

Competition Disqualification Orders

A consultation paper

July 2002

The first in a series of consultation papers about how the provisions of the Enterprise Bill will work in practice

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**ENTERPRISE ACT 2002: Public Consultation on Guidance for Competition
Disqualification Orders**

The Office of Fair Trading (OFT) is conducting a public consultation on the guidance it is required to publish about the making of competition disqualification orders once the Enterprise Bill becomes law. A copy of the proposed guidance, including a summary, is enclosed. A copy of the guidance can also be found on the OFT's website, www.oft.gov.uk. The Introduction to the consultation draft will be available in Welsh from the OFT.

Details about the Enterprise Bill, including an explanatory note can be found on the Department of Trade and Industry's website, www.dti.gov.uk/enterprisebill

The Enterprise Bill remains subject to parliamentary debate and approval. This draft guidance reflects the content and clause numbering of the bill as at 20 June. The OFT will publish the finalised guidance after the Bill receives Royal Assent and becomes the Enterprise Act 2002.

The Enterprise Act 2002 will amend the Company Directors Disqualification Act 1986 to allow the OFT to request disqualification of directors who have been involved in an infringement of competition law. The draft guidance sets out the circumstances in which the OFT (and certain sectoral regulators) may apply to the courts for a competition disqualification order (CDO).

Please turn over



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Law firms representing business and other representatives of business as well as consumer bodies are being invited to comment on the proposed guidance in order to improve its clarity. Consultees responding to this consultation are asked to supply a brief summary of the people and organisations they represent, where appropriate. We are open to suggestions of other individuals or organisations about who should be consulted.

We will be taking queries by phone, but any suggested changes or comments should be submitted in writing (by letter or email as indicated below). We will reply to all written submissions or queries. The OFT can only consider suggested changes to the guidance, not the underpinning legislation, as the latter is a matter for Parliament and not covered by the consultation exercise. Responses may be made public unless confidentiality is specifically requested.

This consultation exercise will last for 12 weeks. We therefore ask that your comments on the proposed guidance are submitted to us no later than 26 September 2002. It may not be possible to take into account any suggested changes or comments after the deadline for receipt.

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I hope that you will be able to assist in this invaluable procedure.

Steven Preece

CONTENTS

<i>Chapter</i>		<i>Page</i>
1	Introduction	1
2	Competition Disqualification Orders	2
3	Competition Disqualification Undertakings	6
4	Applications for Competition Disqualification Orders	7
5	Procedure	18

1 INTRODUCTION

- 1.1 This guidance discusses the powers of the OFT and each specified regulator¹ under the Competition Disqualification Order (CDO) provisions of the Company Directors Disqualification Act 1986 (CDDA).² The guidance does not offer any commentary on the court procedure relating to CDOs, nor does it speculate as to when a court will decide to make a CDO.
- 1.2 The OFT is committed to transparency and wishes to explain the approach it intends to take to CDOs. This guidance is particularly aimed at company directors, their professional advisers and relevant professional associations. It is, however, hoped that business people and consumers more generally will also find this guidance useful.
- 1.3 Chapter 2 of this guidance discusses the statutory basis of CDOs. Chapter 3 outlines the statutory basis for Competition Disqualification Undertakings. Chapter 4 describes the factors which the OFT will take into consideration when deciding whether or not to apply for a CDO. Chapter 5 outlines the procedure which the OFT will follow **before** applying to the court for a CDO, as well as some of the factors which the OFT will take into account when deciding whether to accept a Competition Disqualification Undertaking.

¹ For these purposes, specified regulator means:

- the Director General of Telecommunications
- the Gas and Electricity Markets Authority
- the Director General of Water Services
- the Rail Regulator, and
- the Civil Aviation Authority.

In its designated sector, a specified regulator has all the powers of the OFT in respect of CDOs (see sections 9A(10) and 9B of the CDDA). (The CAA's role in considering a CDO is limited at present to a breach of competition law by an undertaking engaged in the supply of air traffic services.) Throughout the remainder of this guidance, the terms 'Office of Fair Trading' and 'OFT' **include** specified regulator.

2 COMPETITION DISQUALIFICATION ORDERS

2.1 Under the CDDA, as amended by the Enterprise Act 2002, 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:

- a) an undertaking which is a company of which that person is a director commits a breach of competition law, **and**
- b) 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

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 that it does for the purposes of the Competition Act 1998 (CA98) and Articles 81 and 82 of the EC Treaty.⁴ An undertaking includes any natural or legal person carrying on commercial or economic activities relating to goods or services, irrespective of its legal status.⁵ It follows that a sole trader, partnership, company or a group of companies can all be an undertaking.

2.3 A CDO may be made against a director of a company.⁶ For the purposes of section 9A of the CDDA, 'company' includes unregistered companies.⁷

² Sections 9A—9E CDDA.

³ See sections 9A(1) to (3) CDDA.

⁴ Section 9A(11) CDDA.

⁵ Further guidance on the meaning of undertaking for the purposes of Competition Act 1998 can be found in the Competition Act guidelines *The Major Provisions* and *The Chapter I Prohibition*.

⁶ 'Director' for these purposes includes a shadow director: section 9E(5) CDDA. 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. Note that 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. See also the comments of Millet J in *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 183. The

2.4 For the purposes of section 9A of the CDDA, a 'breach of competition law' means an infringement of **any** of the following:

- the Chapter I prohibition of CA98
- the Chapter II prohibition of CA98
- Article 81 of the EC Treaty
- Article 82 of the EC Treaty.⁸

2.5 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...

2.6 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.⁹

OFT also considers that 'director' for these purposes includes a de facto director, defined by Millet J in *Re Hydrodam (Corby) Ltd*, *supra* as '...a person who assumes to act as a director.'

⁷ Section 22(2)(b) CDDA. For a definition of unregistered companies, see section 220 of the Insolvency Act 1986. 'Unregistered companies' may include companies registered outside of Great Britain: see, eg, *Re a Company (No 007946 of 1993)* [1994] Ch 198 and *Re Normandy Marketing Ltd* [1993] BCC 879. Furthermore, references to a company in the CDDA include references to a limited liability partnership: see Regulation 4(2)(a) of the Limited Liability Partnership Regulations 2001 (SI 2001/1090).

⁸ Section 9A(4) CDDA.

2.7 Article 81 of the EC Treaty provides that:

(1) The following shall be prohibited as incompatible with the common 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 common market...

2.8 Article 82 of the EC Treaty provides that:

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

The court considers that person's conduct as a director of the company makes him or her unfit to be a director of a company

2.9 When deciding whether the second condition above is satisfied in relation to that person, the court:

- **must** have regard to whether
 - his or her conduct contributed to the breach of competition law
 - his or her 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 or she took no steps to prevent it

⁹ Further guidance on the scope of the prohibitions can be found in the Competition Act. guidelines *The Chapter I Prohibition* and *The Chapter II Prohibition*.

- he or she did not know but ought to have known that the conduct of the undertaking constituted the breach
- **may** have regard to his or her 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.¹⁰

2.10 The maximum period of disqualification under a CDO is 15 years.¹¹ During the period in which a director is subject to a CDO, it is a criminal offence¹² for a person to:

- a) be a director of a company
- b) act as a receiver of a company's property
- c) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company
- d) act as an insolvency practitioner.¹³

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.¹⁴

¹⁰ Sections 9A(5) and (6) CDDA. Schedule 1 CDDA specifies matters to be considered when determining unfitness of directors in non-CDO cases.

¹¹ Section 9A(9) CDDA.

¹² Section 13 CDDA. Unless, with respect to categories (a)-(c) below only, that person has the leave of the court: section 1(1)(a) CDDA.

¹³ Section 1(1) CDDA.

¹⁴ Section 15 CDDA.

3 COMPETITION DISQUALIFICATION UNDERTAKINGS

- 3.1 The OFT may accept a Competition Disqualification Undertaking from a person **instead** of applying for a CDO, or where a CDO has been applied for, **instead** of continuing with the application for a CDO.¹⁵
- 3.2 A Competition Disqualification Undertaking is an undertaking by a person that for the period specified in the undertaking he or she will not:
- a) be a director of a company
 - b) act as a receiver of a company's property
 - c) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company
 - d) act as an insolvency practitioner.¹⁶
- 3.3 The maximum period which may be specified in a disqualification undertaking is 15 years.¹⁷ Breach of a Competition Disqualification Undertaking has the same consequences as a breach of a CDO.¹⁸
- 3.4 Please see paragraphs 5.3 to 5.4 below for the factors which the OFT will consider when deciding whether or not to accept a Competition Disqualification Undertaking.

¹⁵ Section 9B(2) CDDA.

¹⁶ Section 9B(3) CDDA. However, a disqualification undertaking may provide that the prohibition covering categories (a)-(c) above does not apply if the person obtains the leave of the court.

¹⁷ Section 9B(5) CDDA.

¹⁸ See sections 13 and 15 CDDA. See also paragraph 2.10 above.

4 APPLICATIONS FOR COMPETITION DISQUALIFICATION ORDERS

4.1 The OFT has the power to apply to the court¹⁹ for a CDO against a person.²⁰

Factors for consideration

4.2 The OFT will have regard to the following factors when considering whether to apply for a CDO:

- a) whether there has been a prior determination of a breach of competition law by an undertaking which is a company
- b) whether the undertaking in question has been granted lenient treatment in respect of a financial penalty for that breach of competition law
- c) the seriousness of the case, having regard to any aggravating and mitigating factors. For example, mitigating factors include evidence that before the prior determination of breach a director could not reasonably have known that by carrying out or agreeing to carry out the activity in question the company would breach competition law.²¹

4.3 To help it consider these questions, the OFT may use any or all of the information-gathering powers in sections 26 to 28 of CA98.²²

¹⁹ In England and Wales 'court' means the High Court. In Scotland, 'court' means the Court of Session.

²⁰ Section 9A(10) CDDA.

²¹ See paragraphs 4.26 to 4.28 below for a discussion of aggravating and mitigating factors.

²² See sections 9C(1) and 9C(2) CDDA. See the Competition Act guideline *Powers of Investigation* for a discussion of sections 26 to 28 of CA98.

Prior determination of breach

4.4 The OFT does not intend to apply for a CDO under section 9A CDDA unless there has first been a prior determination of a breach of competition law.²³ 'Prior determination' for these purposes means a determination by the:

- Office of Fair Trading²⁴
- European Commission
- Competition Appeal Tribunal, or
- the European Court.²⁵

4.5 In respect of prior determinations of breach by the European Commission and the European Court, it is not the intention of the OFT to apply for CDOs where the infringement to which the determination relates does/did not have an actual or potential effect on trade in the United Kingdom.

APPEALS

4.6 An application for a CDO will not be made where the prior determination of breach remains subject to appeal. 'Remains subject to appeal' for these purposes means either that the deadline for appeal against the prior determination has not yet passed, or that an appeal has been made, but not yet determined.

²³ See paragraph 2.4 above for the definition of 'breach of competition law.'

²⁴ As noted at footnote 1 above, 'Office of Fair Trading' includes specified regulator. See footnote 1 for the definition of 'specified regulator'.

²⁵ 'European Court' means the Court of Justice of the European Communities and includes the Court of First Instance.

Leniency policy

- 4.7 In order to minimise the risk of a CDO application being made against them, company directors whose companies have been involved in cartel activity should ensure that their companies approach the OFT or the European Commission for leniency. 'Leniency' means the immunity from or the reduction in financial penalty described in paragraphs 3.3 to 3.8 of the *Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty*, or that described in paragraphs 8 to 11 and paragraphs 20 to 23 of the European Commission *Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*²⁶.
- 4.8 The OFT will **not** apply for a CDO against **any** current director of an undertaking whose company is the beneficiary of a grant of leniency, in respect of the activities to which the grant of leniency relates.²⁷
- 4.9 Where a person ceased to be a director of a company prior to the grant of leniency, the OFT may still consider applying for a CDO against that person. Similarly, where a director has at any time been removed as a director of a company owing to his or her role in the breach of competition law in question, then the OFT may still consider applying for a CDO against that person, irrespective of whether his or her former company has been granted leniency by the OFT or European Commission.

Seriousness of the case

- 4.10 Having considered the questions of prior determination of breach and leniency, the OFT will consider the seriousness of the case concerning

²⁶ OJ 2002 C45/3.

²⁷ A CDO application may **still** be made against a director in respect of any breach of competition law to which the grant of leniency does **not** relate, provided that there has been a prior determination of breach. Company directors should therefore ensure that a request for leniency is made in respect of **all** cartel activity in which their company is, or has been, involved.

the director. In doing so, the OFT will also have regard to aggravating or mitigating factors.

4.11 Where the breach has been committed by a subsidiary company, the OFT will bear in mind that staff of the parent company or another related company may be shadow directors or de facto directors of the subsidiary. When considering whether to apply for CDOs against shadow or de facto directors, the OFT will have regard to the same factors as it will take into account when considering whether to apply for CDOs against directors formally appointed pursuant to the constitution of the company.

PARTICULARLY SERIOUS CASES

4.12 The OFT considers that it is very likely to apply for a CDO against a director in particularly serious cases. The OFT considers that particularly serious cases are those where there is evidence of the director, either alone or with other persons, having

- planned, devised, approved or encouraged the activity of the undertaking which caused the breach
- ordered, encouraged or advocated that his or her undertaking participate in the breach of competition law
- ordered or pressured those identified as having a direct or indirect role in the breach to engage in the activity causing the breach
- attended meetings (internal or external) in which the activity constituting the breach either occurred or was discussed, or both
- directed, ordered or pressured staff of the undertaking to attend meetings (internal or external) for the purpose of participating in or discussing the activity constituting the breach

- ordered, encouraged or advocated retaliation against other undertakings who were reluctant to or refused to participate in the activity constituting the breach of competition law.

The key consideration is whether the director had an active role in causing his or her company to carry out or agree to carry out the activity constituting the breach. If the director did not know that by carrying out or agreeing to carry out the activity in question the company would breach competition law, a CDO may still be sought.²⁸ However, evidence that the director could not reasonably have known that by carrying out or agreeing to carry out activity in question the company would breach competition law will be a mitigating factor when the OFT is considering whether to apply for a CDO.²⁹

4.13 Where two or more of the factors described in paragraph 4.12 apply to a director in respect of the same breach, then the OFT is more likely still to apply for a CDO against that person.

SERIOUS CASES

4.14 The OFT takes the view that it is likely to apply for a CDO against a person in serious cases. Serious cases are those where there is evidence that a director, either alone or with other persons:

- knowing or having reasonable grounds to suspect that persons within the company were directly or indirectly involved in the conduct which constituted a breach, failed to take reasonable steps to halt the activity in question
- authorised or approved expenditure of funds used to finance any activity relating to the breach, knowing or having reasonable grounds

²⁸ See section 9A(7) CDDA.

²⁹ See paragraphs 4.26 to 4.28 below.

to suspect that those funds would be used for the activity and that the activity related to a breach.

LESS SERIOUS CASES

- 4.15 The OFT does not rule out applying for a CDO against a director in less serious cases, taking into account the OFT's administrative priorities. Less serious cases are those where none of the factors discussed in paragraphs 4.12 to 4.14 above apply to a person. They include situations where there is no evidence that the director was actually aware of the activity constituting the breach of competition law, but ought to have known. For example, a director may have deliberately failed to inform himself or herself about the actions of the company.
- 4.16 In considering whether a director ought to have known that the activity constituting the breach occurred, the OFT is likely, among other things, to consider:
- a) the general knowledge, skill and experience that reasonably may be expected of a director in that company, **and**
 - b) the general knowledge, skill and experience actually possessed by the director in question.
- 4.17 The OFT considers that **all** directors of **all** companies may reasonably be expected to **know** that companies must comply with competition law.
- 4.18 The OFT further considers that all directors of a company which in the past has been found to have infringed competition law ought to be actively vigilant against the commission of new competition law breaches by their company.

- 4.19 In considering the actual knowledge of an individual director, the OFT is likely to take into consideration a variety of factors, including whether:
- that director has had, or has, managerial roles in undertakings subject to competition law scrutiny, and
 - staff subordinate to that director are known to that director to have been involved in breaches of competition law.
- 4.20 The OFT is furthermore likely to assess whether internal company information with which the director was ordinarily familiar (eg, price lists, sales records, funding requests, minutes of meetings, accounting records, discussions with other directors or employees) indicated that the director ought to have known about the breach.
- 4.21 Bearing in mind the factors above, the more proximate in the company hierarchy the person(s) directly or indirectly involved in the breach of competition law is (are) to a director or directors, the more likely, generally speaking, it is that the OFT will consider that that director or those directors ought to have known that the breach of competition law was taking place, and that reasonable steps should have been taken to stop the breach.
- 4.22 In these circumstances, the OFT is also likely to take into account whether the persons directly or indirectly involved in the breach of competition law concealed their activities from their colleagues within the company, and if so, the degree of concealment which occurred.

Board of directors as a whole

- 4.23 A board of directors might, for example, resolve that the company should engage in the activity that constituted the breach of competition law.

- 4.24 It is likely that the OFT will view this as a particularly serious case.³⁰ Accordingly, the OFT would in such a case consider applying for CDOs against each member of the board of directors of the company in question. When doing so, the OFT is likely to take into account the conduct of each individual director **in relation to that resolution**.
- 4.25 The mere absence of a director from the board meeting at which the resolution to engage in a breach of competition law was made, would not necessarily mean that the OFT would not consider applying for a CDO against that director. For example, a director may not have attended the relevant board meeting, or left before the relevant resolution was discussed, simply so that he or she would not have to vote on the resolution in question. That director may not however have taken any other steps to prevent the board from resolving that the company should commit a breach of competition law.³¹ In those circumstances, the OFT will still consider applying for a CDO against that director, in addition to the other members of the board of directors.

Aggravating and mitigating factors

- 4.26 As noted at paragraph 4.10 above, when considering whether to apply for a CDO, the OFT will, in addition to assessing the seriousness of the case, have regard to the presence of any aggravating or mitigating factors. Aggravating factors increase the likelihood that the OFT will apply for a CDO. Conversely, the presence of mitigating factors may reduce the likelihood that an application for CDO will be made.

³⁰ However, evidence that the directors could not reasonably have known that by carrying out or agreeing to carry out the activity in question the company would breach competition law will be a mitigating factor when the OFT is considering whether to apply for a CDO: see paragraphs 4.26 to 4.28 below.

³¹ See paragraphs 4.26 to 4.28 below for a discussion of mitigating factors, which includes an indication of some of the steps that a director may take to reduce the likelihood of a CDO application being made against him or her.

AGGRAVATING FACTORS

4.27 Aggravating factors include evidence that the director:

- a) has been directly or indirectly involved in breaches of competition law in the past
- b) destroyed or advised others to destroy any records relating to any breach of competition law
- c) was or advised others to be significantly uncooperative with or unhelpful to the OFT or European Commission during any investigation into any breach of competition law
- d) obstructed or impeded any investigation by the OFT or European Commission into any breach of competition law or attempted to do so or advised others to do so
- e) destroyed, removed or refused to provide evidence or information relating to any matter relevant to any investigation of a breach of competition law when lawfully required to do so or attempted to do so or advised others to do so
- f) during any investigation of a breach of competition law, without lawful reason, refused or advised refusal of investigators from the OFT or European Commission access to any part of the company's premises
- g) ordered, encouraged or advocated continued participation in the breach following commencement of an investigation into the breach by the OFT or European Commission, knowing that such an investigation had commenced.

MITIGATING FACTORS

4.28 Mitigating factors include evidence:

- a) that before the prior determination of breach a director could not reasonably have known that by carrying out or agreeing to carry out the activity in question the company would breach competition law
- b) that the undertaking committed the breach as a result of severe external duress or pressure
- c) that, in the case of a resolution by the board of directors that the company should engage in a breach of competition law, a director:
 - strongly objected to a board resolution that the undertaking engage in the activity which constituted a breach of competition law, **or**
 - advised the board that competition law advice should be sought before making the resolution, **and (in either case)**
 - voted against the resolution at the relevant meeting.

Cartel offence: conviction/leniency

4.29 A court by or before which an individual is convicted of an indictable offence (whether on indictment or summarily) committed in connection with the management of a company may make a disqualification order against that individual.³²

4.30 Where an individual company director has been convicted of the cartel offence under section 183 Enterprise Act 2002, and that offence has

³² See section 2(1) and 2(2)(b) CDDA.

been committed in connection with the management of a company, the convicting court has the power to make a disqualification order against that individual director.³³ The OFT takes the view that the court by or before which the individual director is convicted of the cartel offence is the most appropriate venue for consideration of a disqualification order, so the OFT would not expect to have to use its powers under section 9A CDDA in these circumstances.

- 4.31 The OFT will **not** apply for a CDO against **any** beneficiary of a no-action letter in respect of the cartel activities specified in that letter.³⁴

³³ This is because the cartel offence is an indictable offence (section 185 Enterprise Act 2002).

³⁴ A no-action letter is a letter sent by the OFT to a person stating that they will not face criminal prosecution for cartel activities specified in the letter. See OFT guidance on *No-Action Letters*.

5 PROCEDURE

- 5.1 Before making an application for a CDO against a person, the OFT shall give notice to the person likely to be affected by the application (a 'section 9C notice').
- 5.2 The section 9C notice will include the following information:
- a) that the OFT proposes to apply for a CDO against the person
 - b) the consequences for that person of a CDO being made against him or her
 - c) the grounds for the proposed application
 - d) the evidence which the OFT intends to submit to the court in support of its proposed application
 - e) that that person has the right to make written, and if requested, oral representations prior to the OFT making the proposed application³⁵
 - f) a deadline for indicating to the OFT whether that person wishes to make written representations and the date by which oral representations must be requested
 - g) that if the person wishes to make representations in respect of the OFT's proposed application for a CDO, the OFT will, if requested, allow that person to have access to the file concerning the proposed application (subject to any necessary confidentiality excisions to the file)

³⁵ The OFT is required to allow the person the opportunity to make representations: section 9C(4)(b) CDDA.

- h) that if the OFT has not heard anything from the person by the date specified in (e) above, following that date an application for CDO may be made forthwith
- i) that the person's representations may be prepared or made by a legal advisor, and
- j) that the person may wish to offer the OFT a disqualification undertaking, which if accepted by the OFT, would mean that the OFT would not make the application for a CDO.

COMPETITION DISQUALIFICATION UNDERTAKINGS

- 5.3 The OFT will give very serious consideration to a disqualification undertaking offered in response to a section 9C notice. Whether or not such an offer will be accepted by the OFT will depend upon the facts of the case, as well as upon the period of disqualification offered.
- 5.4 The period of a disqualification undertaking must be proportionate to the seriousness of the case, taking account of any aggravating or mitigating factors.