

2.4 According to the Consultation document, the CMA considers that if it was able to seek a CDO while an infringement finding was subject to appeal, in certain cases this would mean that disputes regarding the infringement could be addressed at the same time by the CAT. This may then reduce the risk of divergent outcomes between the CAT and the High Court in relation to the assessment of the same competition law infringement. If the CMA decides to retain the removal of paragraph 4.10 we consider that further guidance is necessary on how this approach would work in practice, including how the rights of the individual director would be adequately protected.

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.

3.1 We welcome the proposed changes on recognition for cooperation and reduction in the period of disqualification for early agreement of CDUs. We would welcome clarity on the factors that the CMA would take into account when deciding whether a director who does not qualify for leniency has provided "material assistance and cooperation".

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

4.1 Paragraphs 4.27 - 4.29 in the Current Guidance confirm that CMA and regulators would not expect to apply for CDO where the director has been convicted of the criminal cartel offence (as this would be considered by the convicting court), and will not apply for a CDO against any beneficiary of a no-action letter in respect of the cartel activities specified in that letter. These sections do not appear in the Draft Guidance. In our view these paragraphs should be included in the revised guidance.

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.

5.1 We have no further comments.

Baker McKenzie

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