

# **Competition disqualification orders**

## **Proposed changes to the OFT's Guidance**

A consultation paper

August 2009

OFT1111con

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## Scope of this consultation

<b>Topic of this consultation</b>	This consultation concerns proposed changes to the OFT's Guidance on the circumstances in which the OFT and certain sectoral regulators will exercise their powers to apply for a Competition Disqualification Order (CDO) under the Company Directors Disqualification Act 1986 (as amended).
<b>Scope of this consultation</b>	This consultation is limited to the use of the OFT's and certain sectoral regulators' powers to apply for CDOs. It is intended to ensure the effective use of CDOs as a deterrent to breaches of competition law. It does not extend to the use of any other enforcement powers which the OFT and other regulators may exercise in competition law cases, nor does it cover the use of Director Disqualification Orders in criminal cartel cases.
<b>Geographical scope</b>	There is no specific geographical dimension to this consultation.
<b>Impact assessment</b>	Not applicable.

## Basic information

<b>To</b>	This consultation is aimed at businesses, trade associations, professional bodies, regulators and company directors.
<b>Duration</b>	The consultation will run from 18 August to 20 November 2009.

<p><b>Enquiries</b></p>	<p>If you have any queries regarding the content of this consultation, please contact:</p> <p>Ruth Ashworth or Paul Gilbert</p> <p>CDO Review</p> <p>Office of Fair Trading</p> <p>Fleetbank House</p> <p>2-6 Salisbury Square</p> <p>London EC4Y 8JX</p> <p>Tel: 020 7211 5848 / 8234</p> <p>Fax: 020 7211 8757</p> <p>Email: <a href="mailto:ruth.ashworth@oft.gsi.gov.uk">ruth.ashworth@oft.gsi.gov.uk</a> / <a href="mailto:paul.gilbert@oft.gsi.gov.uk">paul.gilbert@oft.gsi.gov.uk</a></p>
<p><b>How to respond</b></p>	<p>We would welcome your comments on the proposed changes set out in this document. Please respond to as many questions as you are able, and provide any supporting evidence for views expressed. We encourage you to provide evidence in writing (by email, or alternatively by letter or fax, as indicated above). When responding to this consultation please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.</p>
<p><b>Additional ways to become involved</b></p>	<p>If you wish to meet with the OFT team involved, please contact Ruth Ashworth or Paul Gilbert (details given above).</p>
<p><b>After the consultation</b></p>	<p>After the consultation the OFT will publish its final guidance as well as a summary of responses received. Both documents will be available on the OFT's website at <a href="http://www.oft.gov.uk/publications">www.oft.gov.uk/publications</a></p>
<p><b>Compliance with the <i>Code of Practice on Consultation</i></b></p>	<p>This consultation complies with the Better Regulation Executive's Code of Practice on Consultation. A list of the key criteria, along with a link to the full document, can be found at Annexe C.</p>

## Background

<b>Getting to this stage</b>	The legal framework for this review, including the scope of the OFT's powers to apply for CDOs, is described in Chapter two. The OFT has reviewed its use of these powers and believes that CDOs could be used more effectively as a means of motivating competition law compliance.
<b>Previous engagement</b>	The OFT issued guidance on Competition Disqualification Orders in May 2003 (OFT510). It commissioned a report by Deloitte in 2007 on the deterrent effect of competition enforcement by the OFT (OFT962). This report was published in November 2007.

## Feedback about this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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A copy of the key criteria from the Better Regulation Executive's *Code of Practice on Consultation* can be found in Annexe C.

## **Data use statement for responses**

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. All information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may choose to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000 (FOIA). In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

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# 1 INTRODUCTION

- 1.1 Under the provisions of the Company Directors Disqualification Act 1986 (as amended) (the CDDA) the court<sup>1</sup> must disqualify a director from acting as a director for a period of up to 15 years if the company of which he is a director breaches competition law and the court considers that he is unfit to be concerned in the management of a company.<sup>2</sup> This is referred to in this consultation paper as a Competition Disqualification Order (a CDO). The OFT or a 'specified regulator'<sup>3</sup> (a Regulator) has the power to apply to the court for a CDO.
- 1.2 The legal framework of the OFT's and Regulators' powers to apply for a CDO is set out in Chapter two.
- 1.3 The power to apply for CDOs is intended to provide an incentive on individuals to comply with competition law. CDOs complement the OFT's and Regulators' other civil competition law enforcement powers, which are principally targeted at companies and their shareholders as opposed to the individuals responsible for the breach. The OFT's view of the importance of CDOs in motivating compliance with competition law is summarised in Chapter three.
- 1.4 The OFT and Regulators believe that the current Guidance<sup>4</sup> does not maximise the deterrent effect of CDOs and we are therefore minded to publish revised Guidance. In particular, the current Guidance states that the OFT or Regulator is more likely to apply for a CDO in cases where a director was directly involved in the breach of competition law than in cases where he was not directly involved but failed to take corrective

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<sup>1</sup> The court is the High Court or (in Scotland) the Court of Session.

<sup>2</sup> Section 9A CDDA.

<sup>3</sup> The Office of Communications, the Gas and Electricity Markets Authority, the Water Services Regulation Authority, the Office of Rail Regulation, and the Civil Aviation Authority.

<sup>4</sup> Competition Disqualification Orders (OFT510).

action or failed to keep himself sufficiently informed of the company's activities.<sup>5</sup> Under the proposed changes the OFT or Regulator would be likely to apply for a CDO in all cases where it thinks a director is unfit to be concerned in the management of a company, whether or not his conduct directly contributed to the breach of competition law.

- 1.5 We are also considering whether in certain cases it may be appropriate for the OFT or a Regulator to apply for a CDO in relation to a breach of competition law which has not been proven in a decision or judgment or in cases where no financial penalty has been imposed.
- 1.6 Finally, the OFT is considering whether in certain cases it may be appropriate to apply for a CDO against a director of a company which has benefited from Type C leniency under the OFT's Guidance as to the Appropriate Amount of a Penalty or a reduction in a fine imposed by the European Commission under its Notice on immunity from fines and reduction of fines in cartel cases.
- 1.7 The proposed changes to the Guidance are set out in Chapter four.

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<sup>5</sup> Paragraph 4.16 of OFT510.

## 2 LEGAL FRAMEWORK

### Competition Disqualification Orders

2.1 The OFT and the Regulators have the power under the CDDA to apply to the court for a CDO against a person. The court **must** make a CDO against that person if:

- 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 unfit to be concerned in the management of a company.

2.2 A CDO can be made only against a **director** of a company.<sup>6</sup> A 'director' includes any person occupying the position of director, regardless of his or her title.<sup>7</sup> This includes a shadow director (that is, any person in accordance with whose directions or instructions the directors of a company are accustomed to act<sup>8</sup>) and a de facto director (that is, a person who assumes to act as a director<sup>9</sup>).

2.3 A breach of competition law means an infringement of any of the following:

- the Chapter I prohibition of the Competition Act 1998 (the CA98)
- the Chapter II prohibition of the CA98
- Article 81 of the EC Treaty, or

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<sup>6</sup> The term 'company' includes an unregistered company (section 22(2)(b) CDDA).

<sup>7</sup> Section 22(4) CDDA.

<sup>8</sup> Section 22(5) CDDA. However, a person is not deemed to be a shadow director by reason only that the directors act on the advice given by that person in a professional capacity.

<sup>9</sup> *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180.

- Article 82 of the EC Treaty.

2.4 When deciding whether a person's conduct as a director makes him unfit to be concerned in the management of a company, the court must have regard to whether:

- his conduct contributed to the breach of competition law
- his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it, or
- he did not know but ought to have known that the conduct of the undertaking constituted the breach.<sup>10</sup>

2.5 The court may also have regard to the individual's conduct as a director of a company in connection with any other breach of competition law.<sup>11</sup>

2.6 During the period in which a person is subject to a CDO, it is a criminal offence<sup>12</sup> for him to:

- 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

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<sup>10</sup> Sections 9A(5) and (6) CDDA. The court must not have regard to any of the matters specified in Schedule 1 CDDA. Schedule 1 CDDA specifies matters to be considered when determining unfitness of directors in non-CDO cases.

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

<sup>12</sup> Section 13 CDDA. Unless, with respect to the categories in the first three bullet points, that person has the leave of the court (section 1(1)(a) CDDA).

- act as an insolvency practitioner.<sup>13</sup>

2.7 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>14</sup>

2.8 Details of CDOs must be entered into a public register maintained by the Secretary of State.<sup>15</sup> The maximum period of disqualification under a CDO is 15 years.<sup>16</sup>

### **Competition Disqualification Undertakings**

2.9 The OFT or a Regulator may accept a Competition Disqualification Undertaking (CDU) from a person instead of applying for a CDO against that person or, where a CDO has been applied for, instead of continuing that application.<sup>17</sup>

2.10 A CDU is an undertaking by a person that for the period specified in the undertaking he 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

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<sup>13</sup> Section 1(1) CDDA.

<sup>14</sup> Section 15(1)(a) CDDA.

<sup>15</sup> Section 18 CDDA.

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

<sup>17</sup> Section 9B(2) CDDA.

- act as an insolvency practitioner.<sup>18</sup>

2.11 A breach of a CDU has the same consequences as a breach of a CDO.<sup>19</sup>

2.12 Details of CDUs must also be entered into a public register maintained by the Secretary of State.<sup>20</sup> The maximum period which may be specified in a CDU is 15 years.<sup>21</sup>

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<sup>18</sup> Section 9B(3) CDDA.

<sup>19</sup> Sections 13 and 15 CDDA.

<sup>20</sup> Section 18 CDDA.

<sup>21</sup> Section 9B(5) CDDA.

### 3 DETERRENT EFFECT OF CDOS

- 3.1 The OFT believes that CDOs act as an important deterrent to anticompetitive behaviour because they provide a sanction affecting the individual or individuals responsible for the breach.
- 3.2 In this respect CDOs complement the OFT's and Regulators' other civil enforcement powers, which principally penalise companies and their shareholders.<sup>22</sup> In particular, the imposition of a fine punishes the company involved in the breach and its wider corporate group (who may be responsible for paying the fine), and also impacts on shareholders through the diminution in the value of their shareholdings. A fine does not impact on the individual or individuals responsible for the breach (other than indirectly, for example through loss of bonuses based on company performance or share price movement).
- 3.3 Research carried out on behalf of the OFT<sup>23</sup> suggests that sanctions which impact on the individuals involved in a breach of competition law have a strong motivating effect:

'In terms of the sanctions which motivate compliance, the company results in particular highlight the importance of sanctions which operate at the individual, as opposed to corporate level.'

- 3.4 The same research found that:

'the threat of director disqualification is seen as a serious one by both lawyers and companies, and many thought that a greater use of this sanction would improve deterrence'.

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<sup>22</sup> The criminal cartel offence applies to individuals who dishonestly engage in hardcore cartel behaviour (section 188 Enterprise Act 2002). A court has the power to make a Director Disqualification Order in such cases without an application by the OFT or a Regulator.

<sup>23</sup> The deterrent effect of competition enforcement by the OFT, a report prepared for the OFT by Deloitte, November 2007 (OFT962). See paragraphs 1.23 and 5.117.

- 3.5 The OFT and the Regulators are therefore minded to increase the use of their powers to apply for CDOs in future cases, in order to maximise this deterrent effect. Chapter four sets out the circumstances in which the OFT and Regulators believe it is appropriate to exercise these powers.

**Question for consultation**

- Q1 Do you agree that the increased use of CDOs would be an effective method of deterring breaches of competition law? If not, please explain your views.**

## 4 PROPOSED CHANGES TO THE GUIDANCE

4.1 Under the current Guidance<sup>24</sup> the OFT or Regulator will follow a five step process when deciding whether to apply for a CDO. These steps are summarised below.

- Step one: whether the person is a director of a company which has committed a **breach of competition law**. The OFT or Regulator will not apply for a CDO unless the breach has been proven in a decision of the OFT, a Regulator or the European Commission or in a judgment of the Competition Appeal Tribunal or the European Court.<sup>25</sup>
- Step two: whether a **financial penalty** has been imposed for the breach of competition law. The OFT or Regulator will not apply for a CDO unless a financial penalty has been imposed on the company for the relevant breach.
- Step three: whether the company of which the person is a director benefitted from **leniency** from financial penalties.<sup>26</sup> The OFT or Regulator will not apply for a CDO against any **current director** of a company which benefitted from leniency in respect of the relevant breach. However, where a director has at any time been removed as a director of a company owing to his role in the breach of competition law in question and/or for opposing the relevant application for leniency, the OFT or Regulator may still consider applying for a CDO against that person.

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<sup>24</sup> Competition Disqualification Orders, May 2003 (OFT510). See Chapter 4 of that Guidance.

<sup>25</sup> 'European Court' means the Court of Justice of the European Communities and includes the Court of First Instance.

<sup>26</sup> 'Leniency' for these purposes means the immunity from, or any reduction in, financial penalty in the manner described in the OFT's Guidance as to the appropriate amount of a penalty (OFT423), or in the European Commission Notice on immunity from fines and reduction of fines in cartel cases (2006 C298/11).

- Step four: the extent of the **director's responsibility** for the breach. Under the OFT's current Guidance the greater the degree of the director's responsibility for, or involvement in, the breach of competition law, the more likely the OFT or Regulator is to apply for a CDO.
- Step five: the application of any **aggravating or mitigating factors**.

### **Proposed changes to step one**

- 4.2 Step one (breach of competition law) of the current Guidance states that the OFT or a Regulator will apply for a CDO only where the relevant breach of competition law has been proven in a decision or judgment (as the case may be) of the OFT or Regulator, the European Commission, the Competition Appeal Tribunal or the European Court. Moreover, the OFT or a Regulator will not apply for a CDO where the decision or judgment is subject to appeal. This will continue to be our approach in most cases.
- 4.3 However, there may be exceptional cases in which it is appropriate to apply for a CDO where the breach of competition law has not been established by a decision or judgment in this way. In such cases it would be for the court to determine whether a breach had occurred.
- 4.4 For example, it might be appropriate to apply for a CDO where a decision or judgment is subject to appeal only in relation to the quantum of a fine imposed and not to the finding of infringement.<sup>27</sup> Other examples might include cases where the OFT or Regulator has decided it is not appropriate to reach a decision against the undertaking because, for example, the companies comprising the undertaking have been liquidated or the undertaking would benefit from limited immunity from fines under sections 39 and 40 CA98 and the Competition Act 1998 (Small

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<sup>27</sup> Where the finding of infringement is subject to appeal, the OFT or Regulator would not apply for a CDO until after the appeal had been resolved.

Agreements and Conduct of Minor Significance) Regulations 2000<sup>28</sup>, or where the breach of competition law has already been established by a court in a private action.<sup>29</sup>

- 4.5 We are therefore considering amending the Guidance to allow the OFT and the Regulators to apply for CDOs where this is the case and would welcome stakeholders' views on this proposal. It should be noted that the proposed approach would not preclude the OFT or a Regulator from issuing an infringement decision after a CDO application had been made.

#### **Proposed changes to step two**

- 4.6 Step two (whether a financial penalty has been imposed for the breach) of the current Guidance states that the OFT or Regulator will not consider applying for a CDO unless a financial penalty has been imposed for the breach of competition law and, in the event of an appeal, upheld in whole or part.
- 4.7 It follows from the proposed changes to step one described above that in certain exceptional cases it may be appropriate for the OFT or a Regulator to apply for a CDO where no financial penalty has been imposed or where the amount of a financial penalty imposed is subject to appeal.
- 4.8 There may also be cases where the breach of competition law has been proven in a decision but no fine has been imposed, even though a director's conduct is sufficiently serious to warrant a CDO application. For example, this may be true of some 'small agreements' or 'conduct of minor significance', which benefit from limited immunity from fines under sections 39 and 40 CA98 and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000<sup>30</sup>.

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<sup>28</sup> SI 2000/262.

<sup>29</sup> This list of examples is not intended to be exhaustive.

<sup>30</sup> SI 2000/262.

4.9 We are therefore considering amending the Guidance to allow the OFT and Regulators to apply for CDOs in cases where no financial penalty has been imposed and would welcome stakeholders' views on this proposal.

**Proposed changes to step three**

4.10 Step three (leniency) of the current Guidance states that the OFT or Regulator will not consider applying for a CDO against any current director of a company which benefited from leniency in relation to the same activities.

4.11 We continue to believe that the OFT and Regulators should not apply for a CDO against a director of a company which has benefited from:

- Type A or Type B immunity or leniency under the OFT's Guidance as to the Appropriate Amount of a Penalty and in accordance with the OFT's Leniency and No Action Guidance, or
- immunity from fines under section II of the European Commission's Notice on Immunity from Fines and Reduction of Fines in Cartel Cases.

4.12 The main reason for this approach is to ensure that the possibility of a CDO application does not deter companies from approaching the OFT, a Regulator or the European Commission with information on illegal cartel activity and that leniency therefore remains an effective tool for uncovering competition law infringements.

4.13 However, we are considering whether we should continue to rule out the possibility of a CDO application against a director of a company which has benefited from:

- Type C leniency under the OFT's Guidance as to the Appropriate Amount of a Penalty and in accordance with the OFT's Leniency and No Action Guidance, or

- a reduced fine under section III of the European Commission's Notice on Immunity from Fines and Reduction of Fines in Cartel Cases.

The OFT and the Regulators would retain a discretion not to apply for a CDO in these circumstances.

- 4.14 We are also considering whether we should continue to rule out the possibility of a CDO against a director of a Type A or Type B applicant company in circumstances where that director fails to co-operate with the OFT's or Regulator's investigation.
- 4.15 Finally we are considering whether it may be appropriate to apply for a CDO against a director of a company which has benefited from immunity or leniency but who has resigned as a result of his responsibility for the breach of competition law.
- 4.16 We are considering, in particular, whether and to what extent the approach set out above would impact on companies' incentives to apply for leniency. We are also considering whether it is appropriate to differentiate between directors of different companies benefiting from Type C leniency. For example, it may be appropriate not to apply for a CDO against a director of the first company to apply for Type C leniency, but to consider applying for CDOs against directors of subsequent applicant companies. Another possibility would be for the OFT to refrain from applying for a CDO against a director of the Type C applicant receiving the highest percentage penalty reduction, but consider doing so against the directors of other Type C applicants.
- 4.17 We are therefore considering amending the Guidance to allow the OFT and Regulators the discretion to apply for CDOs against a director of a company which has benefited from Type C leniency or a reduction in fine, and would welcome stakeholders' views on these proposals.
- 4.18 These proposals, if adopted, may require amendments to other OFT Guidance on leniency. The OFT will consider whether any such amendments are required based on the outcome of this consultation.

## Proposed changes to step four

4.19 Step four (director's responsibility) of the current Guidance sets out the factors the OFT or Regulator will take into account when assessing the extent of a director's responsibility for the breach of competition law. It states that the OFT or Regulator:

- is likely to apply for a CDO against a director who has been directly involved in the breach
- is quite likely to apply for a CDO against a director whom it considers improperly failed to take corrective action against the breach, and
- does not rule out applying for a CDO against a director whom it considers, taking into account that director's role and responsibilities, failed to keep himself sufficiently informed of the company's activities which constituted the breach of competition law.

4.20 We are concerned that this approach may not sufficiently encourage directors to take positive steps to uncover potentially anticompetitive behaviour or monitor their companies' competition law compliance. Under the current approach a director who did not know (but ought to have known) that the conduct of the undertaking constituted a breach of competition law is less likely to be subject to a CDO application than one who had reasonable grounds to suspect that it constituted a breach (but who took no steps to prevent it) or one whose own conduct contributed to a breach.

4.21 In addition, we wish to ensure that CDOs operate as an effective deterrent for directors of larger companies as well as those of small and medium-sized enterprises (who are more likely to be directly involved in the day-to-day business activities of their companies).

4.22 For these reasons we believe it is appropriate in future to consider whether a director is unfit to be concerned in the management of a company on a case-by-case basis. The OFT or Regulator will decide whether to apply for a CDO by reference to the facts and circumstances

of each individual case and the evidence available, rather than being more likely to pursue cases in which the director was directly involved in the breach.

4.23 This does not imply that directors who are directly involved in a breach of competition law are less likely to be considered unfit to be concerned in the management of a company, and therefore less likely to face an application for CDO. However, it does mean that the OFT and the Regulators may be more likely to apply for a CDO in cases where there is evidence (of the type set out in step four of the OFT's Guidance) that the director had reasonable grounds to suspect the conduct constituted the breach but took no steps to prevent it and in cases where the director did not know, but ought to have known, that the conduct constituted the breach.

#### **Proposed changes to step five**

4.24 We do not propose to amend step five (aggravating and mitigating factors) of the current Guidance.

#### **Revised Guidance**

To reflect the proposed changes to steps one to four set out above we propose to replace paragraphs 4.6 to 4.21 of the current Guidance<sup>31</sup> with the following:

##### **Step one Breach of competition law**

**4.6** The first question the OFT or Regulator will consider is whether a company which is an undertaking of which the person is a director has committed a breach of competition law. The OFT or Regulator will generally apply for CDOs in respect of breaches of competition law that have been proven in decisions or judgments (as the case may be) of:

- the OFT or Regulator

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<sup>31</sup> Competition Disqualification Orders (OFT510).

- the European Commission
- the Competition Appeal Tribunal
- the European Court, or
- any other competent court.

**4.7** In respect of breaches proven in a European Commission decision or a judgment of the European Court, it is not the intention of the OFT or Regulator to apply for CDOs where the breach to which the decision or judgment relates does not, or did not, have an actual or potential effect on trade in the United Kingdom.

**4.8** The OFT or Regulator will not apply for CDOs in respect of breaches of competition law which ended before the commencement of sections 9A to 9E CDDA (20 June 2003). Breaches which started before the commencement of sections 9A to 9E CDDA, but which continued until or after the date of commencement of those sections may be susceptible to CDO applications.

### **Appeals**

**4.9** Where an application for a CDO is made relying on a decision or judgment proving the breach of competition law, the application will not be made while the decision or judgment remains subject to appeal except in circumstances where the outcome of any appeal would not affect the relevant company's liability for the breach. 'Remains subject to appeal' for these purposes means either that the deadline for appeal against the decision or judgment has not yet passed, or that an appeal has been made, but not yet determined.

## **Step two Nature of the breach**

**4.10** The next matter which the OFT or Regulator will take into account is the nature of the breach of competition law. The OFT or Regulator is more likely to consider CDO applications to be appropriate in cases involving more serious breaches, such as those in which a financial penalty has been imposed (and, in the event of an appeal, upheld in whole or part) or would have been imposed save for the application of section 39 or 40 CA98 and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000.<sup>32</sup>

## **Step three Immunity and leniency**

**4.11** The next question which the OFT or Regulator will consider is whether the company of which a person is a director benefited from immunity or leniency. 'Immunity or leniency' for these purposes means the immunity from, or any reduction in, financial penalty in the manner described in the OFT's Guidance as to the Appropriate Amount of a Penalty (the 'Penalties Guidance') or that described in the European Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (the 'EC Fining Notice'), or any publications replacing them. 'Reduction' for these purposes does not mean a reduction in the amount of financial penalty imposed for a breach owing to the application of any mitigating factors discussed in the Penalties Guidance or the EC Fining Notice or to the application of a settlement or early resolution discount. (See also paragraph 4.27 below with respect to no-action letters in cartel cases.)

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<sup>32</sup> SI 2000/262.

**4.12** The OFT or Regulator will not apply for a CDO against any current director of a company whose company benefited from:

- Type A or Type B immunity or leniency under the Penalties Guidance and in accordance with the OFT's Leniency and No Action Guidance unless that director fails to co-operate with the OFT's or Regulator's investigation, or
- immunity from fines under section II of the EC Fining Notice

in respect of the activities to which the grant of leniency relates. Companies benefiting from leniency in this way will receive confirmation of this policy.

**4.13** The OFT and the Regulators retain a discretion to apply for a CDO against a current director of a company which benefited from:

- Type C leniency under the Penalties Guidance and in accordance with the OFT's Leniency and No Action Guidance, or
- a reduction of a fine under section II of the EC Fining Notice

in respect of the activities to which the grant of leniency relates.

**4.14** Where a director has at any time been removed or otherwise ceases to act as a director of a company owing to his role in the breach of competition law in question and/or for opposing the relevant application for leniency, the OFT or Regulator may still consider applying for a CDO against that person, irrespective of whether his former

company has been granted immunity or leniency by the OFT, a Regulator or the European Commission.

- 4.15** 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 therefore seek to ensure that their companies are the first to approach the OFT, a Regulator or the European Commission thereby securing immunity or, in the case of the OFT or a Regulator, Type B leniency.

**Step four    Extent of the director's responsibility for the breach**

- 4.16** The next step in the OFT's or Regulator's assessment will be for the OFT or Regulator to consider the extent of the director's responsibility for, or involvement in, the breach, whether by action or omission, in order to assess whether the director is unfit to be concerned in the management of a company.

- 4.17** The OFT or Regulator is likely to apply for a CDO against a director where it considers that:

- his conduct contributed to the breach of competition law
- his conduct did not contribute to the breach of competition law but he had reasonable grounds to suspect that the undertaking's conduct constituted the breach and took no steps to prevent it, or
- he did not know but ought to have known that the undertaking's conduct constituted the breach.

**Director's conduct contributed to the breach**

- 4.18** The OFT or Regulator will consider whether there is evidence indicating that a director's conduct contributed to

the breach, including (but not limited to) evidence of the director, either alone or with other persons, having:

- actively taken steps to carry out the infringement (for example, by drawing up a list of the company's prices and sending them to a competitor so as to enable them to align their prices or implementing a predatory pricing strategy)
- planned, devised, approved or encouraged the activity of the undertaking which caused the breach
- ordered, pressured or encouraged 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, pressured or encouraged staff of the undertaking to attend meetings (internal or external) for the purpose of participating in or discussing the activity constituting the breach, or
- 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.

**4.19** The key consideration is whether the director had an active role in causing his company to carry out or agree to carry out the activity constituting the breach.

## **Reasonable grounds to suspect breach but took no steps to prevent it**

**4.20** Where there is no evidence that the director's conduct contributed directly to the breach, the OFT or Regulator may consider whether there is evidence that, for example:

- the director had reasonable grounds to suspect (or knew) that persons within the company were directly or indirectly involved in the conduct which constituted a breach, but failed to take reasonable steps to halt the activity in question, or
- the director authorised or approved expenditure of funds used to finance any activity relating to the breach, having reasonable grounds to suspect (or knowing) that those funds would be used for the activity and that the activity related to a breach.

## **Ought to have known of the breach**

**4.21** When considering whether a director ought to have known that his company was involved in the breach, the OFT or Regulator is likely to consider, among other things, the following factors:

- the director's role in the company, including his specific position and responsibilities
- the relationship of the director's role to those responsible for the breach
- the general knowledge, skill and experience actually possessed by the director in question and that which should have been possessed by a person in his or her position, and/or
- the information relating to the breach which was available to the director.

**4.22** While the OFT and Regulators do not expect that directors should have specific expertise in competition law, they do expect that all company directors should appreciate that competition law compliance is a crucial matter for their companies. Furthermore, the OFT and Regulators expect that every director of every company ought to know that price-fixing, market sharing and bid-rigging agreements are likely to breach competition law. However, the fact that a director is responsible for ensuring competition law compliance within a company will not itself expose that director to an increased risk of CDO proceedings should a breach of competition law occur, or create a presumption that the director ought to have known about any breach that occurs. The OFT and Regulators will also take into account the actions taken by such a director to create a compliance culture and to avoid breaches of competition law occurring.

### Questions for Consultation

- Q2** What are your views on the proposal to allow the OFT and the Regulators to apply for CDOs in some exceptional cases where the breach of competition law has not already been proven in a relevant decision or judgment?
- Q3** What are your views on the proposal to allow the OFT and the Regulators to apply for CDOs in cases where no fine has been imposed?
- Q4** What are your views on the proposal to allow the OFT and the Regulators to apply for a CDO against a director of a company which has benefited from immunity or leniency where that director fails to co-operate with the OFT's or Regulator's investigation?
- Q5** What are your views on the proposal to allow the OFT and the Regulators to apply for a CDO against a director of a company which has benefited from immunity or leniency who has resigned as a result of his role in the breach?
- Q6** What are your views on the proposal that the OFT and the Regulators should retain a discretion to apply for a CDO against a director of a company which has benefited from Type C leniency or benefited from a reduced fine by the European Commission?
- Q7** What are your views on the proposal that when assessing whether a director is unfit to be involved in the management of a company the OFT and Regulators should consider all cases on an equal basis according to the facts and circumstances of the case and the evidence available?
- Q8** Do you have any other comments on the proposed changes to the Guidance?
- Q9** Do you have any comments on any other aspects of the OFT's current Guidance on CDOs (OFT510)?

# ANNEXE(S)

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## **A SUMMARY OF QUESTIONS**

- Q1 Do you agree that the increased use of CDOs would be an effective method of deterring breaches of competition law? If not, please explain your views.**
- Q2 What are your views on the proposal to allow the OFT and the Regulators to apply for CDOs in some exceptional cases where the breach of competition law has not already been proven in a relevant decision or judgment?**
- Q3 What are your views on the proposal to allow the OFT and the Regulators to apply for CDOs in cases where no fine has been imposed?**
- Q4 What are your views on the proposal to allow the OFT and the Regulators to apply for a CDO against a director of a company which has benefited from immunity or leniency where that director fails to co-operate with the OFT's or Regulator's investigation?**
- Q5 What are your views on the proposal to allow the OFT and the Regulators to apply for a CDO against a director of a company which has benefited from immunity or leniency who has resigned as a result of his role in the breach?**
- Q6 What are your views on the proposal that the OFT and the Regulators should retain a discretion to apply for a CDO against a director of a company which has benefited from Type C leniency or benefited from a reduced fine by the European Commission?**
- Q7 What are your views on the proposal that when assessing whether a director is unfit to be involved in the management of a company the OFT and Regulators should consider all cases on an equal basis according to the facts and circumstances of the case and the evidence available?**
- Q8 Do you have any other comments on the proposed changes to the Guidance?**

**Q9** Do you have any comments on any other aspects of the OFT's current Guidance on CDOs (OFT510)?

## **B LIST OF CONSULTEES**

**The following organisations and individuals have been consulted. We would welcome suggestions of others who may wish to be involved in this consultation process. This consultation is open to anyone who wishes to respond.**

Addleshaw Goddard LLP

Allen & Overy

Ashurst LLP

Attorney General's Office

Baker and McKenzie LLP

Better Regulation Executive

British Chambers of Commerce

Civil Aviation Authority

Cleary Gottlieb Steen & Hamilton LLP

Clifford Chance LLP

Confederation of British Industry

Competition Commission

CRA International

Department for Business, Innovation and Skills

Denton Wilde Sapte LLP

Dundas & Wilson LLP

European Commission, Directorate General Competition

Federation of Small Business

Financial Services Authority  
Freshfields Bruckhaus Deringer LLP  
Frontier Economics Limited  
Health and Safety Executive  
Herbert Smith LLP  
HM Treasury  
Institute of Directors  
Linklaters  
Local Better Regulation Office  
Macfarlanes LLP  
Mayer Brown International LLP  
Ministry of Justice  
Monckton Chambers  
NERA Economic Consulting  
Northern Ireland Executive  
Northern Ireland Utility Regulator  
Norton Rose LLP  
Office of Communications  
Office of Rail Regulation  
Office of Gas and Electricity Markets  
Office of Water Services  
Oxera

RBB Economics

Scottish Government

Shearman & Sterling LLP

Shepherd and Wedderburn LLP

Simmons & Simmons

Slaughter and May

The Bar Council

The City of London Law Society

The Competition Law Forum

The Law Society of England and Wales

The Law Society of Northern Ireland

The Law Society of Scotland

The Postal Services Commission

Trade Association Forum

Water Industry Commission for Scotland

Welsh Assembly

Wilmer Cutler Pickering Hale and Dorr LLP

## C CONSULTATION CRITERIA

**Public bodies are required to perform consultations in accordance with the following criteria wherever possible:**

- C.1 **When to consult** – formal consultation should take place at a stage when there is scope to influence the policy outcome.
- C.2 **Duration of consultation exercises** – consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- C.3 **Clarity of scope and impact** – consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- C.4 **Accessibility of consultation exercises** – consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- C.5 **The burden of consultation** – keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- C.6 **Responsiveness of consultation exercises** – consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- C.7 **Capacity to consult** – officials running consultations should seek guidance in how to run effective consultation exercises and share what they have learned from the experience.
- C.8 The full *Code of Practice on Consultation* can be found on the website of the Department for Business, Enterprise and Regulatory Reform:  
[www.berr.gov.uk/files/file47158.pdf](http://www.berr.gov.uk/files/file47158.pdf)