

# Guidance on Competition Disqualification Orders

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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').<sup>1</sup> 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 which are the same in all material respects as those under the CDDA.<sup>2</sup> Save for the description of the provisions in the CDDA, this guidance also applies to the exercise of the CMA's powers under the Company Directors Disqualification (Northern Ireland) Order 2002.
- 1.2 This guidance does not offer any commentary on the court's procedure relating to competition disqualification orders ('CDOs').<sup>3</sup>
- 1.3 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.
- 1.4 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 court for a CDO. Chapter 6 explains the CMA's approach to transparency and disclosure in CDO cases.
- 1.5 This guidance was published and came into effect on 6 February 2019. It replaces the CMA's previous guidance – OFT510 *Director disqualification orders in competition cases*.

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<sup>1</sup> 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.

<sup>2</sup> SI 2002/3150. Articles 13A-13E.

<sup>3</sup> In England and Wales 'court' means the High Court and 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.<sup>4</sup>

### Condition 1 – 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').<sup>5</sup> 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.<sup>6</sup>
- 2.4 A company means a registered company but also includes any unregistered company that is capable of being wound up under Part 5 of the Insolvency Act 1986.<sup>7</sup> Further the term 'company' also encompasses building societies,<sup>8</sup> incorporated friendly societies,<sup>9</sup> NHS foundation trusts<sup>10</sup> and limited liability partnerships.<sup>11</sup>
- 2.5 A breach of competition law for the purposes of section of the 9A CDDA means an infringement of **any** of:

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<sup>4</sup> Sections 9A(1) to (3) CDDA.

<sup>5</sup> Section 9A(11) CDDA.

<sup>6</sup> 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.

<sup>7</sup> Section 22(2) CDDA.

<sup>8</sup> Section 22A CDDA.

<sup>9</sup> Section 22B CDDA.

<sup>10</sup> Section 22C CDDA.

<sup>11</sup> Limited Liability Partnerships Regulations 2001 (SI 2001/1090 reg.4(2)).

- the Chapter 1 prohibition of the CA98;
- the Chapter 2 prohibition of the CA98;
- Article 101 of the TFEU; or
- Article 102 of the TFEU.

2.6 The Chapter 1 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 2 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:

‘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 – a 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;<sup>12</sup>
  - 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.<sup>13</sup>

## 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.<sup>14</sup>

2.12 That person can also not act as an insolvency practitioner.<sup>15</sup>

2.13 The maximum period of disqualification is 15 years.<sup>16</sup>

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.<sup>17</sup>

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<sup>12</sup> See paragraph 2.5 above for ‘breach of competition law’.

<sup>13</sup> Sections 9A(5) and (6) CDDA. Schedule 1 CDDA specifies matters to be considered when determining unfitness of directors in non-CDO cases including the director’s responsibility for the causes of any material contravention by a company of any applicable legislative or other requirement; the director’s responsibility for the causes of the company’s insolvency; and any misfeasance or breach of any fiduciary duty by the director in relation to the company.

<sup>14</sup> Sections 1(1)(a) and 13 CDDA.

<sup>15</sup> Section 1(1) CDDA.

<sup>16</sup> Section 9A(9) CDDA.

<sup>17</sup> 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.<sup>18</sup>
- 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.<sup>19</sup>
- 3.3 The maximum period which may be specified in a CDU is 15 years.<sup>20</sup> Breach of a CDU has the same consequences as a breach of a CDO.<sup>21</sup>
- 3.4 A director can offer to give a CDU at any time during an investigation or during court proceedings.
- 3.5 If the CMA accepts a CDU offered by a director before court proceedings are commenced the CMA will not seek to recover any costs of its 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.

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<sup>18</sup> Section 9B(2) CDDA.

<sup>19</sup> Section 9B(3) CDDA. However, a CDU may provide that a prohibition covering the categories in the first three bullet points does not apply if the person first obtains the permission of the court.

<sup>20</sup> Section 9B(5) CDDA.

<sup>21</sup> Sections 13 and 15 CDDA. See also paragraphs 2.11 to 2.14 above.



## 4. Applications for competition disqualification orders

4.1 The CMA has the power to apply to the court for a CDO.<sup>22</sup>

### 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.<sup>23</sup>

### 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.<sup>24</sup> Other factors relating to the breach of competition law that the CMA may take into account include:

- the nature and seriousness of the infringement;<sup>25</sup>
- 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 act 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 company. In all cases the CMA must, as directed by section 9A of the CDDA, consider whether:

- the director's conduct contributed to the breach of competition law;

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<sup>22</sup> Section 9A(10) CDDA.

<sup>23</sup> Section 9C(2) CDDA.

<sup>24</sup> This is the first condition for making a CDO (see paragraph 2.1).

<sup>25</sup> 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).

- 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 whether the director has been involved directly or indirectly in previous breaches of competition law.
- 4.7 The CMA will also consider other matters 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.
- 4.8 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.<sup>26</sup>
- 4.12 'Leniency' for these purposes means immunity from, or any reduction in, financial penalty as described in the *CMA's Guidance as to the Appropriate Amount of a Penalty* (the 'Penalties Guidance')<sup>27</sup> or as described in the European Commission's *Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*<sup>28</sup>. 'Reduction' for these purposes does not mean a reduction in the amount of financial penalty imposed for a breach owing to the

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<sup>26</sup> The CMA's policy on leniency is set out in OFT1495 *Applications for leniency and no action in cartel cases, OFT's detailed guidance on the principle and process*, July 2013 or any publication replacing it ('Leniency Guidance').

<sup>27</sup> CMA73 *CMA's guidance as to the appropriate amount of a penalty*.

<sup>28</sup> OJ 2006 C298/11.

application of any mitigating factors or circumstances discussed in the Penalties Guidance or the European Commission's *Guidelines on the Method of Setting Fines*<sup>29</sup> or to the application of a settlement or early resolution discount.

- 4.13 Irrespective of whether the relevant company has been granted immunity or leniency by the CMA or the European Commission, the CMA may, however, 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.<sup>30</sup>
- 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.

### 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 to apply for a CDO against him or her 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.

### Cartel offence: conviction/no-action letters

- 4.16 Any court<sup>31</sup> by or before which an individual is convicted of an indictable offence (whether tried on indictment or summarily) committed in connection with the management of a company may make a disqualification order against that individual.
- 4.17 Where a director has been convicted of the cartel offence under section 188 of the Enterprise Act 2002 and that offence has been committed in connection with the management of a company, the convicting court has the power to make a disqualification order against that director.<sup>32</sup> The CMA takes the view that where the court by or before which the director is convicted has

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<sup>29</sup> OJ 2006 C210/02.

<sup>30</sup> See the Leniency Guidance.

<sup>31</sup> Sections 2(1) and 2(2)(b) CDDA.

<sup>32</sup> This is because the cartel offence is an indictable offence (section 190 Enterprise Act 2002).

considered whether to make a disqualification order, that will be the most appropriate venue for consideration of the matter, so the CMA would not ordinarily expect to exercise its powers under section 9A of the CDDA in these circumstances.

- 4.18 Provided the applicable conditions have been met, the CMA will **not** apply for a CDO against **any** beneficiary of a no-action letter in respect of the cartel activities specified in that letter.<sup>33</sup> The CMA will provide recipients of no-action letters with confirmation of this policy.

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<sup>33</sup> A no-action letter is a letter sent by the CMA to an individual stating that they will not be prosecuted for the criminal cartel offence in respect of the cartel activities specified in the letter.

## 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').<sup>34</sup>
- 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;<sup>35</sup>
  - 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.

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<sup>34</sup> Sections 9C and 16(1), CDDA.

<sup>35</sup> Any documents which are provided may be subject to excisions for reasons of confidentiality and data protection.

## 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 its website: [www.gov.uk/search-the-register-of-disqualified-company-directors](http://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*.<sup>36</sup>

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<sup>36</sup> CMA6 *Transparency and disclosure: Statement of the CMA's policy and approach*.