Draft CMA's guidance as to the appropriate amount of a penalty

18 March 2019

CMA73

Preface

The Competition and Markets Authority (CMA) has the power to apply and enforce the Competition Act 1998 (CA98). ~~The CMA also has the power[1] to apply and enforce Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in the United Kingdom.[2]~~ In relation to the regulated sectors these provisions are applied and enforced, concurrently with the CMA, by the regulators listed below (under section 54 and schedule 10 of the CA98) (the Regulators). Throughout this guidance, references to the CMA should be taken to include the Regulators in relation to their respective sectors, unless otherwise specified.

The following are the Regulators, as at ~~1 April 2018~~18 March 2019:

- the Office of Communications (Ofcom) (communications);
- Ofgem (gas and electricity markets in Great Britain);
- the Northern Ireland Authority for Utility Regulation (gas, electricity, water and sewerage services in Northern Ireland);
- the Water Services Regulation Authority (Ofwat) (water and sewerage markets in England and Wales);
- the Office of Rail and Road (ORR) (railway services in Great Britain);
- the Civil Aviation Authority (CAA) (air traffic services and airport operation services);
- NHS Improvement (healthcare services in England);
- the Financial Conduct Authority (FCA) (financial services); and
- the Payment Systems Regulator (PSR) (participation in payment systems).[3]

This guidance is issued in performance of the statutory obligation on the CMA, contained in section~~s~~ 38(1) ~~and 38(1A)~~ of the CA98 (and pursuant to section 38(3) of the CA98), to publish guidance as to the appropriate amount of a penalty~~, including guidance as to the circumstances in which, in determining a penalty, the CMA may~~

~~[1] Under Council Regulation (EC) No 1/2003 of 16 December 2002 (the Modernisation Regulation).~~

~~[2] Paragraph 1.2 provides describes the circumstances in which the CMA is required to apply Article 101 and 102.~~

[3] The list is correct as at ~~1 April 2018~~18 March 2019. The list may change from time to time if further sector regulators are given concurrent powers or existing sectoral regulators are given concurrent powers over a wider range of markets. Some of these Regulators have or may issue guidance on other specific issues, such as competition law compliance, which may interact with this guidance. These documents are not referred to in this guidance.

~~take into account the effects of an infringement in another member state~~. The CMA is required to have regard to the guidance for the time being in force when setting the amount of any penalty to be imposed. Although there is no equivalent statutory obligation on the Regulators to publish guidance as to the appropriate amount of a penalty, the Regulators are required to have regard to the CMA's published guidance for the time being in force when setting the amount of any penalty to be imposed under the CA98. The Competition Appeal Tribunal (CAT) also must have regard to the CMA's published guidance.[4]

[4] Section 38(8) of the CA98.

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1. Introduction

1.1 This guidance[5] sets out the basis on which the CMA will calculate penalties for infringements of the CA98 ~~or of the TFEU~~ where it decides to exercise its discretion to impose a penalty under section 36(1) and 36(2) of the CA98. The guidance also sets out the basic requirements for the grant of lenient treatment by the CMA under the CMA's leniency programme.[6] The CMA is issuing this guidance in performance of its statutory obligation to publish guidance as to the appropriate amount of a penalty~~, including guidance as to the circumstances in which, in determining a penalty, the CMA may take into account the effects of an infringement in another Member State~~.[7]

~~1.2 The Modernisation Regulation requires national competition authorities of the Member States (NCAs) and the courts of the member states to apply Articles 101 and 102 of the TFEU as well as national competition law when national competition law is applied to agreements or conduct which may affect trade between member states. The CA98 gives the CMA powers to enforce both the Chapter I and Chapter II prohibitions of the CA98 and Articles 101 and 102 of the TFEU.[8]~~

Policy objectives

~~1.3~~1.2 Consistent with section 36(7A) of the CA98, the twin objectives of the CMA's policy on financial penalties are:

- to impose penalties on infringing undertakings[9] which reflect the **seriousness of the infringement**; and

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[5] This revised guidance ~~replaces~~ updates the CMA's *Guidance as to the appropriate amount of a penalty* (~~OFT423~~CMA73, originally issued April 2018~~December 2004, adopted by the CMA Board~~).

[6] *Applications for leniency and no action in cartel cases* (OFT1495, adopted by the CMA Board).

[7] See Statutory background section below for further details.

[8] ~~Article 101 prohibits agreements between undertakings (see notes 7 and 9 below) 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. Article 102 prohibits conduct by one or more undertakings which amounts to an abuse of a dominant position within the common market or a substantial part of it in so far as it may affect trade between Member States. The Chapter I prohibition and the Chapter II prohibition of the CA98 correspond to Article 101 and Article 102 respectively but apply to anti-competitive practices and conduct which affect trade within the United Kingdom. For further details see the competition law guidelines *Agreements and concerted practices* (OFT401, adopted by the CMA Board) and *Abuse of a dominant position* (OFT402, adopted by the CMA Board).~~

[9] The term 'undertaking' is not defined in ~~the TFEU or~~ the CA98, but its meaning has been set out in EU case law prior to the UK's exit from the European Union (EU Exit). It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, associations of undertakings (for example, trade associations) non profit-making organisations and (in some circumstances) public entities that offer goods or services on a given market. A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of each case. Certain principles laid down and decisions made by the European Court pre-EU Exit will remain relevant to the CMA's application of domestic competition law post-EU Exit by virtue of section 60A of the CA98. In particular,

- to ensure that the threat of penalties will **deter** both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.

The CMA has a discretion to impose financial penalties and intends, where appropriate, to impose financial penalties which are severe, in particular in respect of agreements[10] between undertakings which fix prices or share markets, other cartel activities[11] and serious abuses of a dominant position. The CMA considers that these are among the most serious infringements of competition law.

~~1.4~~1.3 There are two aspects to the deterrence objective. First, there is a need to deter the undertakings which are subject to the decision from engaging in future anti-competitive activity (often referred to as 'specific deterrence'). Second, there is a need to deter undertakings at large which might be considering activities contrary to ~~any of Article 101, Article 102,~~ the Chapter I or Chapter II prohibitions[12] from breaching the law (often referred to as 'general deterrence').

~~1.5~~1.4 The CMA recognises that it is important to ensure that penalties imposed on individual undertakings are proportionate and not excessive.

~~1.6~~1.5 The CMA also wishes to encourage undertakings to come forward with information relating to any cartel activity in which they are involved. The CMA therefore sets out in part 3 of this guidance when lenient treatment will be given to such undertakings.

Statutory background

~~1.7~~1.6 Section 36 of the CA98 provides that the CMA may impose a financial penalty on an undertaking which has intentionally or negligently committed an infringement of ~~Article 101, Article 102,~~ the Chapter I and/or Chapter II

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under section 60A of the CA98, when determining a question arising under Part I of the CA98, the CMA is required to act with a view to securing that there is no inconsistency between (i) the principles it applies and the decisions it reaches and (ii) the principles laid down by the Treaty on the Functioning of the European Union (TFEU) and European Court prior to EU Exit and any relevant decision made by the European Court prior to EU Exit so far as applicable immediately before EU Exit in determining any corresponding questions arising in EU law. This is subject to the exceptions in section 60A of the CA98, including if the CMA thinks that it is appropriate to act otherwise in light of one of the circumstances set out in that section.

[10] References in this guidance to 'agreements' should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices.

[11] See below paragraph 3.1, containing a definition of 'cartel activities' for the purposes of this guidance.

[12] For further details, see the competition law guidelines *Agreements and concerted practices* (OFT401, adopted by the CMA Board) and *Abuse of a dominant position* (OFT402, adopted by the CMA Board).

prohibitions.[13] It is therefore for the CMA to determine in a given case whether or not a financial penalty should be imposed.

~~1.8~~1.7 Section~~s~~ 38(1) ~~and 38(1A)~~ of the CA98 require~~s~~ the CMA to prepare and publish guidance as to the appropriate amount of a penalty~~, including guidance as to the circumstances in which, in determining a penalty, the CMA may take into account the effects of an infringement in another member state~~. Section 38(2) of the CA98 provides that the CMA may alter the guidance on penalties at any time. Section 38(3) of the CA98 provides that, if altered, the CMA must publish the amended guidance. Under section 38(4) the Secretary of State must approve any guidance on penalties before it can be published. When preparing or altering guidance on penalties, sections 38(6) and (7) require the CMA to consult such persons as it considers appropriate, including the Regulators. These particular provisions apply to the CMA alone and not also to the Regulators.

~~1.9~~1.8 This guidance was approved by the Secretary of State as required under section 38(4) of the CA98 on ~~16 April 2018~~[DATE TBC]. It was published and came into effect on ~~18 April 2018~~[DATE TBC]. Before finalising this revised guidance, the CMA conducted a consultation in accordance with sections 38(6) and (7) of the CA98.

~~1.10~~1.9 By virtue of section 38(8) of the CA98, the CMA must have regard to the guidance for the time being in force when setting the amount of any financial penalty to be imposed. A similar requirement applies to the Regulators by virtue of the legislation that conferred on them concurrent powers under the CA98. The CAT also must have regard to the CMA's published guidance.[14] This guidance applies from the date of publication to ongoing and new CA98 cases. ~~The CMA notes that the amendments made to the previous guidance (OFT423) are intended to be clarificatory and reflect recent CMA decisional practice. They do not substantively alter the CMA's penalty calculation mechanism.~~ Amendments have been made to CMA73 as originally issued in April 2018 to reflect EU Exit on exit day (as defined in the European Union (Withdrawal) Act 2018), including the coming into force of The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93).

[13] Section 36(3) of the CA98 provides that the CMA may impose a penalty on an undertaking only if it is satisfied that the infringement has been committed intentionally or negligently. It does not, for the purposes of crossing that threshold, have to determine specifically which it was. See *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 at [455]-[457], [2002] CompAR 13 (*Napp*) and *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 11 at [484] and [485] (*Aberdeen Journals (No.2)*). See also Case C-137/95 P, *SPO and Others v Commission* [1996] ECR I-1611 at paragraphs 53-57.
[14] Section 38(8) of the CA98.

1.111.10 The financial penalty may not in any event exceed the maximum penalty of 10% of the worldwide turnover of the undertaking.[15]

1.121.11 This guidance on penalties will continue to be kept under review in the light of experience in its application.

Exceptions

1.131.12 Sections 39 and 40 of the CA98 provide limited immunity from financial penalties for **small agreements** in relation to infringements of the Chapter I prohibition and for **conduct of minor significance** in relation to infringements of the Chapter II prohibition.[16] This immunity does not apply to ~~any infringements of Articles 101 or 102 or to~~ infringements of the Chapter I prohibition which are price-fixing agreements. It may be withdrawn by the CMA in certain circumstances. ~~Further details are set out in the competition law guideline *Enforcement* (OFT407, adopted by the CMA Board).~~[17]

Criminal cartel offence

1.141.13 Section 188 of the Enterprise Act 2002 introduced a criminal offence for individuals who engage in cartel arrangements that fix prices, limit supply or production, share markets or rig bids in the UK. The criminal cartel offence only applies to relevant agreements in respect of arrangements between undertakings operating at the same level of the supply chain, known as horizontal agreements. Vertical agreements which are intended to operate between undertakings at different levels in the supply chain, for example between a manufacturer and a distributor, or between a distributor and a retailer, are not covered by the offence.

1.151.14 The cartel offence operates alongside the provisions of the CA98, and further information can be found in the *Cartel Offence Prosecution Guidance* (CMA9, March 2014). The guidance document *Applications for leniency and no action in cartel cases* (OFT1495, adopted by the CMA Board) sets out how the CMA will handle applications for immunity from prosecution for the criminal cartel offence under section 190(4) of the Enterprise Act 2002. The prosecution or conviction of individuals under section 188 of the Enterprise

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[15] Calculated in accordance with The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) (as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259) and The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93)).

[16] See further The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262) (as amended by The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93)).

[17] ~~*Enforcement: Incorporating the Office of Fair Trading's guidance as to the circumstance in which it may be appropriate to accept commitments* (OFT407, adopted by the CMA Board).~~

Act 2002 in connection with an infringement is not relevant for the purpose of setting the amount of financial penalties payable by undertakings under section 36 of the CA98.

~~Parallel application of Articles 101 and 102 and the Chapter I and Chapter II prohibitions~~

~~1.16 In cases where an undertaking has committed an infringement both of an EU prohibition (that is, Article 101 or Article 102) and the equivalent UK prohibition (that is, the Chapter I prohibition or Chapter II prohibition respectively), the undertaking will not be penalised twice for the same anti-competitive effects.~~

~~1.17 In most cases the penalty imposed in respect of an infringement of an EU prohibition will be the same as the penalty imposed in respect of an infringement of a UK prohibition, because the CMA will calculate the penalty for each infringement according to the same steps as set out in part 2 of this guidance. However, in some cases the penalties for infringement of an EU prohibition and its equivalent UK prohibition will differ, such as where the infringing agreement or conduct commenced before 1 March 2000 when the CA98 entered into force.~~

2. Steps for determining the level of penalty

Method of calculation

2.1 A financial penalty imposed by the CMA under section 36 of the CA98 will be calculated following a six-step approach:[18]

- Calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking.
- Adjustment for duration.
- Adjustment for aggravating or mitigating factors.
- Adjustment for specific deterrence and proportionality.
- Adjustment if the maximum penalty of 10% of the worldwide turnover of the undertaking[19] is exceeded ~~and to avoid double jeopardy~~.
- Adjustment for leniency, settlement discounts and/or approval of a voluntary redress scheme.[20]

Details on each of these steps are set out in paragraphs 2.3 to ~~2.10~~2.30 below.

2.2 An undertaking participating in cartel activity[21] may benefit from total immunity from, or a significant reduction in the level of, a financial penalty, if the

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[18] In applying the steps to individual undertakings in multi-party cases, the CMA will observe (save where one of the exceptions in section 60A CA98 applies, including where the CMA thinks it appropriate to act otherwise in light of one of the circumstances set out in that section (see note 9 above)) the principle of equal treatment, which is articulated by the Court of First Instance (now the General Court) in the *Tokai Carbon* case as follows: 'The fact none the less remains that … [the Commission] must comply with the principle of equal treatment, according to which it is prohibited to treat similar situations differently and different situations in the same way, unless such treatment is objectively justified (FETTCSA, paragraph 406).' (See Case T-236/01 *Tokai Carbon Co. Ltd and Others v Commission* [2004] ECR II-1181, at paragraph 219). In doing so, the CMA will take account of the judgment of the Competition Appeal Tribunal (the CAT) in the *Kier* Construction judgment that, '…it is perfectly rational for a bigger undertaking to receive a more severe penalty than a smaller company… However, this does not mean that penalties should be precisely proportionate to the relative sizes of the undertakings on which they are imposed… it will not necessarily be fair or proportionate to impose on a bigger company a penalty which reflects the same proportion of its total worldwide turnover as a penalty imposed on a smaller company represents in relation to the latter's turnover.' (See *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, at [177]).

[19] See note 151~~4~~514 above.

[20] A voluntary redress scheme is a method of alternative dispute resolution, via which a business may apply to the CMA for approval of a scheme where it is seeking to offer compensation to victims of competition law breaches.

[21] See below paragraph 3.1, containing a definition of 'cartel activities' for the purposes of this guidance~~For the purposes of this guidance, 'cartel activities' are agreements and/or concerted practices which infringe Article 101 of the TFEU and/or the Chapter I prohibition and involve price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market-sharing or market-dividing~~.

requirements for lenient treatment set out in part 3 of this guidance are satisfied.

Step 1 – starting point

2.3 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to:

- the seriousness of the infringement and the need for general deterrence;[22] and
- the relevant turnover of the undertaking.

The starting point will be calculated as described below.

Assessment of seriousness – application of percentage starting point to relevant turnover

2.4 The CMA will apply a starting point of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular infringement (and ultimately the extent and likelihood of actual or potential harm to competition and consumers). In applying the starting point, the CMA will also reflect the need to deter the infringing undertaking and other undertakings generally from engaging in that type of infringement in the future.

2.5 This is a case specific assessment of:

- first, how likely it is for the type of infringement at issue to, by its nature, harm competition;
- second, the extent and/or likelihood of harm to competition in the specific relevant circumstances of the individual case (as discussed in paragraph 2.8 below); and
- finally, whether the starting point is sufficient for the purpose of general deterrence.

2.6 At the first stage, the CMA will consider the likelihood that the type of infringement at issue will, by its nature, cause harm to competition. There is no pre-set 'tariff' of starting points for different types of infringement given the

[22] This is distinct from the need to deter the specific infringing undertaking from further breaches of the Chapter I or Chapter II prohibitions ~~and/or Article 101 or 102~~ ('specific deterrence'), which is assessed at Step 4 (see paragraphs 2.19~~2.19~~2.19~~.19~~ to 2.23~~2.23~~2.23~~.23~~).

range of conduct that will be encountered in different cases and to which the CMA must have regard in setting an appropriate penalty for the case in question. However, in making its assessment, the CMA will have reference to the following principles:

- The CMA will generally use a starting point between 21 and 30% of relevant turnover for the most serious types of infringement, that is, those which the CMA considers are most likely by their very nature to harm competition. In relation to infringements of the Chapter I prohibition ~~and/or Article 101~~, this includes cartel activities, such as price fixing and market sharing, and other, non-cartel object infringements which are inherently likely to cause significant harm to competition. In relation to infringements of the Chapter II prohibition ~~and/or Article 102~~, this will typically include conduct which is inherently likely to have a particularly serious exploitative or exclusionary effect, such as excessive and predatory pricing.

- In relation to infringements of the Chapter I prohibition ~~and/or Article 101~~, a starting point between 10 and 20% is more likely to be appropriate for certain, less serious object infringements, and for infringements by effect.[23] A 10 to 20% starting point is also more likely to be appropriate in relation to infringements of the Chapter II prohibition ~~and/or Article 102~~ involving conduct which is less likely to be inherently harmful.

2.7 The above principles do not prevent the CMA from applying a starting point of below 10%. However, the CMA considers that this is likely to occur as a result of the CMA having made a downwards adjustment to reflect the particular circumstances of the case, as described below.

2.8 At the second stage, the CMA will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately to consumers. When making its case-specific assessment, the CMA will consider the relevant circumstances of the case. These may include, for example:

- the nature of the product including the nature and extent of demand for that product;

[23] For further information on object and effect infringements see, *Agreements and concerted practices* (OFT401, adopted by the CMA Board).

- the structure of the market including the market share(s) of the undertaking(s) involved in the infringement, market concentration and barriers to entry;
- the market coverage of the infringement;
- the actual or potential effect of the infringement on competitors and third parties; and
- the actual or potential harm caused to consumers whether directly or indirectly.

2.9 Finally, the CMA will consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence. In particular the CMA will consider the need to deter other undertakings, whether in the same market or more broadly, from engaging in the same or similar conduct.

2.10 In the case of infringements involving more than one undertaking, the assessment outlined above will be consistent for each undertaking. The starting point is intended to reflect the seriousness of the infringement at issue, rather than the particular circumstances of each undertaking's unlawful conduct (which are taken into account at other steps). As a result, for infringements involving more than one undertaking, the CMA expects to adopt the same percentage starting point for each undertaking to the infringement.[24]

Determination of relevant turnover

2.11 The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market[25] affected by the infringement in the undertaking's last business year.[26] In this context, an undertaking's last business year is the financial year preceding the date when the infringement ended.

2.12 Generally, the CMA will base relevant turnover on figures from an undertaking's audited accounts. However, in exceptional circumstances it may

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[24] See *Eden Brown v Office of Fair Trading* [2011] CAT 8, paragraph 80.
[25] See the competition law guideline *Market Definition* (OFT403, adopted by the CMA Board) for further background information on the relevant product market and relevant geographic market. The CMA notes also that the Court of Appeal in its judgment in the *Toys and Kits* appeals stated that: '…neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty' and that it was sufficient for the OFT to 'be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement.' See Argos *Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraphs 169 and 170 to 173 respectively.
[26] Relevant turnover will be calculated after the deduction of sales rebates, value added tax and other taxes directly related to turnover.

be appropriate to use a different figure as reflecting the true scale of an undertaking's activities in the relevant market.[27]

2.13 The CMA recognises that such an exceptional approach may be appropriate where, in particular, the remuneration for services supplied is based on commission fees. When deciding whether it is appropriate to depart from its general rule of using turnover from audited accounts in this way, the CMA will consider a number of factors, in particular: (i) whether the remuneration for the services in question is decided by the seller of the services or the client, and (ii) whether the undertaking is purchasing inputs in order to supply a fresh product incorporating those inputs to its client.[28] Other factors such as whether a person is taking ownership of goods or services and whether the person bears risks resulting from the operation of the business in question may also be relevant. In addition, the CMA notes that specific situations for the calculation of 'turnover' may arise in the areas of credit, financial services and insurance, as is recognised in the statutory instrument which relates to the determination of the maximum penalty that the CMA may impose.[29]

~~2.14 In cases concerning infringements of Article 101 and/or Article 102, the CMA may, in determining the starting point, take into account effects in another member state of the agreement or conduct concerned. Where it does so, the CMA will take into account effects in another member state through its assessment of relevant turnover. The CMA may consider turnover generated in another member state if the relevant geographic market is wider than the UK and the express consent of the relevant member state or NCA, as appropriate, is given in each particular case.~~

~~2.15~~2.14 As stated at paragraph 2.4 above, the starting point may not in any event exceed 30% of the relevant turnover of the undertaking.

Step 2 – adjustment for duration

~~2.16~~2.15 The starting point may be increased or, in particular circumstances, decreased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years of the infringement. Where the total duration of an infringement is less than one

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[27] See *Eden Brown Ltd and others v Office of Fair Trading* [2011] CAT 8 (the *Construction Recruitment Forum* judgment), at [44]-[59].
[28] Ibid.
[29] See The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259) and The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93).

year, the CMA will treat that duration as a full year for the purpose of calculating the number of years of the infringement. In exceptional circumstances, the starting point may be decreased where the duration of the infringement is less than one year. Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional cases decide to round up the part year to a full year.

Step 3 – adjustment for aggravating and mitigating factors

~~2.17~~2.16 The basic amount of the financial penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or decreased where there are mitigating factors. The CMA will consider whether any adjustments are appropriate in all cases for each undertaking based on the specific circumstances of the infringement. A list of non-exhaustive factors is provided in the following paragraphs.

~~2.18~~2.17 Aggravating factors include:

- persistent and repeated unreasonable behaviour that delays the CMA's enforcement action;[30]
- role of the undertaking as a leader in, or an instigator of, the infringement;
- involvement of directors or senior management (notwithstanding paragraph 1.14~~1.14~~1.15 above);
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuing the infringement after the start of the investigation;
- repeated infringements by the same undertaking or other undertakings in the same group (recidivism);[31]

[30] This will include situations where an undertaking persistently and repeatedly disrespects CMA time limits specified (for example for providing representations on confidentiality) or otherwise persistently delays the CMA's investigation. The CMA will not treat the full exercise of the party's rights of defence as unreasonable behaviour.
[31] Where an undertaking **continues or repeats** the same or a similar infringement after the CMA or one of the Regulators ~~or the European Commission~~ has made a decision that the undertaking infringed ~~Article 101 and/or~~ the Chapter I prohibition~~, or Article 102~~ and/or the Chapter II prohibition or, in relation to an infringement which occurred prior to EU Exit, after the CMA, one of the Regulators or the European Commission has made a decision that the undertaking infringed Article 101 TFEU and/or the Chapter I prohibition, or Article 102 TFEU and/or the Chapter II prohibition, the amount resulting from the application of steps 1 and 2 may be increased by up to 100% for each such infringement established. The CMA would expect to apply such an increase only where the prior decision found that the infringement or infringements had a UK impact. The actual amount of any such increase for recidivism will be determined on a case-by-case basis having regard to all relevant circumstances.

- infringements which are committed intentionally rather than negligently;[32]
- retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant;
- failure to comply with competition law following receipt of a warning or advisory letter in respect of the same or similar conduct.[33]

~~2.19~~2.18 Mitigating factors include:

- role of the undertaking, for example, where the undertaking is acting under severe duress or pressure;
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- adequate steps having been taken with a view to ensuring compliance with ~~Articles 101 and 102 and~~ the Chapter I and Chapter II prohibitions;[34]
- termination of the infringement as soon as the CMA intervenes;[35]

The CMA would not expect to apply an uplift for recidivism in respect of prior infringement decisions made more than 15 years before the start of the infringement for which the current penalty is being set. The CMA considers that infringements are the 'same or similar' where they fall under the same provision of the CA98 or (for an infringement which occurred prior to EU Exit) equivalent provision of the TFEU. For instance, an infringement decision under the Chapter I prohibition or Article 101 could be counted as a 'same or similar' infringement when assessing the penalty for another infringement of Chapter I or Article 101.

[32] In *Napp* at [456] and [457] the Competition Commission Appeal Tribunal (now the CAT) stated that, in its judgment, an infringement is committed 'intentionally' if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition and an infringement is committed 'negligently' if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition. This approach was followed by the CAT in *Aberdeen Journals (No.2)* at [484] and [485].

[33] When considering whether to uplift, the CMA will take into account the individual circumstances of the failure and will impose an uplift in these circumstances only where the warning letter or advisory letter related to conduct the CMA considers to be the same or similar to the conduct under investigation. See CMA guidance on *warning and advisory letters*. The Regulators may use different terminology for their equivalents of warning and advisory letters.

[34] The CMA will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount from the penalty of up to 10%. The mere existence of compliance activities will not be treated as a mitigating factor. Compliance activities are likely to be treated as a mitigating factor where an undertaking demonstrates that adequate steps, appropriate to the size of the business concerned, have been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the undertaking (from the top down). This will be expected to include appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities, including making a public statement regarding a commitment to compliance on the undertaking's relevant website(s) and conducting periodic review of its compliance activities, and reporting that to the CMA. The undertaking will also need to present evidence on the steps it took to review its compliance activities, and change them as appropriate, in light of the events that led to the investigation at hand. The CMA will expect compliance activities and the steps taken to be appropriate to the size of the undertaking. Save for exceptional cases, the CMA will not treat the existence of compliance activities as an aggravating factor justifying an increase in the financial penalty. Such exceptional circumstances could include situations where, for example, compliance activities are used to conceal or facilitate an infringement, or to mislead the CMA during its investigation. It should be noted that the CMA has published *guidance to assist businesses to achieve competition law compliance*.

[35] Intervention by the CMA would be by the exercise of its powers under sections 26 to 28A of the CA98.

- cooperation which enables the enforcement process to be concluded more effectively and/or speedily.[36]

Step 4 – adjustment for specific deterrence and proportionality

~~2.20~~2.19 In considering whether any adjustments should be made at this step for specific deterrence or proportionality, the CMA will consider appropriate indicators of the undertaking's size and financial position at the time the penalty is being imposed. The CMA may have regard to indicators – including, where they are available, total turnover, profitability (including profits after tax), net assets and dividends, liquidity and industry margins – as well as any other relevant circumstances of the case. The CMA will generally consider three year averages for profits and turnover. The CMA may also consider indicators of size and financial position from the time of the infringement.

~~2.21~~2.20 The penalty figure reached after steps 1 to 3 may be increased to ensure that the penalty to be imposed on the undertaking will deter it from breaching competition law in the future, given its specific size and financial position and any other relevant circumstances of the case. Such an increase will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of penalty reached at the end of step 3. Where relevant, the CMA's estimate would account for any gain which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration.[37] The assessment of the need to adjust the penalty will be made on a case-by-case basis for each individual infringing undertaking.

~~2.22~~2.21 In addition, there might be exceptional cases where an undertaking's relevant turnover is very low or zero with the result that the figure at the end of step 3 would be very low or zero. In such cases, the CMA would expect to make more significant adjustments, both for general and specific deterrence,

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[36] Respecting CMA time limits specified or otherwise agreed will be a necessary but not sufficient criterion to merit a reduction at this step, that is to say, cooperation over and above this will be expected. An example of such cooperation may be the provision of staff for voluntary interviews and/or arranging for staff to provide witness statements. Note that in cases of cartel activity an undertaking which cooperates fully with the investigation may benefit from total immunity from, or a significant reduction in the level of, a financial penalty, if it satisfies the requirements for lenient treatment set out in part 3 of this guidance. Undertakings benefiting from the leniency programme will not receive an additional reduction in financial penalties under this head (since continuous and complete cooperation is a condition of leniency).

[37] For example, in a predation case the relevant market may be very small. However, the act of predation might provide an undertaking with a reputation for aggressive behaviour which it could use to its advantage in many other markets. ~~In cases concerning infringements of Articles 101 and/or 102 of the TFEU, the gain in another member state may be taken into account, provided the express consent of the relevant member state or NCA, as appropriate, is given in each particular case.~~

at this step. Such an approach may also be appropriate where the relevant turnover did not accurately reflect the scale of an undertaking's involvement in the infringement or the likely harm to competition. This might be the case, for example, in relation to bid-rigging cases or where an undertaking's turnover in the last business year before the infringement ended was unusually low.

~~2.23~~2.22 In considering the appropriate level of uplift for specific deterrence, the CMA will ensure that the uplift does not result in a penalty that is disproportionate or excessive having regard to the undertaking's size and financial position and the nature of the infringement.

~~2.24~~2.23 At this step, the CMA will assess whether, in its view, the overall penalty proposed is appropriate in the round. Where necessary, the penalty reached at the end of steps 1 to 3 may be decreased to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.

Step 5 – adjustment to prevent maximum penalty being exceeded ~~and to avoid double jeopardy~~

~~2.25~~2.24 The final amount of the penalty calculated according to the method set out above may not in any event exceed 10% of the worldwide turnover of the undertaking in its last business year.[38] The business year on the basis of which worldwide turnover is determined will be the one preceding the date on which the decision of the CMA is taken or, if figures are not available for that business year, the one immediately preceding it. The penalty will be adjusted if necessary to ensure that it does not exceed this maximum.

~~2.26~~2.25 In addition, where an infringement ended prior to 1 May 2004, any penalty imposed in respect of an infringement of the Chapter I prohibition or the Chapter II prohibition ~~(but not any penalty imposed in respect of an infringement of Article 101 or Article 102)~~ will, if necessary, be adjusted further to ensure that it does not exceed the maximum penalty applicable in respect of an infringement of the Chapter I prohibition or the Chapter II prohibition prior to 1 May 2004, that is, 10% of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended (multiplied pro rata by the length of the infringement where the length of the infringement

[38] See note 15~~14~~15 above.

was in excess of one year, up to a maximum of three years).[39] The adjustments referred to in paragraphs 2.242.242.25 and 2.252.252.26 will be made after all the relevant adjustments have been made in steps 2 to 4 above and also before adjustments are made in respect of leniency, settlement or approval of a voluntary redress scheme discounts under step 6.

2.27 Where any infringement by an association of undertakings (for example, a trade association) relates to the activities of its members, the penalty shall not exceed 10% of the sum of the worldwide turnover of each member of the association of undertakings active on the market affected by the infringement. See the competition law guideline *Trade associations, professions and self-regulating bodies* (OFT408, adopted by the CMA Board) for further details on the imposition and enforcement of penalties on associations of undertakings.[40]

2.26 If a penalty or fine has been imposed by the European Commission, or by a court or other body in another member state in respect of an agreement or conduct, the CMA must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct.[41] This is to ensure that where an anti-competitive agreement or conduct is subject to proceedings resulting in a penalty or fine in another member state, an undertaking will not be penalised again in the UK for the same anti-competitive effects.

Step 6 – application of reductions under the CMA's leniency programme, settlement and approval of voluntary redress schemes

2.282.27 The CMA will reduce an undertaking's penalty where the undertaking has a leniency agreement with the CMA, entered into as a result of an application pursuant to part 3 of this guidance below and in accordance with the CMA's published guidance on leniency, provided always that the undertaking meets the conditions of the leniency agreement.[42]

2.292.28 The CMA will also apply a penalty reduction where an undertaking settles with the CMA, which will involve, among other things, the undertaking admitting its participation in the infringement.[43]

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[39] Calculated in accordance with The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) immediately prior to its amendment by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).
[40] *Trade associations, professions and self-regulating bodies* (OFT408, adopted by the CMA Board).
[41] See section 38(9) of the CA98.
[42] See the CMA's guidance *Applications for leniency and no-action in cartel cases* (OFT1495, adopted by the CMA Board).
[43] See Chapter 14, *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8).

~~2.30~~2.29 The CMA may also apply a penalty reduction where an undertaking obtains approval for a voluntary redress scheme.[44] The procedure for applying for approval is set out in the CMA's *Guidance on the approval of voluntary redress schemes for infringements of competition law* (CMA40).

~~2.31~~2.30 Where the CMA applies discounts at this step, these discounts will be applied consecutively.[45]

Financial hardship

~~2.32~~2.31 In exceptional circumstances, the CMA may reduce a penalty where the undertaking is unable to pay the penalty proposed due to its financial position. The CMA emphasises that such financial hardship adjustments will be exceptional and there can be no expectation that a penalty will be adjusted on this basis.[46]

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[44] See paragraph 3.32, *Guidance on the approval of voluntary redress schemes for infringements of competition law* (CMA40).
[45] For example, any leniency discount will be applied to penalty after Step 5, then any settlement discount will be applied to the figure reached after application of the leniency discount, with finally any discount in respect of an approved voluntary redress scheme being applied to the figure reached after the application of the settlement discount.
[46] See *Sepia Logistics Limited (formerly known as Double Quick Supplyline Limted) v Precision Concepts Ltd* [2007] CAT 13, at [94]. See also *GF Tomlinson Group Limited and Others v Office of Fair Trading* [2011] CAT 7, at [262].

3. Lenient treatment for undertakings coming forward with information in cartel activity cases

Immunity from or reduction in financial penalty for undertakings coming forward with information in cartel activity cases

3.1 For the purposes of this guidance, 'cartel activities' are agreements and/or concerted practices which infringe ~~Article 101 of the TFEU and/or~~ the Chapter I prohibition and involve price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market-sharing or market-dividing.

3.2 Undertakings participating in cartel activities might wish to terminate their involvement and inform the CMA of the existence of the cartel activity, but be deterred from doing so by the risk of incurring large financial penalties.

3.3 The CMA considers that it is in the interest of the economy of the UK~~, and the European Union more generally,~~ to have a policy of granting lenient treatment to undertakings which inform it of cartel activities and which then cooperate with it in the circumstances set out below. It is the often secret nature of cartel activities which justifies such a policy. The interests of customers and consumers in ensuring that such activities are detected and prohibited outweigh the policy objectives of imposing financial penalties on those undertakings which participate in cartel activities but which cooperate to a significant degree with the CMA as set out below.

3.4 In order to encourage undertakings participating in cartel activities to come forward, the CMA **will** grant total immunity from financial penalties for an infringement of ~~Article 101 and/or~~ the Chapter I prohibition to a participant in cartel activity who is the first to come forward before the CMA has commenced an investigation and who satisfies the requirements set out in paragraphs 3.8~~3.8~~3.13 and 3.9~~3.9~~3.14. Alternatively, the CMA **may** offer total immunity or a reduction of up to 100% from financial penalties to a participant who is the first to come forward and who satisfies the requirements set out in paragraphs 3.11~~3.11~~3.16 and 3.12~~3.12~~3.17. An undertaking which is not the first to come forward, or does not satisfy these requirements may benefit from a reduction of up to 50% in the amount of the financial penalty imposed if it satisfies the requirements set out in paragraphs 3.13~~3.13~~3.18 to 3.15~~3.15~~3.20.

Procedure for requesting immunity or a reduction in the level of penalties

3.5 An undertaking which wishes to take advantage of the lenient treatment set out in this part must contact the CMA following the procedures set out in the CMA's guidance on *Applications for leniency and no-action in cartel cases* (OFT1495) or any equivalent guidance issued by the Regulators.[47] This step has to be taken by a person who has the power to represent the undertaking for that purpose.

3.6 Initial contact can be made by telephone.[48] Prospective applications may be discussed with the CMA without disclosing the identity of the undertaking if preferred, perhaps with the prospective applicant's legal adviser.[49] However, before an application can then be taken forward, the applicant's name must be given to the CMA.

3.7 The CMA document, *Applications for leniency and no-action in cartel cases* (OFT1495) provides detailed guidance on the interaction between the CMA's approach to lenient treatment for undertakings as described in this guidance and the CMA's approach to granting no-action letters confirming immunity from prosecution from the criminal cartel offence under section 190(4) of the Enterprise Act 2002.

~~**Leniency applications and the European Competition Network**~~

~~3.8 The European Commission and a number of NCAs also have leniency programmes that facilitate the detection of infringements.[50]~~

~~3.9 As set out at paragraph 1.2 above, the Modernisation Regulation creates a system in which NCAs and the European Commission will apply Articles 101 and 102. The European Competition Network ('the ECN') facilitates close cooperation between NCAs and the European Commission and ensures an effective and consistent application of EU competition rules. An NCA will be considered well placed to deal with a case where the cumulative case allocation criteria are met. Details of these criteria are provided in the~~

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[47] See the CMA's guidance *Applications for leniency and no-action in cartel cases* (OFT1495).
[48] Prospective applicants may call the following number: 020 3738 6833.
[49] See paragraph 3.193.193.193.24 as regards confidentiality.
[50] ~~The European Commission document, *Commission Notice on immunity from fines and reduction of fines in cartel cases* (published in the Official Journal of the European Communities: Official Journal C298, 08.12.06, page 17) concerns 'secret cartels'. Cartels are defined in this Notice as 'agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors'. Therefore, the European Commission's Notice applies to horizontal agreements only. The CMA's civil leniency policy applies to cartel activities (as defined in paragraph 3.1 above), namely horizontal agreements and any form of price-fixing including resale price maintenance.~~

Commission Notice on Cooperation within the Network of Competition Authorities (the Network Notice).[51]

3.10 In most instances, where the CMA receives a leniency application (and it is well placed to deal with the case), it will remain in charge of the case. An application for leniency to the CMA will not be considered as an application for leniency to another authority within the ECN, even where that other authority deals with the case in parallel with or in place of the CMA. It is therefore in the interest of the applicant to apply for leniency to all the competition authorities which have the power to apply Article 101 in the territory affected by the infringement and which may be considered well placed to deal with the infringement in question. In view of the importance of timing in most existing leniency programmes, applicants will also need to consider whether it would be appropriate to make leniency applications to the relevant authorities simultaneously. A list of competition authorities in member states which offer a leniency programme can be found on the European Commission's website.[52] Individual applications may be discussed with the CMA.[53]

3.11 The CMA accepts short form 'summary applications' as contemplated in the ECN Model Leniency Programme[54] in appropriate cartel cases[55] where:

- the Commission is 'particularly well-placed' to deal with a case in accordance with paragraph 14 of the Network Notice;
- the CMA is in its opinion also 'well-placed' to act in accordance with paragraph 8 of the Network Notice;
- the applicant has made or is in the process of filing an application for immunity with the Commission; and
- the applicant is in a position where it could have benefited from immunity under paragraph 3.13 below.

3.12 Details on how information may be exchanged within the ECN, and the safeguards in place to protect the position of a leniency applicant with regard

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[51] *Commission Notice on Cooperation within the Network of Competition Authorities,* Official Journal C101, 27.04.04, page 43.
[52] See the document on the European Commission's website: List of National Competition Authorities which operate a leniency programme.
[53] See paragraph 3.24 as regards confidentiality.
[54] ECN Model Leniency Programme.
[55] Further details on the circumstances in which summary applications are accepted can be found in the CMA's guidance *Applications for leniency and no-action in cartel case* (OFT1495, adopted by the CMA Board).

~~to such information exchange, can be found in the Network Notice (see paragraphs 39 to 42).~~

Total immunity for the first to come forward before an investigation has commenced in cartel activity cases

~~3.13~~3.8 An undertaking **will** benefit from total immunity from financial penalties if the undertaking is the first[56] to provide the CMA with evidence of cartel activity in a market before the CMA has commenced an investigation[57] of the cartel activity; provided that the CMA does not already have sufficient information to establish the existence of the alleged cartel activity, and conditions (a) to (e) below are satisfied. The undertaking must:[58]

(a) accept that the undertaking participated in cartel activity;

(b) provide the CMA with all the information, documents and evidence available to it regarding the cartel activity;

(c) maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action (including criminal proceedings and defending civil or criminal appeals) by the CMA arising as a result of the investigation;

(d) refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA); and

(e) not have taken steps to coerce another undertaking to take part in the cartel activity.

~~3.14~~3.9 The information, documents and evidence provided by the undertaking must, as a minimum, give the CMA a sufficient basis for taking forward a credible investigation.

~~3.15~~3.10 If an undertaking does not qualify for total immunity under paragraphs 3.8~~3.8~~~~3.13~~ and 3.9~~3.9~~~~3.14~~ above, it may still benefit from a reduction of

[56] Guaranteed immunity under this paragraph will not be available if the CMA has been informed of the cartel activity by either an undertaking applying for immunity from financial penalties or an individual seeking immunity from criminal prosecution under section 190(4) of the Enterprise Act 2002.
[57] For these purposes, the CMA will have commenced an investigation from the point where the CMA (a) considers there are reasonable grounds for suspecting cartel activity, such that it may conduct an investigation under one or both of section 192 of the Enterprise Act 2002 and section 25 of the CA98, and (b) has taken active steps in relation to that investigation. Active steps may be overt or covert and may or may not involve the use of statutory information gathering powers.
[58] Further details on the interpretation of these conditions is provided in the CMA's guidance *Applications for leniency and no-action in cartel cases* (OFT1495, adopted by the CMA Board).

financial penalties of up to 100% under paragraphs 3.113.113.16 and 3.123.13.17 below or a reduction of up to 50% under paragraphs 3.133.133.18 to 3.153.153.20 below.

Immunity or reduction in the level of financial penalties of up to 100% for the first to come forward after an investigation has commenced in cartel activity cases

3.163.11 An undertaking **may** benefit from immunity or a reduction in the level of the financial penalty of up to 100% if the following conditions are satisfied:

- the undertaking seeking immunity or a reduction in the level of financial penalty under this paragraph is the first[59] to provide the CMA with evidence of cartel activity in a market before the CMA has issued a statement of objections;[60]
- conditions (a) to (e) in paragraph 3.83.83.13 above are satisfied; and
- the information, documents and evidence provided by the undertaking, as a minimum, add significant value to the CMA's investigation, that is they must constitute or contain information which genuinely advances the investigation.

3.173.12 Immunity or a reduction in the level of the financial penalty of up to 100% by the CMA in these circumstances is discretionary. In order for the CMA to exercise this discretion it must be satisfied that the undertaking should benefit from a reduction in the level of the financial penalty, taking into account the overall added value provided by the leniency applicant. This will generally depend on the stage at which the undertaking comes forward, the information, documents and other evidence already in the CMA's possession and the probative value of the information, documents and other evidence provided by the undertaking. The CMA will also take into account the overall level of cooperation provided.

[59] Immunity or reductions in financial penalty under this paragraph will not be available if the CMA has previously been informed of the same cartel activity by either an undertaking applying for immunity under paragraph 3.83.13 or under this paragraph, or by an individual seeking immunity from criminal prosecution under section 190(4) of the Enterprise Act 2002, except where the only prior applicant is an individual employee or officer of the applicant undertaking and it remains the first **undertaking** to come forward.
[60] Under Rule 5 of The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/458).

Reduction in the level of financial penalties of up to 50% in cartel activity cases

3.183.13 Undertakings which provide evidence of cartel activity before a statement of objections is issued, but are not the first to come forward, or do not qualify for total immunity or a reduction in the level of financial penalty under paragraphs 3.83.83.13 and 3.93.14 or 3.113.113.16 and 3.123.123.17 above (as the case may be), may be granted a reduction of up to 50% in the amount of a financial penalty which would otherwise be imposed, if conditions (a) to (d) in paragraph 3.83.83.13 above are met. The information, documents and evidence provided by the undertaking must, as a minimum, add significant value to the CMA's investigation, that is, they must genuinely advance the investigation.

3.193.14 The key criterion for determining the discount available will be the overall added value of the information, documents and evidence provided by the leniency applicant. This will generally depend on the stage at which the undertaking comes forward, the information, documents and evidence already in the CMA's possession and the probative value of the information, documents and evidence provided by the undertaking. The CMA will also take into account the overall level of cooperation provided.

3.203.15 The grant of a reduction by the CMA in these circumstances is discretionary. In order for the CMA to exercise this discretion it must be satisfied that the undertaking should benefit from a reduction, taking into account the factors described in paragraphs 3.133.133.18 and 3.143.143.19 above.

Additional reduction in financial penalties ('Leniency Plus')

3.213.16 An undertaking cooperating with an investigation by the CMA under the CA98 in relation to cartel activities in one market (the first market) may also be involved in completely separate cartel activity in another market (the second market) which also infringes ~~Article 101 and/or~~ the Chapter I prohibition.

3.223.17 If the undertaking obtains total immunity from financial penalties under paragraph 3.83.83.13 and 3.93.93.14 or a reduction of up to 100% in the amount of the financial penalty under paragraphs 3.113.113.16 and 3.123.123.17 above in relation to its activities in the second market, it will also receive a reduction in the financial penalties imposed on it which is additional

to the reduction which it would have received for its cooperation in the first market alone.[61]

~~3.23~~3.18 For example, as a result of an investigation by the CMA of producers, including ABC Limited, in the widgets market, ABC Limited carries out an internal investigation and discovers that, as well as having participated in cartel activities in the widgets market, one of its divisions has participated in separate cartel activities in the sprockets market. ABC Limited has been cooperating with the CMA's widgets investigation and is interested in seeking lenient treatment by disclosing its participation in the sprockets cartel activity. Assuming ABC Limited qualifies for total immunity or a reduction of up to 100% of the financial penalty in relation to the sprockets market, it can also obtain a reduction in financial penalty in relation to the widgets market in addition to the reduction it would have received for cooperation in the widgets investigation alone, that is, an additional reduction in respect of the widgets market (the first market) as a result of its cooperation in the investigation into the sprockets market (the second market).

Confidentiality

~~3.24~~3.19 An undertaking coming forward with evidence of cartel activity may be concerned about the disclosure of its identity as an undertaking which has volunteered information. The CMA will therefore endeavour, to the extent possible ~~and allowing for the exchange of information as required within the ECN~~, to keep the identity of such undertakings confidential throughout the course of its investigation until the issue of a statement of objections. Further detailed guidance is provided in the CMA's guidance on *Applications for leniency and no-action in cartel cases*[62] on the circumstances in which it will or may be necessary to disclose the identity of, or information, documents and evidence provided by, undertakings that have applied for lenient treatment.

[61] For the avoidance of doubt, the undertaking does not need to be in receipt of leniency in respect of the first market to receive this reduction. It is sufficient for the undertaking to be receiving a reduction, by way of mitigation, for cooperation.
[62] The CMA's guidance on *Applications for leniency and no-action in cartel cases* (OFT1495, adopted by the CMA Board).