Law Society of Scotland

Consultation Response

Revised guidance on competition disqualification orders

September 2018

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Competition Law Sub-committee welcomes the opportunity to consider and respond to the CMA's consultation *Revised guidance on competition disqualification orders*.[1] The Sub-committee has the following comments to put forward for consideration.

General remarks

We note that s1.5 is permissive; the specified regulators may adopt it. At least a number of these regulators are sector competition regulators. We consider that it is important to ensure consistency across sectors and would welcome further information as to how this will be achieved in practice, although we are aware that many, if not all, will be involved in the UKCN discussions and it may be that this will suffice.

Response

Question 1: Do you agree with the proposed changes to the Current Guidance which relate to the CMA's decision-making on whether to make an application for a CDO (described in Chapter 3)? Please give reasons for your views.

Much of the detail has been removed from the analysis of the Current Guidance by the proposed changes, which is particularly apparent by the removal of the five-step decision-making process in Chapter 4 which has now been condensed into Chapter 4 of the Revised Draft Guidance. The CMA's thinking and approach is less clear as a result. We consider that the removal of this detail will likely lead to greater uncertainty and does not present an improvement for company directors, or those advising them.

[1] https://www.gov.uk/government/consultations/revised-guidance-on-competition-disqualification-orders

For example, further detail on the new 'General Principles', particularly those outlined at paragraphs 4.3 and 4.4 would be welcomed as the detailed overview of the summary steps from 4.2 is not replicated anywhere else in the Revised Draft Guidance. In addition, paragraph 4.10 which was removed prior to the publication of this consultation should be reinstated to allow the CMA to first consider which company or companies in the corporate group directly committed the breach of competition law. This does not preclude a finding a Director in the parent company responsible (upholding the SEE principle) but merely sets out an order the CMA will follow in investigating the company as a whole.

4.12 could be made clearer. The current wording contained within 4.12 of the Current Guidance states that "Leniency for these purposes means the immunity from, or any reduction in, financial penalty…" This is confusing and would be better worded as "Leniency for these purposes means immunity from, or any leniency reduction awarded in, financial penalty." The explanation of 'reduction' could then be removed from the end of paragraph 4.12. However, we welcome the re-ordering to highlight that the CMA will not apply for a CDO against any current or former director of a company that has benefitted from leniency.

We understand the desire to remove the five-step process to avoid creating the impression that all five steps will be of equal significance in each case, however, the detail contained within Step 4 (extent of the director's responsibility for the breach) and Step 5 (aggravating and mitigating factors) has not been repeated elsewhere in the Revised Draft Guidance. At the very least a streamlined version of these steps should be reintroduced into the guidance as the reasoning given by Directors under these headings feeds into the facts and circumstances of each individual case which the CMA should be taking into account during their decision-making process. If these are no longer to be followed then further justification must be given as to why that is not the case, and guidance provided as to how individual director's circumstances will be taken into account when defending against a CDO.

Question 2: Do you agree with the proposed changes to the Current Guidance that relate to the process and content of the section 9C notice and the timing of the issue of the application for a CDO in the High Court (described in Chapter 4)? Please give reasons for your views.

In terms of the proposed changes made to paragraph 5.2, it would be helpful to have further information as to why the right of access to the file generally has been changed to now only include access to the documents contained in the index of 'relevant' documents compiled by the CMA. Limiting the scope of access to documents may may lead to a very restrictive in practice, which could limit the Director's rights of defence and due process. Moreover, it is unclear how the CMA determines which documents are deemed to be relevant, and which documents ultimately fall outwith disclosure. Further clarification for this would be welcomed.

Furthermore, within paragraph 5.2 we query why the possibility of making oral representations has been removed. No explanation is given for this removal, which could further limit the Director's rights of defence.

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Question 3: Do you agree with the proposed changes to the Current Guidance on (a) recognition for cooperation and (b) reductions in the period of disqualification for early agreement of CDUs (described in Chapter 5)? Please give reasons for your views.

We welcome the reduction in the period of disqualification for early agreement of CDUs; it is in the public's interest to avoid unnecessary lengthy investigations and additional costs, and for the public protection benefits which are increased by the clear incentive for parties to settle early (but still undergo a reduced period of disqualification).. However, further guidance could be offered as to the length of time by which the disqualification period can be reduced. Even a range of time for different stages in the proceedings should be set as a benchmark as this gives full discretion to the CMA to consider the reduction on a case by case basis, at which point a benchmark will only develop as the examples arise in practice, and could create wide-ranging differences if the levels of reductions are not monitored.

Question 4: Do you agree with the other proposed changes to the Current Guidance? Please give reasons for your views.

The publication of CDOs and CDUs by the CMA at Companies House and its ability to make public announcements to this effect is in line with the CMA's policy and approach to transparency and disclosure, however for consistency, reference to the existence of this new Chapter 6 should be included from the outset in the introduction and therefore added to paragraph 1.3 of the Draft Revised Guidance.

Question 5: Are there other aspects of the Current Guidance which you consider could be usefully clarified, and/or are there other aspects of our procedures where you think further changes could usefully be made (whether to the Current Guidance or to the CDDA)? Please explain which areas and why.

We have the following comments about specific aspects which could be further clarified when incorporated into the Draft Revised Guidance, taking into account other aspects of the Current Guidance not covered in the questions above.

For example, within Chapter 2, the language of Condition 1 should be simplified in order to avoid confusion. Although the proposed changes to the content do not drastically differ from that of the Current Guidance, the opportunity should be taken to provide a clearer title of Condition 1 so as to better steer parties as to who satisfies these conditions. However, the addition of new paragraph 2.4 in the Draft Revised Guidance does provide directors and advisers with a better understanding of all categories of company which are caught by this guidance and the CDDA, which is helpful. In paragraph 2.3, early clarifications are also welcomed on former and shadow directors of a company.

As a minor point, it would be helpful if the last bullet point of paragraph 2.10 summarised the 'matters' referred to in Schedule 1 of the CDDA, perhaps in a footnote for ease.

It would also be helpful if the deleted text at paragraphs 3.3 and 3.4 were to be reinstated in the Revised Draft Guidance as the CMA should still take these points into account. Again. the reference to aggravating and mitigating factors has been removed. We would welcome clarification as to whether the CMA will consider any mitigating factors: this would assist directors (and those advising them) to ensure that the correct evidence is submitted to the CMA to allot it to thoroughly explore the individual circumstances of the case.

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