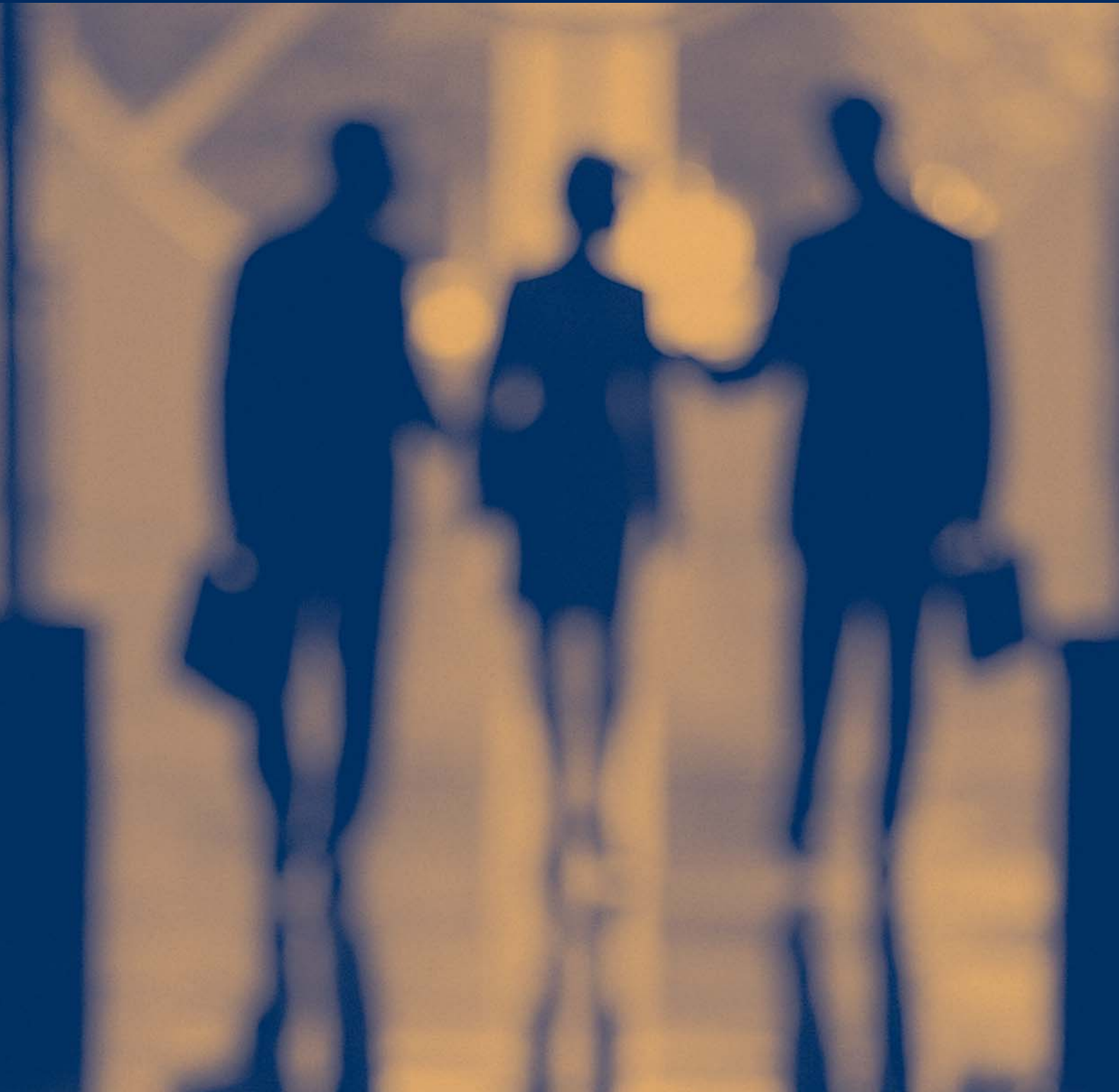


Competition disqualification orders

Guidance



The Enterprise Act 2002 received Royal Assent in November 2002. It will come into force in June 2003.

The Act makes a number of significant reforms to competition law and consumer law enforcement in the UK. The new provisions will work alongside the Competition Act 1998 and various pieces of consumer legislation, largely replacing the Fair Trading Act 1973.

The Act establishes the Office of Fair Trading (the OFT), replacing the former statutory office of the Director General of Fair Trading. The OFT will apply and enforce the new competition and consumer measures alongside the Competition Commission, the sectoral regulators, the Competition Appeal Tribunal, Trading Standards Departments and others.

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1 Introduction

¹ For these purposes each of the following is a 'specified regulator':

- 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.

See section 9E(2) CDDA.

In its designated sector, a specified regulator has all the powers of the OFT in respect of CDOs (see, e.g. sections 9A(10), 9B and 9C 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.) The Communications Bill, presently before Parliament, proposes to transfer the functions of the Director General of Telecommunications to the Office of Communications, which will have a wider sectoral remit.

² Sections 9A to 9E CDDA.

1.1 This guidance deals with the powers of the Office of Fair Trading (the OFT) and each specified regulator¹ (Regulator) 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 may decide to make a CDO.

1.2 The OFT and Regulators are committed to transparency and wish to explain the general approach they intend to take to CDOs. This guidance is particularly aimed at company directors, their professional advisers and relevant professional associations. It is however hoped that interested businesses 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 (CDUs). Chapter 4 sets out the factors which the OFT or Regulator will take into consideration when deciding whether or not to apply for a CDO. Chapter 5 outlines the procedure which the OFT or Regulator will follow **before** applying to the court for a CDO.

2 Competition Disqualification Orders

2.1 Under the CDDA,³ 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:

- (1) an undertaking which is a company of which that person is a director commits a breach of competition law, **and**
- (2) the court considers that person's conduct as a director makes him or her unfit to be concerned in the management of a company.⁴

'(1) 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.⁵ An undertaking includes any natural or legal person carrying on commercial or economic activities relating to goods or services, irrespective of its legal status.⁶ 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**⁷ of a **company**. The OFT and Regulators consider that 'director' for these purposes includes a de facto director.⁸ 'Company' includes unregistered companies.⁹

³ As amended by the Enterprise Act 2002.

⁴ See sections 9A(1) to (3) CDDA.

⁵ Section 9A(11) CDDA.

⁶ Further guidance on the meaning of 'undertaking' for the purposes of CA98 can be found in the Competition Act guidelines 'The Major Provisions' and 'The Chapter 1 Prohibition'.

⁷ 'Director' includes any person occupying the position of director, by whatever name called: section 22(4) CDDA; for these purposes 'director' 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 and the Court of Appeal in **Secretary of State for Trade and Industry v Deverell** [2000] 2 All ER 365.

⁸ Defined by Millet J in **Re Hydrodam (Corby) Ltd**. (cited at footnote 7 above) as '...a person who assumes to act as a director.' A de facto directorship will generally be regarded as being mutually exclusive of shadow directorship: **Re Hydrodam (Corby) Ltd**.

⁹ 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, e.g. **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).

¹⁰ For the purposes of section 9A of the CDDA.

¹¹ Section 9A(4) CDDA. See paragraph 4.8 below for breaches of competition law which ended before commencement of sections 9A to 9E CDDA: these are breaches in respect of which the OFT does **not** intend to apply for CDOs.

2.4 'Breach of competition law'¹⁰ 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.¹¹

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...'

¹² 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*'.

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.'¹²

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.’

‘(2) 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 law¹³
 - 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
 - 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 law¹⁴
- must **not** have regard to any of the matters specified in Schedule 1 of the CDDA.¹⁵

2.10 The maximum period of disqualification under a CDO is 15 years.¹⁶ During the period in which a person is subject to a CDO, it is a criminal offence¹⁷ for him or her 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
- act as an insolvency practitioner.¹⁸

¹³ See paragraph 2.4 above for ‘breach of competition law’.

¹⁴ See paragraph 2.4 above for ‘breach of competition law’.

¹⁵ Sections 9A(5) and (6) CDDA. Schedule 1 CDDA specifies matters to be considered when determining unfitness of directors in non-CDO cases.

¹⁶ Section 9A(9) CDDA.

¹⁷ Section 13 CDDA. Unless, with respect to the categories in the first three bullet points below only, that person has the leave of the court: section 1(1)(a) CDDA.

¹⁸ Section 1(1) CDDA.

¹⁹ 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 the relevant debts of the company: section 15(1)(a) CDDA.

²⁰ See section 18 CDDA.

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.¹⁹ Furthermore, details of a CDO will be entered into a public register maintained by the Secretary of State for Trade and Industry.²⁰

3 Competition disqualification undertakings

3.1 The OFT or Regulator may accept a Competition Disqualification Undertaking (CDU) 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.²¹

²¹ Section 9B(2) CDDA.

3.2 A CDU is an undertaking by a person that for the period specified in the undertaking he or she 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.²²

²² Section 9B(3) CDDA. However, a disqualification undertaking may provide that the prohibition covering the categories in the first three bullet points above does not apply if the person obtains the leave of the court.

²³ Section 9B(5) CDDA.

²⁴ See sections 13 and 15 CDDA. See also paragraph 2.10 above.

²⁵ See section 18 CDDA.

The maximum period which may be specified in a CDU is 15 years.²³ Breach of a CDU has the same consequences as a breach of a CDO.²⁴ Furthermore, details of a CDU will be entered into a public register maintained by the Secretary of State for Trade and Industry.²⁵

3.3 The OFT or Regulator will give very serious consideration to a CDU offered in response to a section 9C notice.²⁶ Whether or not such an offer will be accepted by the OFT or Regulator will depend upon the period of disqualification offered and in the light of all the facts of the case.

²⁶ Please see paragraph 5.1 et seq. for a discussion of section 9C notices.

3.4 The period of a CDU must be proportionate to the seriousness of the case against the director, taking account of any aggravating or mitigating factors.

4 Applications for competition disqualification orders

- 4.1** The OFT or Regulator has the power to apply to the court²⁷ for a CDO against a person.²⁸ Since, before a CDO can be made, a court must be persuaded that a person's conduct makes him or her unfit to be a director, the OFT or Regulator will only apply to the court for a CDO against a person whose relevant conduct it considers to be such as to make them unfit to be concerned in the management of a company.

Factors for consideration

- 4.2** The OFT or Regulator will follow a five-step process when deciding to apply for a CDO. It will:
- (1) consider whether an undertaking which is a company of which the person is a director has committed a breach of competition law
 - (2) consider whether a financial penalty has been imposed for the breach
 - (3) consider whether the company in question benefited from leniency (see paragraph 4.11 below for the definition of 'leniency' in this context)
 - (4) consider the extent of the director's responsibility for the breach of competition law, either through action or omission
 - (5) have regard to any aggravating and mitigating factors.

- 4.3** To help it consider these questions, the OFT or Regulator may use any or all of the information gathering powers in sections 26 to 28 of CA98.²⁹

Directors and officers of parent and subsidiary companies

- 4.4** As noted at paragraph 2.2 above, an undertaking may in some cases constitute a group of companies (treated for the purposes of competition law as a 'single economic entity'). In certain circumstances, such as where a subsidiary has no real independence from its parent, a parent company may be held responsible for a breach by one or more of its subsidiaries on the basis that they form a single economic entity. In such cases, for the purposes of CDOs,

²⁷ In England and Wales 'court' means the High Court. In Scotland, 'court' means the Court of Session: section 9E(3) CDDA.

²⁸ Section 9A(10) CDDA.

²⁹ See sections 9C(1) and 9C(2) CDDA. See the Competition Act guideline '*Powers of Investigation*' (OFT404) for a discussion of sections 26-28 of CA98.

the OFT or Regulator will first consider which company or companies in the corporate group directly committed the breach of competition law. Applications for CDOs will then be considered against the directors of those companies using the five-step process discussed above at paragraph 4.2.

- 4.5** In respect of the parent company, the directors or officers of the parent company may not have been formally appointed as directors of the subsidiary company pursuant to the subsidiary's articles of association. Where this is the case, the OFT or Regulator will consider whether any of the directors or officers of the parent company are de facto or shadow directors of the subsidiary. Where such persons are de facto or shadow directors of the subsidiary, the OFT or Regulator will consider whether to apply for a CDO against these persons, using the five-step process discussed above at paragraph 4.2.

Step 1 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 law³⁰. The OFT or Regulator only intends to 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 a Regulator³¹
- European Commission
- Competition Appeal Tribunal, or
- European Court.³²

- 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 or did not have an actual or potential effect on trade in the United Kingdom.

³⁰ See paragraph 2.4 above for the definition of 'breach of competition law.'

³¹ See footnote 1 for the discussion of 'Regulator'.

³² 'European Court' means the Court of Justice of the European Communities and includes the Court of First Instance.

³³ As at May 2003, sections 9A to 9E CDDA were due to enter into force on 20 June 2003.

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.³³ Breaches which started before the commencement of sections 9A to 9E CDDA, but which continued onto or after the date for commencement of those sections may be susceptible to CDO applications.

Appeals

4.9 An application for a CDO will not be made where the decision or judgment relating to the breach remains subject to appeal. '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 2 Whether a financial penalty has been imposed for the breach

4.10 The next matter which the OFT or Regulator will take into account is whether a financial penalty has been imposed for the breach of competition law. The OFT or Regulator will not consider CDO applications to be appropriate in cases other than those in which a financial penalty has been imposed and, in the event of an appeal, upheld in whole or part.

Step 3 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 leniency. 'Leniency' for these purposes means the immunity from, or any reduction in, financial penalty in the manner described in the *'Director General of Fair Trading'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'*³⁴ (the fining notice) or any publication replacing them. 'Reduction' for these purposes does **not** mean any reduction in the amount of financial penalty imposed for a breach owing to the application of any mitigating factors discussed in the

³⁴ OJ 2002 C45/3.

penalties guidance or the fining notice. (See also paragraph 4.27 below with respect to no-action letters in cartel cases.)

- 4.12** The OFT or Regulator will **not** apply for a CDO against **any** current director of a company whose company benefited from leniency in respect of the activities to which the grant of leniency relates.³⁵ Companies benefiting from leniency will receive confirmation of this policy.
- 4.13** However, 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 and/or for opposing the relevant application for leniency, then the OFT or Regulator 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 Regulator or European Commission.
- 4.14** 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 ensure that their companies approach the OFT or Regulator or the European Commission for leniency.

³⁵ 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 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.

Step 4 Extent of the director's responsibility for the breach

- 4.15** The next step in the OFT 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.
- 4.16** The greater the degree of the director's responsibility for or involvement in a breach, the greater the likelihood that the OFT or Regulator will consider that person to be unfit to be concerned in the management of a company and hence, of a CDO application being made against that person. 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
- does not rule out applying for a CDO against a director whom it considers, taking into account that director's role and responsibilities, to have failed to keep himself or herself sufficiently informed of the company's activities which constituted the breach of competition law – whether an application is made in these circumstances will depend upon the OFT or Regulator's priorities.

Direct involvement – likely to apply for CDO

4.17 The OFT or Regulator will consider whether there is evidence indicating that a director was directly involved in the breach. The OFT or Regulators are of the view that this is evidence of the director, either alone or with other persons, having:

- actively taken steps to carry out the infringement (e.g. 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)
- planned, devised, approved or encouraged the activity of the undertaking which caused the breach
- 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, 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.

4.18 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.

Failure to take corrective action – quite likely to apply for CDO

4.19 Where there is no evidence of direct involvement by the director in a breach, the OFT or Regulator may consider whether there is evidence that:

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

Failure to keep sufficiently informed – CDO application not ruled out

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

- the director's role in the company
- 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
- the information relating to the breach which was available to the director prior to the breach.

4.21 While the OFT and Regulators do not expect that directors must 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.

Step 5 Aggravating and mitigating factors

4.22 The final step which the OFT or Regulator will consider when deciding whether to apply for a CDO against a director is whether any aggravating or mitigating factors (or both) apply. Aggravating factors increase the likelihood that the OFT or Regulator will apply for a CDO. Conversely, the presence of mitigating factors may reduce the likelihood that an application for a CDO will be made.

Aggravating factors

4.23 Aggravating factors include evidence that the director:

- has been directly or indirectly involved in breaches of competition law in the past
- destroyed or advised others to destroy any records relating to any breach of competition law with the objective of concealing the breach
- obstructed or impeded any investigation by the OFT or Regulator or European Commission into any breach of competition law or attempted to do so or advised others to do so
- during any investigation of a breach of competition law, unlawfully refused or advised refusing to grant access to investigators from the OFT or Regulator or European Commission to any part of the company's premises
- ordered, encouraged or advocated continued participation in the breach following commencement of an investigation into the breach by the OFT or Regulator or European Commission.

Mitigating factors

4.24 Mitigating factors include evidence indicating that:

- the undertaking committed the breach as a result of coercion by another undertaking (for example, where the breach was committed as the only perceived way to avoid threatened retaliation by a dominant undertaking)
- there was genuine uncertainty prior to the breach as to whether the infringing activity constituted a breach
- the director contributed to the company taking quick remedial steps when the breach was brought to his or her attention, including the implementation or revision of a competition law compliance programme
- the director took disciplinary action against the employees responsible for the breach
- the director was himself or herself under severe internal pressure (such as from controlling shareholders of the company or directors of a parent company, for example) either to be involved in the breach or to allow it to occur.³⁶

³⁶ Pressure to meet sales or profitability targets will not however be a mitigating factor for these purposes.

Cartel offence: conviction/no-action letters

4.25 Any court³⁷ 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.³⁸

³⁷ Including a magistrate's court.

³⁸ See sections 2(1) and 2(2)(b) CDDA.

4.26 Where an individual company director has been convicted of the cartel offence under section 188 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 individual director.³⁹ The OFT and Regulators take 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 they would not expect to have to use their powers under section 9A CDDA in these circumstances.

³⁹ This is because the cartel offence is an indictable offence (section 190 Enterprise Act 2002).

⁴⁰ 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 the OFT guidance *'The cartel offence: Guidance on the Issue of No-Action Letters for Individuals'* (OFT513).

4.27 The OFT or Regulator will **not** apply for a CDO against **any** beneficiary of a no-action letter in respect of the cartel activities specified in that letter.⁴⁰ Recipients of no-action letters will receive individual confirmation of this policy.

5 Procedure

- 5.1** Before making an application for a CDO against a person, the OFT or Regulator 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:
- that the OFT or Regulator proposes to apply for a CDO against the person
 - the consequences for that person of a CDO being made against him or her
 - the grounds for the proposed application
 - the evidence which the OFT or Regulator intends to submit to the court in support of its proposed application
 - that the OFT or Regulator will, if requested, allow that person to have access to the file concerning the proposed application (subject to any confidentiality excisions to the file)
 - that that person has the right to make written, and if requested, oral representations prior to the OFT or Regulator making the proposed application⁴¹
 - a deadline for indicating to the OFT or Regulator whether that person wishes to make written representations and the date by which oral representations must be requested
 - that if the OFT or Regulator has not heard anything from that person by the deadline specified in the bullet point above, following that date an application for CDO may be made forthwith
 - that that person's representations may be prepared or made by a legal advisor
 - that that person may wish to offer the OFT or Regulator a CDU, which if accepted by the OFT or Regulator, would mean that the OFT or Regulator would not make the application for a CDO
 - the length of a CDU likely to be accepted by the OFT or Regulator in respect of that person
 - the costs incurred by the OFT or Regulator in the relevant proceedings to date and an assurance that, if a CDU offered by

⁴¹ The OFT or Regulator is required to allow the person an opportunity to make representations: section 9C(4)(b) CDDA.

that person is accepted by the OFT or Regulator, that the OFT or Regulator will not usually seek to recover any costs from that person, and

- a statement that once a CDO application has been made to the court, that the award of costs will be at the discretion of the court and that the court will usually award costs against the unsuccessful party.

Enterprise Act publications

Throughout 2003 the OFT is issuing a series of guidance booklets on various aspects of the Act. New guidance may be published and the existing guidance revised from time to time. For an up-to-date list of guidance booklets:

check www.ofg.gov.uk/enterpriseact.htm
email enterpriseact.enquiries@ofg.gsi.gov.uk
or telephone Enterprise Act enquiries on 0207 211 8181

All guidance booklets can be ordered or downloaded from the OFT's website <http://www.ofg.gov.uk/enterpriseact.htm>. Or you can request them by:

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Published by the Office of Fair Trading
Printed in the UK on paper comprising 75% post-consumer waste and 25% ECF pulp
Product code OFT510
Edition 05/03 PUB 129/3,000
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