RESPONSE OF CLIFFORD CHANCE LLP TO THE CONSULTATION ON THE CMA'S GUIDANCE AS TO THE APPROPRIATE AMOUNT OF A PENALTY

Clifford Chance LLP welcomes the opportunity to respond to the consultation on the draft revised CMA guidance as to the appropriate amount of a penalty (the "**Revised Guidance**").

Our comments below are based on the substantial experience of lawyers in our Antitrust Practice of advising on competition law for a diverse range of clients, and across a large number of jurisdictions. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

Q1. Do you agree with the proposed changes?

1.1 We consider most of the proposed changes to provide a more complete explanation of the CMA's existing approach to setting penalties and that the amendments reflecting the introduction of the possibility of voluntary redress schemes are appropriate. However, we do have reservations about certain aspects of the CMA's existing approach, which we have set out below, as those aspects have not been consulted upon before.

Step 1 – assessment of seriousness

1.2 We agree that the revised three-step approach to assessing seriousness offers clearer, more structured guidance. However, we consider that:

1.2.1 the inclusion of excessive pricing in the list of types of conduct that are considered "most likely, by their very nature to harm competition" is undesirable from both a policy perspective and for coherence of the penalty guidance;

1.2.2 the revised guidance should give examples of the types of non-cartel object infringements that would be considered inherently harmful and those that fall into the "less serious" category";

1.2.3 it should be recognised that for some types of conduct, one party's infringement may be more serious than the other's; and

1.2.4 the revised guidance still does not adequately explain the CMA's approach to applying uplifts for general deterrence.

The seriousness of excessive pricing should be considered on a case-by-case basis

1.3 We consider the inclusion of excessive pricing in the list of types of conduct that are considered "most likely, by their very nature to harm competition" to be undesirable from a policy perspective. Treating excessive pricing (even in cases where there is no accompanying exclusionary abuse) as a competition law infringement already has the potential to distort businesses' incentives to compete, and a policy of applying the highest possible fines to such conduct would needlessly exacerbate those distortions, with adverse consequences for dynamic competition in the UK economy. In particular, it would inhibit the incentives for incumbent businesses to continue to participate in

certain markets and other businesses to enter those markets. It would also deter legitimate pricing decisions of dominant businesses (as well as those that are not, but which err on the side of caution due to uncertainty as to whether they are dominant), since, even with the benefit of recent guidance from the Court of Justice of the EU,[1] it is all but impossible for a dominant company to discern the point at which its prices will be considered excessive. We note that until recently the OFT/CMA had not investigated a case of excessive pricing since 2001 (*Napp*) and the Commission has not made a finding of excessive pricing since 2001 (*Scandlines*) in which reluctance was expressed at pursuing pure excessive pricing cases. Both of these cases also involved an exclusionary abuse.

1.4 Moreover, absent any accompanying exclusionary abuse, excessive pricing cannot be said to harm competition. On the contrary, it stimulates competition in two ways. First, it signals the prospect of good commercial returns for potential new entrants to the specific market concerned and therefore increases the likelihood of increased competition through market entry in the long-run. Second, at a more general level, the prospect of earning good commercial returns as a consequence of having a dominant position creates powerful incentives for all businesses operating in the UK to compete strongly in order to attain such a dominant position – by innovating, offering better choice, higher quality products and lower prices. In no sense does excessive pricing lead to a reduction or limitation of competition. It is therefore irrational to treat excessive pricing as a form of conduct that is, by its nature, likely to harm competition.

1.5 While the CMA's policy on enforcement of excessive pricing as an abuse of dominance is outside the scope of this consultation, treating excessive pricing as a form of conduct that will invariably attract the highest fines would limit the CMA's ability and to respond flexibly to the considerations described above, on a case-by-case basis. Given the lack of any clear legal framework that would allow dominant firms (or those that apply the standards of dominance for compliance purposes) to determine whether a given price is unlawful, such an approach would also lead to unfair and disproportionate consequences for firms that are considered, retrospectively, to have crossed that unidentifiable threshold of lawfulness. In our view, therefore, a better and more proportionate approach would be to exclude excessive pricing from the category of infringements that will typically be treated as particularly serious and instead to assess the seriousness of each instance of excessive pricing on the facts of the individual case.

The seriousness of non-cartel object infringements should be considered on a case-by-case basis

1.6 The Revised Guidance makes a distinction between "non-cartel object infringements which are inherently likely to cause significant harm to competition" and "less serious object infringements". However, it offers no examples of the types of infringement that would be considered to fall into each of these categories.

1.7 In our view, there are few, if any, examples of vertical object infringements that should be considered to be inherently likely to cause harm. Even resale price maintenance –

[1] Case C-177/16, *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome*, judgment of 14 September 2017.

often considered to be the most pernicious of vertical object infringements – is recognised to have considerable scope to give rise to efficiencies in certain circumstances.[2] Moreover, EU block exemptions have created a number of so-called "hardcore" vertical restrictions that are equated – at least in the guidance of the European Commission[3] – with object infringements, but which have relatively little capacity to harm competition "by their very nature". For instance, an arrangement whereby supplier appoints an exclusive distributor in a territory, but reserves the right to compete with that distributor, is considered so pro-competitive that it qualifies for block exemption,[4] but if that same supplier appoints two distributors with equivalent protections against sales from distributors in other territories, but no right for the supplier to compete, that is considered a "hardcore" object infringement, even though it results in materially the same degree of competition at the distribution level.

1.8 Consequently, we submit that vertical object restrictions cannot be considered to be of comparable severity to cartel infringements, and the Revised Guidance should recognise those differences by clarifying that they will typically be considered less serious, with the possible exception of resale price maintenance.

It should be recognised that for some types of conduct, one party's infringement may be more serious than the other's.

1.9 Paragraph 2.10 of the Revised Guidance notes that the CMA's seriousness assessment is intended to reflect the seriousness of the infringement at issue, rather than the particular circumstances of each undertaking's unlawful conduct, and that the CMA therefore expects to adopt the same percentage starting point for each undertaking to the infringement. However, the CMA's own enforcement practice suggests that it considers certain types of conduct – in particular those involving vertical agreements - to be serious only on the part of one of the infringing parties. In particular, its recent enforcement policy for resale price maintenance infringements has been to address infringement decisions only to the upstream supplier, and to exercise its discretion not to initiate proceedings against the downstream retailers that participated in the infringement. While we recognise that the role of the undertaking is listed as a mitigating factor under Step 3, it seems to us that for certain types of vertical infringements the relative differences in the seriousness of the conduct of the parties to an agreement should also be reflected in Step 1.

The approach to uplifts for general deterrence lacks clarity

1.10 The Revised Guidance contains no explanation of the circumstances in which the CMA will consider it appropriate to increase the penalty to deter other undertakings from engaging in the same conduct. The Current Guidance at least refers to the degree to

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[2] See Luc Peeperkorn, Defining restrictions “by object” , September 2015, Concurrences Review N° 3-2015, Art. N° 74812, pp. 40-50, in which the author argues that object restrictions should be defined according to their propensity to give rise to efficiencies under Article 101(3) TFEU.

[3] See, for example, paragraph 23 of the Vertical Guidelines (OJ [2010] C130/1).

[4] Vertical Bock Exemption (OJ [2010] L102/1, Articles 2(4) and 4(b).

which the conduct is "widespread" as a relevant factor, which we consider should be retained in the revised guidance.

1.11 More generally, our view is that the revised guidance should specify a limit on the percentage uplift that may be applied for general deterrence, at least in circumstances where the CMA has taken enforcement action against only one (or a few) businesses that have engaged in a widespread practice. Identifying a small number of "scapegoats" for enforcement action may be an effective way to send a message to the wider market, while conserving the CMA's resources. However, allowing for unlimited uplifts in the name of general deterrence risks distorting competition in favour of the rivals of the scapegoat businesses, even when those rivals have engaged in the same practice.

1.12 This is made all the more important by the additional emphasis in the revised guidance (e.g. in paragraph 23) that the assessment of seriousness is distinct from the assessment of general deterrence, which implies that unlimited uplifts may be applied in the name of general deterrence even in those cases that are not particularly serious, i.e. with a limited nature, extent or likelihood of harm to competition.

Step 1 – adjustment for specific deterrence and proportionality

1.13 The clarification of the factors that will be taken into account in assessing the size and financial position of the infringing undertaking is useful. However, it offers no objective benchmarks for what may be considered excessive or disproportionate and in this respect could more comprehensively reflect the recent practice of the CMA. In particular, there have been a number of cases in which the CMA has adjusted a fine upwards or downwards after having considered the undertaking's average worldwide turnover, adjusted net assets and average annual profit after tax. The guidance might therefore usefully include some examples of the resulting impact on these metrics, based on this experience.[5]

1.14 In addition, the CMA's consultation document states (in paragraph 5.25) that the CMA will usually assess these indicators over a three year period. That clarification could usefully be included in footnote 41 of the Revised Guidance.

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

1.15 Paragraph 2.32 of the Revised Guidance now explains the CMA's approach (applied in recent cases) to the cumulation of discounts for leniency, settlement and voluntary redress. By providing that such discounts are applied consecutively – such that a

[5] For instance, in "Online resale price maintenance in the light fittings sector" (Case 50343, decision of 3 May 2017) the CMA increased the fine on NLC for one serious infringement and reduced the fine for another. The fine relating to a market in which NLC did not generate a significant proportion of its turnover was increased to a figure representing 0.2% of average turnover, 0.5% of adjusted net assets and 4.1% of average profit after tax, whereas the fine relating to a market in which NLC did generate a significant proportion of its turnover was reduced to a figure representing 3.8% of turnover, 9% of adjusted net assets and 69% of average profit after tax. The combined fine, which was considered proportionate, appropriate and sufficient for deterrence purposes without being disproportionate or excessive amounted to 4.1% of turnover, 9% of adjusted net assets and 73% of average profit after tax.

reduction for settlement is applied to the value of the fine after the leniency discount has already been applied - this policy will considerably reduce the attractiveness of settlement for parties that have secured leniency. For example, under the CMA's approach the value of settlement for a party that has secured a leniency discount of 50% will be half as much as it would be under the approach applied by the European Commission, where the reduction of the fine granted for settlement is added to a party's leniency reward.[6] In our view, that does not offer appropriate incentives to settle, particularly given the CMA's insistence that settling parties waive their right to appeal, again in contrast to the approach of the European Commission.

1.16	**Q2. Are there any other areas of the Current Guidance which you consider could be usefully clarified?**

2.1 We have the following suggestions for additional clarifications that might be included:

2.1.1 In paragraph 2.18 (2.22 of the Revised Guidance), the Guidance explains that the CMA might increase a fine where it considers that the undertaking's turnover in the last business year before the infringement ended was unusually low, or did not otherwise accurately reflect the scale of its involvement in the infringement or the likely harm to competition. We submit that this principle cuts both ways. The Revised Guidance should therefore provide for the possibility of a reduction in the fine where an undertaking's turnover in the last business year before the infringement ended was unusually high, or otherwise overstates the scale of its involvement and likely harm to competition.

2.1.2 The mitigating factors described in the Revised Guidance do not reflect the CMA's recent decision to fine Ping for preventing online sales of its golf clubs by distributors. In that case, the CMA stated that "[t]he level of the fine imposed on Ping reflects that the CMA found the breach of competition law occurred in the context of a genuine commercial aim of promoting in-store custom fitting."[7] The Revised Guidance should therefore explain the circumstances in which infringing conduct will be considered to have a "genuine commercial aim" that may be treated as a mitigating factor.

2.1.3 Paragraph 2.19 of the Revised Guidance states that it will be a mitigating factor that the undertaking was genuinely uncertainty as to whether its conduct was unlawful. It could be usefully clarified that such uncertainty may arise, in particular, in circumstances where there were no existing decisions finding such conduct to be unlawful at the time that the infringement was committed, and the CMA's infringement decision is therefore novel and precedent-setting.

Clifford Chance LLP
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6 Paragraph 33 of Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ 2008 C167/1

7 CMA press release dated 24 August 2017, "CMA fines Ping £1.45m for online sales ban on golf clubs".