OFFICE OF FAIR TRADING

Director disqualification orders in competition cases

Summary of responses to the OFT's consultation, and OFT's conclusions and decision document

May 2010

OFT1244

CONTENTS

1 INTRODUCTION

1.1 The Office of Fair Trading (OFT) and the specified regulators (the Regulators)[1] have the power to apply to the court for Competition Disqualification Orders (CDOs) against directors who are responsible for breaches of competition law. When deciding whether to impose a CDO the court must consider:

- whether there was a breach of competition law, and
- whether the director's conduct in relation to that breach makes him unfit to be involved in the management of a company.

1.2 CDOs impact on – and therefore change the incentives of – individuals, not firms. The OFT believes that the use of CDOs could therefore help to change boardroom culture and increase deterrence.

1.3 However, the OFT believes that the current guidance on CDOs (the Guidance)[2] does not maximise their deterrent effect. In order to increase the deterrent effect of CDOs, in August 2009 the OFT issued a consultation (the Consultation) on proposed changes to the Guidance.

1.4 Specifically, the OFT asked for views on the following:

- whether it would be appropriate for the Guidance to state that the OFT or a Regulator would be likely to apply for a CDO in all cases where it thinks that 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] 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.

[2] *Competition Disqualification Orders* (OFT 510)

- whether in certain cases it would be appropriate to apply for a CDO in relation to a breach of competition law which had not already been proven in a decision or judgment

- whether in certain cases it would be appropriate to apply for a CDO in relation to a breach of competition law where no financial penalty had been imposed

- whether it would be appropriate to extend the range of circumstances in which it is possible to apply for a CDO against a director of a company which has benefited from 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.

1.5 As part of this consultation, the OFT Competition Policy team gave presentations to, and held discussions with, external stakeholders on the issues arising out of the proposed changes.

1.6 The OFT received a total of 16 responses to the Consultation.[3] Broadly speaking, three key themes emerged:

- **Deterrence**: the increased use of CDOs would be an effective method of deterring breaches of competition law [4]

- **Board dynamics**: Boards tend to act on a collegiate basis and are loth to cast members adrift; the incentives of the company and its Board on the one hand and of individual Board members on the other must be aligned in order to encourage leniency applications

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[3] The respondents to the Consultation are listed at Annexe A.

[4] Only one respondent disagreed with this proposition: the Institute of Directors expressed concern, stating that CDOs would have a disproportionate impact on SMEs even though it is the behaviour of large companies which has the greatest impact on UK consumers.

- **Compliance**: the OFT should not unwittingly take steps which could discourage people from becoming compliance directors or non-executive directors.

1.7 This document sets out a summary of the responses to the Consultation and the OFT's decisions on its proposals. It should be read in conjunction with the Consultation.

1.8 The OFT is also publishing revised Guidance on CDOs.

2 CDOS AND DETERRENCE

2.1 In the Consultation we asked for views on the relationship between CDOs and deterrence.

Question one: 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.

2.2 Most respondents either agreed with, or provided qualified agreement for, the statement that the increased use of CDOs would be an effective method of deterring breaches of competition law.

2.3 It was noted, in particular, that CDOs were a more effective and suitable deterrent than the cartel offence in most cases: CDOs target the right individuals (namely, those who set the behavioural agenda for a company and who are more likely to benefit from anti-competitive practices); and it is easier to bring a CDO action than a criminal charge, given the lower standard of proof and the fact that 'dishonesty' does not need to be established.

2.4 Respondents who provided qualified agreement with this statement noted, in particular, the following points.

- The primary purpose of director disqualification is to protect the public, rather than to deter breaches of competition law - this ought to have greater prominence in the OFT's thinking.

- Even if the proposed changes led to an increase in the number of CDO applications made by the OFT, the Court would not necessarily grant CDOs in all cases. This might limit the value of CDOs as a deterrence tool.

- There is no impediment to the OFT bringing cases under the current Guidance. A more stringent use of CDO powers, and a consequent increase in general awareness of CDOs, might be a more effective and appropriate deterrent than extending the circumstances in which they can be used.

2.5 The Institute of Directors felt that CDOs were not capable of having a significant effect on competition in the UK. It suggested that greater use of CDOs would have a disproportionate impact on small companies (since it is easier to argue that a director of a small company 'ought to have known' about the conduct that breached competition law), but that it was the behaviour of large companies which had the greatest impact on the welfare of UK consumers.

OFT's view

2.6 The OFT has not used its CDO powers to date for a number of reasons - for example because the conduct in question pre-dated the CDO power, because the relevant individuals benefited from immunity from CDOs under the leniency regime, or because of a lack of evidence.

2.7 The OFT notes that CDOs serve to protect the public. In particular, the OFT notes that the White Paper leading to the Enterprise Act 2002 (which amended the Company Directors Disqualification Act 1986)[5] states:

> 'The Government believes that it is also in the public interest that directors who have engaged in serious breaches of competition law should be exposed to the possibility of disqualification on that ground alone. It therefore proposes to legislate to enable the OFT to seek a court order disqualifying a director from acting in the management of a limited liability company where serious breaches of competition law have been found.'

2.8 The OFT considers that individual deterrence is nevertheless important and that this in turn protects the public. This is consistent with the findings of the 2007 Deloitte report on the deterrent effect of competition enforcement.[6] Moreover the public interest benefits of CDOs

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[5] A World Class Competition Regime, 30 July 2001, paragraph 8.24.

[6] The deterrent effect of competition enforcement by the OFT, a report prepared for the OFT by Deloitte, November 2007 (OFT962).

themselves increase deterrence. The two objectives are therefore complementary.

2.9 The OFT is also of the view that CDOs ought to apply equally to companies of all sizes. Effective deterrence (and the public interest benefits which flow from it) will not be achieved if directors of certain types of companies consider that they are not subject to particular sanctions.

2.10 For these reasons the OFT continues to believe that CDOs act as an important deterrent to anti-competitive behaviour by companies of all sizes, which in turn protects the public. It will therefore seek to identify future cases where applications for CDOs are appropriate.

3 CHANGES TO STEP 1 (BREACH OF COMPETITION LAW)

Question two: 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?

3.1 The Consultation suggested that there may be exceptional cases where it is appropriate for the OFT or a Regulator to apply for a CDO where the breach of competition law has not already been established by decision or judgment, for example where:

- a decision or judgment is subject to appeal only in relation to the quantum of fine imposed and not to the finding of infringement
- 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 section 39 or 40 CA98 and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000.[7]

3.2 The Consultation therefore proposed amending step 1 (breach of competition law) of the Guidance in order to allow the OFT to make an application for a CDO in such circumstances.

3.3 Some respondents expressed support or qualified support for this proposal. Respondents who provided qualified support noted, among other things, that:

- it could be difficult in practice to prove an infringement before a non-specialist court

[7] SI 2000/262.

- such applications should be made in exceptional circumstances only, meaning that the proposal might have only a limited impact on deterrence,

- the OFT ought to provide an exhaustive list of what constitutes an 'exceptional case'.

3.4 Over half of the respondents disagreed with this proposal. In particular, the following comments were made.

- A case that is not considered serious enough to warrant an OFT investigation under the Competition Act 1998 (the CA98) should not warrant a CDO application.

- A CDO application made directly to the Court would bypass the procedural safeguards embedded in the competition regime and that it would be wrong to transfer the decision-making burden imposed on the OFT to the Court. The OFT decision-making process is thorough and protects parties' rights of defence; procedural safeguards could be diluted if the question of breach were left to the Court.

- It would be difficult for an individual to defend an allegation that the undertaking breached competition law (in addition to the allegations that he was unfit to be involved in the management of a company) due to a lack of information or the costs involved. This may in turn pressurise a director to offer a Competition Disqualification Undertaking (CDU) in lieu of a CDO.

- It is, in practice, impossible to separate issues relating to the fine from the facts underlying the finding of infringement. For example, even in cases where only the quantum of a fine is subject to appeal, there is a chance that the fine will be set aside in its entirety.

- The benefit of statutory immunity from fines should read across into CDOs: where the undertaking concerned benefits from immunity from fines under the CA98 and the OFT has decided that for this reason it would be inappropriate to launch an investigation into a

suspected infringement, it would be disproportionate to apply for a CDO against one of its directors.

- It would be inappropriate to base a CDO application on a finding of infringement made in a national court outside the UK.

OFT's view

3.5 The OFT has considered carefully the responses received. It agrees that this proposal raises a number of practical and legal questions, but believes these are manageable and should be weighed against the potential benefits. It therefore remains of the view that the proposal should be implemented.

3.6 The OFT stresses that this approach would be taken only in exceptional cases. For example, it may be appropriate in relation to directors of companies that have become insolvent or otherwise been wound up. In these circumstances it may allow the OFT to take effective action against director-shareholders of small companies who sought to avoid responsibility for their actions by winding up an existing company and starting a new one.

3.7 Other examples[8] might include 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, or where the OFT or Regulator has decided it is not appropriate to issue a decision against the undertaking because the undertaking would 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.[9]

3.8 It should also be stressed that the OFT would carefully consider whether to apply for a CDO in the absence of a relevant decision or judgment on

[8] This list of examples is not intended to be exhaustive.

[9] SI 2000/262.

a case by case basis, taking into account all the relevant circumstances and evidence available. In such cases the OFT would still be obliged to satisfy the Court that a breach had occurred. The individual concerned would have the right to defend the allegation of breach (as well as the allegations in relation to his own conduct) and would benefit from the rights of defence inherent in the Court process.

3.9 In addition, the OFT notes the proposal has the potential to achieve efficiencies, which could benefit both the OFT and the individuals concerned. The constituent elements of a CDO application (a breach of competition law and the director's fitness to be involved in the management of a company) would both be tested by the Court, preserving the director's rights of defence, but without the need for a separate OFT decision-making process under the CA98. As well as achieving resource savings for the OFT, this approach would reduce the period of uncertainty to which the individual is subjected pending the outcome of the CDO process.

3.10 Finally, the proposal highlights the importance that the OFT places on individual deterrence and its intention to hold directors individually accountable for breaches of competition law for which they are responsible. The OFT considers this to be important both in ensuring effective deterrence and in protecting the public - a CDO protects the public from the future conduct of that individual (in whatever company or market).

4 CHANGES TO STEP 2 (FINANCIAL PENALTIES)

Question three: 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?

4.1 The Consultation proposed changes to step 2 (whether a financial penalty has been imposed for the breach) of the Guidance in order to allow the OFT or a Regulator to apply for CDOs in cases where no financial penalty had been imposed. The Consultation suggested that this might be appropriate, for example,

- in relation to 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
- in the exceptional cases referred to in chapter 3 above.

4.2 Some respondents agreed with, or provided qualified agreement for, this proposal. Respondents who provided qualified agreement noted, among other things, that:

- this approach would be appropriate only where the breach and director's culpability had both been proven in Court[10]
- the behaviour of the director would have to be heinous in order for the OFT to apply for a CDO where no financial penalty had been imposed
- the OFT should offer guidance on, amongst other things:
  - the circumstances in which it considers it would be appropriate to apply for a CDO in cases of 'small agreements' or 'conduct of minor significance', and

[10] This is a legal requirement in all CDO cases.

- the types of behaviour which would be considered sufficiently serious to warrant a CDO where there has been no fine.

4.3 Most respondents disagreed with this proposal. It was noted, for example, that:

- fines are an indicator of the seriousness of the breach; it would be contradictory and disproportionate to apply for a CDO in a case where no fine had been imposed

- it would be inappropriate to apply for a CDO where the imposition of a fine or the amount of a fine is subject to appeal, as such an appeal may cover issues which are directly relevant to a director's behaviour and which ought to be resolved before a CDO application is made (for example, pleas in mitigation or the effectiveness of compliance measures)

- the proposal would have a limited impact on deterrence - directors of large corporations would not be deterred from engaging in anti-competitive conduct just because the OFT had been successful in applying for a CDO against a director of a small company.

OFT's view

4.4 The OFT has considered carefully the comments made, and concerns raised, in response to the Consultation and remains of the view that this proposal should be implemented.

4.5 It notes that, as with the proposed changes to step 1, this approach would be adopted only in exceptional cases. However, there may be cases in which no fine has been imposed but where the director's conduct is, nevertheless, sufficiently serious to warrant a CDO application.

4.6 The OFT believes that it is important to send a strong deterrence message to all directors. In particular, the OFT is concerned that the public protection objective of CDOs would be undermined and effective deterrence would not be achieved if certain directors believe that they

are exempt from CDO applications simply because they operate in small companies or small markets. This is consistent with the findings of the 2007 Deloitte report on the deterrent effect of competition enforcement.[11]

4.7 The OFT notes that, whereas the legislative framework provides for immunity from fines for 'small agreements' and 'conduct of minor significance', it does not provide immunity from CDOs for directors in these cases. In this context the OFT also notes the importance of CDOs in protecting the public interest. It would be contrary to this objective for the OFT to exclude the possibility of applying for a CDO simply because a director's conduct arose in the context of a case involving, for example, a 'small agreement' or 'conduct of minor significance'. A CDO protects the public from the future conduct of that individual (in whatever market).

4.8 It is, in any event, for the Court to determine whether the director's conduct was sufficiently serious such that he is unfit to be involved in the management of a company (regardless of whether a financial penalty has been imposed on the company or wider undertaking).

[11] The deterrent effect of competition enforcement by the OFT, a report prepared for the OFT by Deloitte, November 2007 (OFT962).

5 CHANGES TO STEP 3 (LENIENCY)

5.1 Step 3 (leniency) of the 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. The Consultation proposed a number of changes to this step of the Guidance.

Question four: 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?

5.2 Over half the respondents agreed with, or provided qualified agreement for, the proposal that the OFT and the Regulators should be allowed 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. For example, it was noted that:

- the position as regards CDOs ought to be consistent with the position as regards criminal immunity - if a director of a company which has received leniency fails to co-operate, the individual should no longer be protected
- this approach would provide directors and undertakings with a further incentive to co-operate with the OFT and would improve the effectiveness of the leniency regime
- this approach would be appropriate so long as the failure to co-operate was significant, and so long as it did not interfere with directors' rights against self-incrimination.

5.3 A number of respondents disagreed with this proposal. For example, it was noted that:

- this proposal could undermine incentives to apply for leniency, particularly given the risk that 'failure to co-operate' could be interpreted broadly

- 'failure to co-operate' is already dealt with under the OFT's leniency policy, and so should not form part of its CDO Guidance

- a CDO would never be appropriate where an undertaking continues to benefit from leniency.

OFT's view

5.4 The OFT does not believe that this approach will undermine companies' incentives to apply for leniency. Rather it is of the view that this approach will support the leniency regime by providing directors with an incentive to co-operate. It may also assist undertakings in meeting their own co-operation obligations under the leniency regime (which generally include an obligation to take steps to secure the co-operation of their directors and employees).

5.5 Moreover, the OFT does not believe that it will be problematic to assess the meaning of 'failure to co-operate'. This is something that the OFT considers as a matter of course in CA98 cases, for example, in the context of settlement, leniency and at step 4 of the penalty calculation. In Type A and B immunity cases, for example, directors and employees of the applicant are already obliged to co-operate with the OFT as a condition of criminal immunity.

5.6 The OFT therefore intends to amend its Guidance as proposed.

Question five: 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?

5.7 Most respondents disagreed that the OFT and the Regulators should be able 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.

5.8 It was suggested that this approach would be difficult to apply in practice. Respondents queried how the OFT would establish that a

director had resigned or had been removed because of involvement in a breach, given that the terms of his resignation would be unlikely to be explicit in this respect. It was also noted that it is difficult to equate resignation with culpability in practice: directors resign for many reasons – for example, for reasons of integrity or even as a scapegoat for others.

5.9 It was suggested that the OFT would need to provide guidance on the practical application of this proposal if it were implemented, for example, on how the OFT would determine the reason for a resignation.

5.10 Respondents suggested that this proposal could undermine the leniency regime. Specifically, it could cause directors to refrain from disclosing information about incriminating behaviour which might lead to their removal or resignation (and the loss of protection from a CDO).

5.11 It was further suggested that this approach could send a confusing message to companies which, on the one hand, wished to punish errant directors (and potentially expose them to CDOs) and, on the other hand, sought to comply with the co-operation requirement in the OFT's leniency policy (which may require incentivising directors to co-operate).

5.12 Some respondents suggested that the proposed policy change could make it difficult for companies to get rid of unwanted and harmful directors. They noted that in practice it was easier to persuade a director to resign than to remove him from office without agreement. It could, for example, entrench a director's position or add to the possible reluctance of fellow directors to ask an implicated director to resign. This could lead to directors staying in roles when it would be in the public interest and better for the company for them to resign. However, others expressed a contrary view: that it was not difficult in practice to remove a director from office.

5.13 Some respondents stated that CDO immunity should be differentiated from criminal immunity on the basis that CDOs could potentially affect a greater number of individuals (particularly given the possibility of a CDO application in 'ought to have known' cases); and on the basis that a criminal case must be proven to a higher standard.

OFT's view

5.14 The OFT notes that most respondents disagreed with this proposal on practical grounds and agrees that it may raise some practical difficulties.

5.15 However, the OFT continues to believe that directors should not be able to avoid a CDO application by resigning (before being removed) from a company as a result of their conduct in connection with the breach. This could undermine both deterrence and the public interest purpose of the CDO legislation. It could also have an adverse impact on the leniency regime.

5.16 The OFT also continues to believe that the proposal is consistent with the objective of ensuring the effectiveness of the leniency regime. If a director resigns from a company as a result of his involvement in breach of competition law and ceases to co-operate with his former company's leniency application, it could harm the OFT's investigation. In this context it should be noted that leniency protection for culpable ex-directors (who resigned as a result of their involvement in a breach of competition law) could still be available. The OFT will consider offering CDO immunity in individual cases conditional on the director co-operating with the leniency process. This approach would support the leniency regime: it would incentivise culpable ex-directors to co-operate with an investigation.

5.17 The OFT is of the view that, on balance, these considerations outweigh the practical difficulties associated with this approach. The OFT has, therefore, decided to implement this proposal.

Question six: 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?

5.18 One respondent agreed with, and another provided qualified agreement for, 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.

5.19 These respondents were of the view that this proposal would encourage companies to apply for leniency sooner and would increase the deterrent effect of CDOs.

5.20 However, most respondents disagreed with this proposal.

5.21 It was suggested that the proposal would undermine incentives for companies to apply for leniency. Respondents noted that it would create a conflict of interests between the company and its individual directors and could result in directors concealing information relevant to a leniency application, or failing to support a corporate decision to apply for leniency.

5.22 Some respondents noted that it would not be appropriate to differentiate between Type C leniency applicants when deciding whether to grant immunity from CDOs, on the grounds that it would create uncertainty for companies and directors considering the merits of a leniency application.

5.23 It was suggested that it was appropriate to treat CDO immunity differently from criminal immunity.

- Criminal liability is likely to be relevant in only a small sub-set of cases and applies only to the most serious forms of conduct (where an individual's conduct was dishonest).

- In contrast, CDOs potentially affect a greater number of individuals, including those who are directly responsible for a breach and those who have a supervisory role – that is, the very people who will have an important role to play in deciding whether to make a leniency application.

- The guarantee of CDO immunity is therefore more likely than a guarantee of criminal immunity to influence a company's decision to apply for leniency.

5.24 Some respondents suggested that there was no need to amend this element of the Guidance since Type C leniency is within the gift of the OFT.

5.25 One respondent suggested that the proposal might create procedural uncertainties between the EU and UK regimes in EU leniency cases.

5.26 One respondent suggested that CDO immunity in Type C cases should apply to each individual director only once.

OFT's view

5.27 The OFT notes that most respondents were of the view that this proposal would undermine the leniency regime.

5.28 Cartels, particularly illegal agreements between businesses to fix prices and share markets, cause serious damage to businesses and the economy and cost consumers money. The OFT's leniency regime is one of its most valuable sources of information about cartels. It is important, therefore, that the OFT's CDO policy does not undermine this valuable and successful programme.

5.29 The OFT agrees with respondents that the success of the leniency regime is dependent on the alignment of the interests of individuals with those of the company and it agrees that this proposal has the potential to create a conflict between those interests. The OFT also accepts that it is possible to differentiate between the grant of automatic immunity from CDOs in Type C leniency cases from the discretionary grant of immunity from criminal prosecution in such cases. Notably, CDOs have the potential to affect a wider range of individuals (being those individuals most likely to be responsible for the decision to make a leniency application) than criminal sanctions, which affect only those whose conduct is dishonest.

5.30 The OFT has, therefore, decided not to implement this proposal at this time, but may review the proposal at a later date in the light of further experience.

6 CHANGES TO STEP 4 (DIRECTOR'S RESPONSIBILITY)

6.1 Step 4 (Director's responsibility) of the Guidance sets out a hierarchy as to when the OFT will consider bringing a CDO application against an individual by reference to specific types of behaviour. The Consultation suggested that the Guidance ought to be amended in order to remove this hierarchy.

Question seven: what are your views of 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?

6.2 Around half of the respondents agreed with, or gave qualified agreement to, this proposal.

6.3 It was noted that this proposal was consistent with the principle of equal treatment. However, it was also noted that the OFT was already obliged to treat all types of case on an equal basis.

6.4 One respondent suggested that the OFT should remove the sliding scale, but include 'level of involvement' in its list of aggravating and mitigating factors.

6.5 One respondent suggested that it might be more appropriate to bring 'ought to have known' cases only where the director was a recidivist.

6.6 It was also suggested that it was unrealistic to state that the OFT would be 'likely to apply' for a CDO in relation to the behaviour in categories two and three, as the Court would require greater evidence to impose a CDO in these circumstances.

6.7 A number of respondents disagreed with this proposal.

6.8 It was suggested that this proposal would lead to a disproportionate emphasis on competition law compliance, and that it could discourage individuals from wanting to become non-executive or compliance directors.

6.9 Respondents stated that there was a significant difference in culpability between those who were directly involved in an infringement, those who failed to take action to bring infringing behaviour to an end, and those who were unaware of an infringement (but ought to have known about it). It was suggested that it would not be right to equate the responsibility of the perpetrator and the supervisor - that it would be disproportionate to treat directors with a supervisory role as harshly as those with a hands-on role. It was also suggested that the OFT should not seek to achieve equality of impact amongst directors of large and small companies. This would ignore the fact that directors in large companies have a broader range of responsibilities and a greater reliance on others.

6.10 Another respondent stated that the OFT should only rarely apply for CDOs in relation to the third category of behaviour, given the low legal threshold and the severity of the sanction.

6.11 It was noted that, in any event, the current Guidance does not prevent the OFT from applying for CDOs in the second and third categories where it is appropriate to do so.

6.12 Most respondents were of the view that the OFT should publish guidance on how the proposed approach would be implemented in practice. It was suggested that this guidance should reflect the practical likelihood of the OFT applying for a CDO in each category of case, taking into account the prospect of obtaining a CDO before the Court.

6.13 Most respondents stated that any guidance ought to set out clearly the type of behaviour that would fall into the 'ought to have known' category and advise directors of the steps they would need to take to avoid the risk of being subject to a CDO application. It was suggested that the OFT should set out what it expected to see in terms of a minimum standard of compliance programme.

6.14 Respondents stated that unclear guidance could discourage individuals from wanting to become non-executive directors or compliance directors.

OFT's view

6.15 Having considered these responses the OFT remains of the view that Step 4 of the Guidance should be amended.

6.16 However, in order to address the concerns raised by some respondents, the OFT will modify the wording proposed in the Consultation. Paragraph 4.17 of the Guidance will be amended to state that:

- the OFT will, in all cases, actively consider whether a CDO application would be appropriate, and
- if the OFT finds sufficient evidence in relation to any of the three categories of behaviour, it will be likely to apply for a CDO.

6.17 This policy change is intended to drive compliance and accountability within companies. The OFT is seeking to have an effect on behaviour at the Board level.

6.18 The OFT is also seeking to avoid the unintended consequences of the current policy (an unfair burden on smaller companies). The current Guidance would focus action on directors of smaller companies, where the directors have greater involvement in day-to-day decision making. In contrast the OFT would be less likely under the current Guidance to apply for a CDO against a director of a large company in which day-to-day decision making is delegated, even though the conduct in the latter case may be no less serious.

6.19 Finally, the OFT believes that the policy change will lead to a more proportionate, consistent and non-discriminatory approach. As regards prioritisation of cases, an assessment of the seriousness of the conduct and the likelihood of success will be more relevant than the type of behaviour.

6.20 The proposed changes are not intended to cause directors with compliance responsibilities to be assessed against a higher standard; the OFT does not intend to impose unfair or disproportionate burdens. Rather, the OFT is seeking to encourage all directors to take positive and

reasonable steps to uncover potentially anti-competitive behaviour or monitor their company's compliance. If a director has taken reasonable steps to ensure compliance in the company (including asking questions and making enquiries where appropriate), then that director will not fall foul of the 'ought to have known' standard.

6.21 The OFT intends to provide further, high level guidance to directors on their responsibilities under competition law and what they can reasonably be expected to understand.

7 OTHER ISSUES

7.1 The consultation also asked for wider views on the Guidance.

Question eight: do you have any other comments on the proposed changes to the Guidance?

Question nine: do you have any comments on any other aspects of the OFT's current Guidance on CDOs (OFT510)?

7.2 A number of respondents made general comments on the proposed changes to the Guidance. The following issues, in particular, were raised.

- it could be difficult for the OFT to secure a CDO against a director in 'ought to have known' cases, and particularly non-executive directors. However choosing the right case to bring and successfully securing a CDO before the Court in an 'ought to have known' case would have a powerful deterrent effect.

- Deterrence through detection is crucial - the OFT must not lose sight of this by focusing too much on individual sanctions.

- It would be a step too far to apply for a CDO in a case involving a novel infringement and where a director did not know of the breach.

- The Guidance ought to distinguish dominance and effects cases from cartel cases, in particular:

  - a director should not be pursued other than for a direct involvement in a cartel

  - CDOs should be used only where the breach is obvious and the director knew what he was doing was wrong.

- The OFT should at all times err on the side of preserving directors' rights of defence.

- CDOs could result in additional and disproportionate bureaucracy for business (for example, employee checks).

- Directors should not be exposed to CDOs for opposing a leniency application - there can be good reasons for deciding to defend a case.

- The OFT should consider offering lower fines in cases where it applies for a CDO.

- The OFT should raise the profile of CDOs by making applications.

- The OFT would need to bring a number of CDO applications to Court (in order to establish precedents) before accepting a CDU - it should not accept a CDU in a case if it does not feel it has sufficient evidence to support an application for a CDO.

7.3 Finally, a number of respondents suggested that the OFT should provide more guidance on the proposed changes and associated practical matters.

OFT's view

7.4 The OFT has considered carefully respondents' views.

7.5 The OFT sees CDOs as an important sanction for deterring breaches of competition law. CDOs impact on the individual responsible for the breach. They complement the OFT's power to imposed financial penalties, which impact on the company and its shareholders.

7.6 For the same reason the OFT does not believe that it would be appropriate to adjust the penalty imposed on an undertaking simply because it intends to apply for a CDO against one or more of its directors. Both corporate and individual sanctions are important in achieving deterrence. Nor would there be certainty at the time a fine is imposed on the undertaking whether the Court would impose a CDO.

7.7 The OFT believes that the amendments to the Guidance will better enable it to make use of its CDO powers and will send a strong signal to business that it takes these powers seriously. The OFT is keen to emphasise that it will hold individuals accountable where appropriate and will seek to identify suitable cases.

7.8 However, the OFT will, of course, consider carefully whether or not it is appropriate to make a CDO application on a case by case basis and it will take steps to ensure that parties' rights of defence are preserved. In particular the Guidance provides that the OFT will consider the nature of a case and any aggravating and mitigating factors when considering whether or not to apply for a CDO.

7.9 The OFT intends to issue further guidance to directors on their responsibilities under CA98, drawing also on the conclusions of the OFT's Drivers of Compliance project.

A LIST OF RESPONDENTS TO THE CONSULTATION

- Addleshaw Goddard
- Allen & Overy
- Baker & McKenzie
- Confederation of British Industry
- Eversheds
- Freshfields Bruckhaus Deringer
- Herbert Smith
- Institute of Directors
- Joint Working Party of the Bars and Law Societies of the UK
- Linklaters
- National Grid
- Norton Rose
- Pinsent Masons
- Shepherd and Wedderburn
- Simmons & Simmons
- Slaughter and May