

Revised guidance on competition disqualification orders

Response to Consultation

© Crown copyright 2019

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. Introduction and summary	2
2. Issues raised by the consultation and our response	4
Decision-making process	4
Section 9C notice and issuing proceedings	5
Recognition for cooperation and early resolution	8
Other proposed changes to the Guidance	9
3. List of Respondents	12

1. Introduction and summary

Introduction

- 1.1 The CMA is the UK's primary competition and consumer authority. It is an independent non-ministerial government department with responsibility for carrying out investigations into mergers, markets and the regulated industries and enforcing competition and consumer law.
- 1.2 The CMA 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 law¹.
- 1.3 On 26 July 2018, the CMA commenced a seven-week consultation on proposed changes to the Current Guidance. Alongside the consultation document, the CMA published draft revised guidance ('the Draft Guidance') showing the proposed changes reflecting the experience the CMA has gained exercising its powers under the CDDA, the judicial nature of the director disqualification process and embedding efficient investigation and decision-making practice.
- 1.4 Following a consultation process, the CMA is replacing the Current Guidance with new guidance – CMA102 Guidance on competition disqualification orders ('the New Guidance') – effective from 6 February 2019. Consequently, the Current Guidance is withdrawn as of the same date.
- 1.5 Any reference to the Current Guidance in other guidance published by the CMA must be read as references to the New Guidance. Where there is any difference in emphasis or detail between the New Guidance and other CMA guidance, the New Guidance will take precedence.

Purpose of this document

- 1.6 The consultation document that accompanied the Draft Guidance set out the questions on which respondents' views were sought (the questions are set out below for ease of reference).

¹ The CDDA applies to England, Wales and Scotland. The CMA's powers relating to the disqualification of persons for being directors of companies in Northern Ireland are contained in the Company Directors Disqualification (Northern Ireland) Order 2002/3150 which are the same in all material respects as those under the CDDA.

- 1.7 This document is intended to summarise the key issues raised by the three responses we received (all of which were from legal advisers or associations of legal advisers) and the CMA's views on these key issues. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available on the [consultation page](#). This response document should be read in conjunction with the consultation document which contains further background and explanation.

Consultation questions

- 1.8 **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 competition disqualification order ('CDO') (described in Chapter 3)? Please give reasons for your views.
- 1.9 **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.
- 1.10 **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 a competition disqualification undertaking ('CDU') (described in Chapter 5)? Please give reasons for your views.
- 1.11 **Question 4:** Do you agree with the other proposed changes to the Current Guidance? Please give reasons for your views.
- 1.12 **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 be made (whether to the Current Guidance or to the CDDA)? Please explain which areas and why.

2. Issues raised by the consultation and our response

- 2.1 The respondents' responses to the questions are summarised in order below together with the CMA's views on the responses.

Decision-making process

- 2.2 The Draft Guidance included changes to reflect the way in which the CMA makes decisions about whether to seek a CDO (explained in Chapter 3 of the consultation document).

Summary of responses

Decision-making

- 2.3 One respondent agreed that the guidance should be updated to reflect the CMA's experience of director disqualification cases and agreed in principle with the removal of the 'five step process' in the Current Guidance. However, respondents generally considered that the Draft Guidance on the way in which the CMA makes decisions about whether to seek a CDO lacks sufficient clarity on the CMA's practice and approach.
- 2.4 Some respondents thought that the substance of step 4 (extent of the director's responsibility for the breach) and step 5 (aggravating and mitigating factors) should be included in the Draft Guidance. One respondent submitted that given the impact of a CDO on a director's livelihood the test for applying for a CDO should be clearly set out in the guidance entailing a high degree of legal certainty.

Competition infringements in another territory

- 2.5 One respondent did not agree with the proposal to remove the restriction in the Current Guidance on applying for a CDO where the breach of competition law does not or did not have an impact in the UK because, in their view, it would be inappropriate to pursue an application for CDO on the basis of foreign proceedings which lack a nexus with the UK.

The CMA's views

Decision-making

- 2.6 The CMA has carefully considered respondents' comments. The CMA, however, does not consider that the reframing of how the CMA will reach decisions about whether to seek a CDO lacks clarity. It is important that the

guidance appropriately reflects the CMA's decision-making in practice, which entails an assessment of a director's conduct in relation to a breach of competition law in the round by reference to the facts and circumstances of each individual case, the evidence available and the public interest in pursuing proceedings for a CDO. The legal framework for a CDO is clearly set out in the CDDA and whether the CMA will apply for a CDO in any given case is an exercise of discretion involving the consideration of the test in the CDDA combined with a wide range of factors that are fact specific and which include but extend beyond those set out in the five-step process.

- 2.7 The factors set out in the five-step process remain considerations that the CMA will generally take into account where relevant in a case-by-case assessment. However, legislating for or providing examples of specific factors to be taken into account by the CMA is misleading in the context of the discretionary exercise of a power in a fact specific individual case. The CMA recognises that comments made in this regard by respondents may be in part driven understandably by the absence of judicial precedent on the interpretation of section 9A of the CDDA. Inevitably as the case law develops on CDOs, directors and their legal advisers will have more clarity on cases in which a CDO may be made by the court.

Competition infringements in another territory

- 2.8 The CMA does not consider that it would be inappropriate to make a CDO application based on a breach of competition law in another jurisdiction not least as Parliament placed no such restriction on the CMA's powers under the CDDA. While such cases are likely to be rare, as noted in the consultation, we consider that it would undermine the public protection rationale of the director disqualification regime to prevent the CMA seeking a CDO against a director of a company that infringed Article 101 or 102 of the Treaty on the Functioning European Union in another territory.

Section 9C notice and issuing proceedings

- 2.9 The Draft Guidance set out proposed changes (a) to the process prior to, and content of, the notice issued pursuant to section 9C of the CDDA ('section 9C notice') and (b) to the timing of the issue of an application for a CDO (see chapter 4 of the consultation document).

Summary of responses

Access to documents in the pre-action phase

- 2.10 One respondent agreed in principle with the proposal to streamline the procedure for issuing a section 9C notice including providing a summary of the evidence on which the CMA proposes to rely. Some respondents had reservations about the proposal to provide a director with key documents (namely, the documents referred to in the CMA's decision on the breach of competition law) without access to other documents that may be on the CMA's file to protect a director's 'rights of defence'.

Automatic right to make oral representations

- 2.11 Two respondents had no objection in principle to the removal of the automatic right to make oral representations but suggested that the CMA allow for a meeting or oral representations in appropriate cases. Another respondent sought clarification on the reasoning for removing the automatic right to make oral representations as they were concerned it may undermine the directors 'rights of defence'.

Issuing a CDO claim whilst an appeal to the competition infringement decision is pending

- 2.12 Respondents raised concerns about 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 subject to appeal or the time limit for appeal has not expired. These respondents submitted that the issue of proceedings for a CDO against a director can cause serious reputational harm. One respondent posited that a director may not be able to advance an adequate defence to the breach of competition law and may lack the resources and records available to the undertaking. Further the same respondent was concerned that this approach may give rise to a risk of a director opting to give a CDU rather than face the complexity, expense and adverse publicity of CDO proceedings.

The CMA's views

- 2.13 The proposed changes set out in chapter 4 of the consultation document aim to streamline the pre-action process, directly reflect the provisions of the CDDA and bring the CMA's procedures into alignment with other types of director disqualification in the CDDA. A consistent theme from the responses is the concern about ensuring that the CMA safeguards a director's 'rights of defence'. In our view this concern is misplaced. As noted in the consultation document, the CMA is not the decision-maker in a director disqualification case; that is the role of the court. The director's 'rights of defence' are therefore safeguarded by the court. The CMA is effectively a claimant in a litigation process - its role is to investigate and issue proceedings against a

director for a CDO where, in the CMA's view, the test in section 9A(1)-(3) of the CDDA is met and it is in the public interest to proceed with the case. Following the issue of the claim by the CMA, the director will have the opportunity to file evidence in response to the CMA's evidence, a hearing will be convened by the court at which the director, if he or she wishes, can give evidence and adduce evidence from, or cross-examine, other witnesses and the director can seek disclosure of relevant material held by the CMA.

Access to documents in the pre-action phase

- 2.14 We do not consider that a director should have a right to inspect the CMA's full file on the competition law infringement. In the pre-action phase at the issue of the section 9C notice, directors are usually provided, on request, with all the documents referred to in the CMA's competition infringement decision and any relevant material gathered, and substantive correspondence, during the CDO investigation (subject to any confidentiality or data protection restrictions). In some cases, where the CMA has yet to reach a final decision, the director will be provided with the CMA's statement of objections. These documents will in most cases be extensive. We do not consider that other documents on the CMA's file relating to the breach of competition law are likely to be relevant to director disqualification proceedings. However, the CMA will consider a director's request for other documents and a director may seek an order for disclosure of those documents once any director disqualification proceedings have been issued.

Automatic right to make oral representations

- 2.15 The CMA proposed the removal of the automatic right to make oral representations because oral representations are often duplicative of a director's written representations and an oral hearing is unnecessary in a litigation based process where the court is the decision-maker. We agree with respondents that a meeting with a director can be helpful in certain cases and, as noted in the consultation document, the CMA will consider requests to meet with a director and his or her legal advisers during the pre-action phase. We see such meetings as a usual way of engaging with another party prior to the issue of proceedings and therefore do not consider that such meetings need to be provided for in the guidance.

Issuing a CDO claim whilst an appeal to the competition infringement decision is pending

- 2.16 While we have carefully considered the concerns raised by respondents on the possibility of the CMA issuing proceedings for a CDO whilst the CMA's competition infringement decision is subject to appeal, we consider that, in

appropriate cases, this approach will bring important procedural and cost benefits for all parties and avoid the risk of divergent decisions on the competition infringement. This approach will not be suitable in every case. However, in some cases we anticipate that a director may wish to challenge the breach of competition law by aligning themselves with a challenge brought by their company.

- 2.17 We note an example given by one respondent of anti-competitive conduct which, in some cases, is arguably difficult to establish and adopting this approach in such cases may give rise to challenge. In practical terms the CMA would need to issue a claim for a CDO in the High Court (or Court of Session in Scotland) and subsequently make an application in the same court to transfer the determination of the breach of competition to the Competition Appeal Tribunal. The director would have an opportunity to oppose the CMA's application or seek a stay of the proceedings pending the outcome of the company's appeal.
- 2.18 We note one respondent's request for guidance on the operation of this process in practice. We do not propose to publish guidance in the immediate future but will consider whether or not to do so over the longer term with further case experience.

Recognition for cooperation and early resolution

- 2.19 The Draft Guidance set out proposed changes to recognise cooperation by directors with the CMA's investigation into the breach of competition law and reductions in the period of disqualification for early agreement of CDUs.

Summary of responses

- 2.20 Respondents welcomed the proposed changes on recognition for cooperation by directors during the investigation into the competition infringement and the reduction in the period of disqualification for early agreement of CDUs. One respondent indicated that they would welcome clarity on the factors that the CMA would take into account in assessing a director's cooperation outside the leniency regime.
- 2.21 One respondent submitted that a director who has made a significant contribution to the CMA's investigation into the competition infringement should be treated in a way which is akin to a director of a company that has been granted leniency, namely immunity from a CDO.
- 2.22 One respondent, who agreed with the proposal to apply a reduction to a period of disqualification for early agreement of a CDU, expressed a concern

that a director should never be pressured into agreeing a CDU. Further that the rigour the CMA applies to cases in which it seeks a CDO should be applied to cases in which it accepts a CDU and that the CMA should not accept a CDU unless it is satisfied that a court would impose a CDO. Another respondent suggested that the CMA could produce guidance on the discount in the period of disqualification for early resolution in part to ensure that this practice is applied consistently in all cases.

The CMA's views

- 2.23 In most cases a director who does not benefit from a company's leniency but who, in the CMA's view, personally provides material assistance and cooperation during the CMA's investigation into the competition infringement may merit a reduction in any period of disqualification in a CDU or a recommendation to the court for such a reduction in CDO proceedings. However, there may be some exceptional cases in which the assistance and cooperation of a director is such that the CMA may decide not to apply for a CDO against the director concerned at all. We have amended Chapter 4 in the New Guidance accordingly.
- 2.24 We recognise that guidance on the factors that the CMA may take into account when assessing a director's cooperation and assistance might be helpful and will consider whether or not to publish guidance on this in the future. Absent such guidance the CMA is amenable to discussing the ways in which a director may be able to assist in an individual case, either with the director themselves or with their legal adviser.
- 2.25 As to any concern about pressurising a director to offer a CDU at an early stage, the CMA carefully considers whether to accept a CDU from a director and will only accept a CDU if it is satisfied that the conditions in section 9A(2)-(3) of the CDDA are met, namely that the director is a director of a company that has breached competition law and that the director's conduct makes him or her unfit (in other words, if the court would impose a CDO in the event the CMA issued proceedings).
- 2.26 As regards ensuring consistency in the period of disqualification for early agreement of a CDU, when considering whether to accept a CDU the CMA reviews all CDO cases to ensure consistency of approach and practice, including as regards the period of disqualification.

Other proposed changes to the Guidance

- 2.27 The Consultation Document also requested comments on other proposed changes to the Current Guidance.

Summary of responses

- 2.28 One respondent raised comments on the drafting of chapter 2 suggesting that the language in condition 1 could be simplified and that a brief summary of the matters in Schedule 1 of the CDDA could be included in the Draft Guidance but welcomed the additional explanation of the definition of a director and a company in paragraphs 2.3 and 2.4 of the Draft Guidance. The respondent also submitted that the aggravating and mitigating factors in paragraphs 3.3 and 3.4 should be reinstated in the Draft Guidance.
- 2.29 One respondent submitted that it is important to ensure consistency between the CMA and the sector regulators and suggested that the United Kingdom Competition Network ('UKCN') discussions may be a means of achieving consistency.
- 2.30 Another respondent submitted that paragraphs 4.27 to 4.29 of the Current Guidance should be included in the Draft Guidance. These paragraphs suggest that the CMA would not expect to seek a CDO where a director has been convicted of the cartel offence under section 188 of the Enterprise Act 2002 as the court has the power to make a disqualification order and that the CMA will not apply for a CDO against any beneficiary of a no-action letter in respect of cartel activities.

The CMA's views

Sector regulators

- 2.31 The sector regulators with concurrent powers under the CDDA, which are set out in paragraph 1.5 of the consultation document, may adopt or otherwise take account of the New Guidance where relevant. The CMA agrees that it is important to ensure consistency of application in the exercise of powers in relation to CDUs and CDOs. While it is a matter for sector regulators as to whether they adopt or otherwise observe the New Guidance where relevant, these matters are regularly discussed in UKCN meetings and in other bilateral discussions between the CMA and sector regulators which we consider will adequately address any issues in relation to consistency of approach to director disqualification cases.

Cartel offence: conviction and no-action letters

- 2.32 We have amended the New Guidance to include the substance of paragraphs 4.27 to 4.29 of the Current Guidance, so that it is clear that the CMA will not usually seek a CDO against a director who has been convicted of the cartel offence under section 188 Enterprise Act 2002 and will not seek a CDO

against a director who is the beneficiary of a no-action letter in respect of the cartel activities specified in that letter.

Drafting amendments and clarificatory changes

- 2.33 Having regard to the comments, the CMA has made amendments to chapter 2 in the New Guidance to simplify the drafting and add further explanation on the provisions of the CDDA. We have also included a reference to the relevant legislation in Northern Ireland, Company Directors Disqualification (Northern Ireland) Order 2002.
- 2.34 The CMA does not consider that setting out aggravating or mitigating factors in guidance would be helpful or an accurate reflection of the CMA's decision making in the exercise of discretionary enforcement power. For the reasons stated at paragraphs 2.6 and 2.7 above, when deciding whether to seek a CDO against a director, the CMA considers the framework in section 9A of the CDDA, the evidence available and the public interest in the disqualification of the director. These considerations are wide ranging and flexibly applied on a case-by-case basis. Given the varying nature and scope of CDO cases, distilling certain aggravating and mitigating factors risks lending an undue weight to some factors, omitting others, and misleading directors on the totality of the considerations that the CMA takes into account in its decision-making.

3. List of Respondents

- Baker McKenzie
- Law Society of Scotland
- Linklaters LLP