

Alert | Antitrust Litigation & Competition Regulation



July 2018

Director Disqualification: CMA Signals Increased Enforcement

The Consultation

The UK Competition and Markets Authority (CMA) has on 26 July 2018 opened a [consultation on revised guidance](#) (Revised Guidance) on competition disqualification orders (CDOs) against directors of undertakings suspected to have been in breach of competition laws.

The Effect of a CDO

By way of background, the CMA may apply to court for a CDO against a director¹ of an undertaking². If an undertaking has committed a breach of competition law, then the court must make a CDO against the director of that undertaking if it considers that director unfit to be concerned in the management of a company.

Alternatively, the CMA may accept a competition disqualification undertaking (CDU) instead of applying for, or proceeding with an application for a CDO.

¹ Director includes any person occupying the position of director, including a shadow director or *de facto* director (a person who assumes to act as a director).

² Undertaking may include a company, building society, incorporated friendly society, NHS foundation trust or a member of a limited liability partnership.

A person subject to a CDO is prohibited, for a maximum period of 15 years, from:

- (a) Being a director of a company;
- (b) Acting as a receiver of a company’s property;
- (c) In any way, whether directly or indirectly, being concerned with or taking part in the promotion, formation or management of a company; or
- (d) Acting as an insolvency director.

Any person involved in the management of an undertaking in contravention of a CDO or CDU is personally liable for all relevant debts of the undertaking.

Key Changes

The CMA’s draft Revised Guidance aims to reflect the CMA’s practice more closely and clarifies the CMA’s view of the scope of its powers. We set out the key changes in the Revised Guidance in the table below:

Key Changes	Current Guidance	Revised Guidance
Clarification that the CMA will, in appropriate cases, apply for a CDO where the breach of competition law has not yet been established by a decision or judgment.	<i>The CMA will only, in exceptional cases, seek a CDO in the absence of a decision or judgment in relation to a breach of competition law.</i>	<i>The reference to the need for a decision or judgment in relation to a breach of competition law was withdrawn with effect from 4 June 2018. The CMA proposes to maintain the withdrawal.</i>
Clarification that there is no territorial restriction on the CMA to apply for a CDO against a director of a company that had infringed (or is suspected of infringing) UK or EU competition law in another territory.	<i>It is not the intention of the CMA to apply for CDOs where the breach of competition law does not or did not have an actual or potential impact in the UK.</i>	<i>No reference to territorial considerations in pursuit of a CDO.</i>
Clarification that the CMA will consider the conduct of all directors of companies that constitute the undertaking, including parent and subsidiary companies, when deciding whether to seek a CDO.	<i>The CMA may hold a parent company responsible for a breach by its subsidiaries on the basis they have no real independence and form a single economic entity.</i>	<i>The CMA will carefully consider all directors’ conduct in relation to the breach of competition law in accordance with the general principles set out in paras 4.3 – 4.9 of the Revised Guidance.</i>
Clarification that the CMA retains full discretion in	<i>The CMA will follow a 5-step</i>	<i>In addition to the considerations set out in the</i>

<p>determining whether or not to pursue a CDO and will consider all relevant facts and circumstances of each case, the evidence available, and the public interest in the disqualification of the director.</p>	<p><i>process:</i></p> <ul style="list-style-type: none"> (1) <i>Whether there has been a breach</i> (2) <i>The nature of the breach and whether a financial penalty has been imposed</i> (3) <i>Whether the undertaking has benefited from leniency</i> (4) <i>The extent of the director’s responsibility for the breach</i> (5) <i>Aggravating and mitigating factors.</i> 	<p><i>CMA’s current guidance, the CMA will consider other relevant considerations including the director’s conduct during the CMA’s investigation, the nature, duration, and consumer impact of the breach, and the deterrent effect of a CDO in the relevant market more widely.</i></p>
<p>Removal of the automatic right to make oral representations in section 9C notices³.</p>	<p><i>The person receiving a section 9C notice has the right to make written and, if requested, oral representations prior to the CMA making the proposed application.</i></p>	<p><i>The person receiving a section 9C notice has an opportunity to make written representations prior to the CMA making the proposed application.</i></p>
<p>Reduction in pre-action evidence provided to the director against whom a CDO application is proposed.</p>	<p><i>The CMA will provide the director with a full set of its evidence prior to issuing proceedings.</i></p>	<p><i>The CMA will provide the director with a summary of evidence and an index to relevant documents (which will only be key documents).</i></p>
<p>Express recognition for cooperation and early resolution.</p>	<p><i>No express recognition of material assistance and co-operation.</i></p>	<p><i>The CMA will recommend or agree a shorter period of disqualification for directors who have provided material assistance and cooperated with the CMA in its investigation, or offers a CDU at an early stage.</i></p>

³ Before making an application for a CDO against a director, the CMA must give notice to that person setting out, amongst other things, the grounds for the proposed application and evidence the CMA intends to submit in support of it.

Despite having had the power to apply for CDOs since 2003, the CMA did not seek to use this power until December 2016, when it secured a five-year CDU against a director of Trod Limited, a company the CMA found to have engaged in cartel conduct.

The CMA has since indicated it intends to make better use of its director qualification powers to deter individuals from engaging in anticompetitive behaviour. In April 2018, the CMA secured the disqualification of two directors in a cartel involving estate agents in Somerset.

The Revised Guidance signals the CMA's intention to flex its director disqualification powers to foster a top-down approach to compliance with competition law. Regardless of the outcome of the consultation, it can be expected that CDOs and CDUs will feature more prominently in future cases. Directors of companies and other undertakings engaged in economic activity in the UK should be aware of their responsibility to put in place effective measures to deter, detect, and prevent anti-competitive conduct.

The consultation on the Revised Guidance will be open until 5:00 p.m. on 13 September 2018.

Authors

This GT Alert was prepared by **Gillian Sproul**, **Lisa Navarro**, and **Addiped Cheng** †. Questions about this information can be directed to:

- **Gillian Sproul** | +44 (0) 203.349.8861 | sproul@gtlaw.com
- **Lisa Navarro** | +44 (0) 203.349.8757 | navarro@gtlaw.com
- **Addiped Cheng** ‡ | +44 (0) 203.349.8700 | chenga@gtlaw.com
- Or your **Greenberg Traurig attorney**

‡ Qualified in Hong Kong.

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany. † Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.* Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¨Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2018 Greenberg Traurig, LLP. All rights reserved.*