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CMA CONSULTATION ON DRAFT REVISED GUIDANCE ON THE APPROPRIATE AMOUNT OF A PENALTY

RESPONSE OF ASHURST LLP

Introduction

Ashurst LLP welcomes the opportunity to respond to the consultation by the Competition and Markets Authority ("**CMA**") on its draft revised guidance on the appropriate amount of a penalty (2 August 2017) ("the "**Draft Revised Guidance**"). This response contains our own views, based on our experience of advising and representing clients involved in CMA competition investigations, and is not made on behalf of any of our clients.

We confirm that nothing in this response is confidential. We confirm also that we would be happy to be contacted by the CMA in relation to our responses.

1. **Do you agree with the proposed changes set out in chapter 5? Please give reasons for your views.**

Introductory comments

1.1 We welcome the CMA's stated desire to provide further transparency to the process of penalty-setting and thereby to increase certainty for businesses, drawing on its recent decisional practice, including since the CMA became fully operational on 1 April 2014.

1.2 We agree with the majority of the proposed changes set out in chapter 5 of the consultation document. However, as explained further below, we have some concerns with the proposed amendments to the application of the starting point range at Step 1, and we would also welcome further clarification on a number of other sections of the Draft Revised Guidance.

1.3 We would mention that we have found the publication of a marked up version of the Draft Revised Guidance showing the proposed changes to the Current Guidance to be very useful. We would encourage the CMA to adopt the same approach when consulting on proposed changes to other guidance documents in the future.

Assessment of the appropriate starting point

1.4 We agree that it would be useful to provide further clarity on the assessment the CMA makes when deciding on an appropriate starting point at Step 1 of the penalty calculation. However, we do not consider that the categorisation approach proposed by the CMA in the Draft Revised Guidance is the best way to achieve this.

1.5 Whilst the Draft Revised Guidance expressly states at paragraph 2.6 that "*there is no pre-set 'tariff' of starting points for different types of infringement*", it goes on to describe the CMA's proposed categorisation approach as a set of "*principles*" to which the CMA "*will have reference*". In practice, this seems likely to lead to *de facto* minimum starting points for certain categories of infringement, from which the CMA will not readily be able to

depart.[1] We believe that this would unnecessarily fetter the CMA's discretion to determine the appropriate starting point on a case-by-case basis, having regard to all the relevant circumstances of a particular case. We note in this regard that the Competition Appeal Tribunal ("**CAT**") has previously emphasised that "*the maxim that each case stands on its own facts is particularly pertinent*" in the context of decisions relating to penalties.[2]

1.6 We would suggest that the CMA's aim of increasing transparency and increasing certainty for businesses could be better achieved by providing illustrative examples from the CMA's decisional practice, explaining why particular starting percentage points were chosen in previous cases, whilst emphasising that each case will be decided on its own particular facts. For example, explaining why a starting point of 21% was considered appropriate in respect of the price-fixing infringement identified in the **Modelling Sector** case,[3] whereas a starting point of 28% was considered appropriate in respect of the market-sharing infringement identified in the **Drawer Wraps** case,[4] and why recent cases involving resale price maintenance have involved lower starting points of 18-19%.[5]

1.7 Should the CMA nonetheless decide to proceed with its proposed categorisation approach, we consider that it would be helpful to adopt a more consistent approach to providing examples of the type of activities which will fall within each of the categories outlined in paragraph 2.6 of the Draft Revised Guidance. In particular, we would welcome clarification of the types of conduct that would be included within the category of "*non-cartel object infringements which are inherently likely to cause significant harm to competition*" (which the Draft Revised Guidance indicates would generally attract a starting point of 21-30%), and the types of conduct that would fall within the category of "*certain, less serious object infringements*" (which would generally attract a starting point of 10-20%).

1.8 In this connection, where would cases involving resale price maintenance fit in? We note in this regard that the CMA's recent decisional practice would appear to suggest that such cases would be treated as "less serious object infringements", generally attracting a starting point towards the upper end of the 10-20% range.[6] It would however be helpful to clarify this in the final version of the guidance, if the CMA maintains the proposed categorisation approach.

1.9 Similarly, it would be helpful to clarify where the exchange (and unilateral disclosure) of commercially sensitive information would fit into the proposed categories of infringement:

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1 Although the CMA's guidance "*is not to be construed as if it were a statute*" (**Argos and Littlewoods –v- OFT** [2005] CAT 13, paragraph 168), "*in accordance with general principle the* [CMA] *must give reasons for any significant departure from the Guidance*" (**Argos and Littlewoods Ltd and JJB Sports plc –v- OFT** [2006] EWCA Civ 1318, paragraph 161).

2 **Kier Group & Others –v- OFT** [2011] CAT 3, paragraph 116.

3 Case CE/9859/14 **Conduct in the modelling sector** (CMA infringement decision dated 16 December 2016).

4 Case CE/9882/16 **Supply of products to the furniture industry (drawer wraps)** (CMA infringement decision dated 27 March 2017).

5 Case 50343 **Online resale price maintenance in the light fittings sector** (CMA infringement decision dated 3 May 2017); Case CE/9857/14 **Online resale price maintenance in the bathroom fittings sector** (CMA infringement decision dated 10 May 2016).; and Case CE/9856/14 **Online resale price maintenance in the commercial refrigeration sector** (CMA infringement decision dated 24 May 2016).

6 In each of the three recent CMA infringement decisions relating to online resale price maintenance the CMA has expressly stated that it considers resale price maintenance to be a serious infringement of Chapter 1 of the Competition Act 1998 and Article 101 TFEU, and a "hardcore" restriction of competition, but that at the same time such agreements do not fall within the category of the most serious infringements of Chapter 1/Article 101 (such as horizontal price-fixing, market sharing and other cartel activities), which would ordinarily attract a starting point towards the upper end of the 30% range (Case 50343 **Online resale price maintenance in the light fittings sector** (CMA infringement decision dated 3 May 2017), paragraphs 5.24-5.25; Case CE/9857/14 **Online resale price maintenance in the bathroom fittings sector** (CMA infringement decision dated 10 May 2016), paragraphs 7.27-7.28; and Case CE/9856/14 **Online resale price maintenance in the commercial refrigeration sector** (CMA infringement decision dated 24 May 2016), paragraphs 7.30-7.31.) In each of these cases the CMA adopted a starting point of 18-19% when calculating the penalty to be imposed.]

we note in this regard that in the recent **Private Ophthalmology** case,[7] which involved anti-competitive information exchange as well as price-fixing agreements, a starting point of 20% was deemed appropriate in respect of one of the two identified infringements, and a starting point of 22% was deemed appropriate in respect of the other. This straddles the proposed distinction drawn between cases where a range of 21-30% is generally appropriate, and cases where a range of 10-20% is generally appropriate: further clarification of the CMA's proposed approach would therefore be welcomed.

1.10 We would also welcome further clarification as to how the CMA's proposed approach would be applied in practice in relation to abuse of dominance cases. In our experience, it is difficult to classify abuses into different categories in terms of seriousness of impact: any conduct by a dominant undertaking which blocks competitors from entering a market or forces them out could potentially be equally serious in terms of the impact on consumers. It is not clear to us why the CMA has chosen to single out excessive and predatory pricing in paragraph 2.6 of the Draft Revised Guidance as examples of "*conduct which is inherently likely to have a particularly serious exploitative or exclusionary effect*", compared to other abuses.

1.11 Similarly, given that abuses will typically be either exploitative or exclusionary, it is not clear to us what types of abuse would fall within the proposed category of "*conduct which is less likely to be inherently harmful*" (which it is suggested would attract a starting point in the 10-20% range). If the CMA decides to maintain the proposed categorisation approach in the final version of the guidance, it would be helpful to provide further examples and explanation.

1.12 Taken together, we believe that the issues discussed in paragraphs 1.7 to 1.11 of this response demonstrate the difficulties to which the CMA's proposed categorisation approach would be likely to give rise when applying the Draft Revised Guidance in practice, and illustrate why it would be preferable simply to provide illustrative examples from the CMA's decisional practice, as proposed above in paragraph 1.6 of this response.

1.13 Finally, whichever approach is taken by the CMA to setting the relevant starting point, we would suggest that the wording of paragraphs 2.8 and 2.10 of the Draft Revised Guidance should be revisited, to clarify how the CMA expects to assess the appropriate starting point in the case of infringements involving more than one undertaking. Paragraph 2.8 of the Draft Revised Guidance states that the factors which the CMA will take into account when considering whether to adjust the starting point upwards or downwards at Step 1 will include the "*market share(s) of the undertaking(s) involved in the infringement*". This could be read as meaning that an undertaking with a small market share may benefit from a downwards adjustment to the starting point on the basis that its conduct is less likely to harm competition/consumers. Yet paragraph 2.10 states that "*for infringements involving more than one undertaking, the CMA expects to adopt the same percentage starting point for each undertaking to the infringement*". This would seem to imply that the same starting point would be applied to, for example, two undertakings party to an anti-competitive agreement, even if one of them had a market share of 30% and the other had a market share of 5%. We presume that the CMA's intended approach is to consider the *combined* market shares of the undertakings involved in the infringement in the context of the upwards/downwards adjustment of the relevant starting point, but it would be helpful to clarify this in the final version of the guidance.

Adjustment for aggravating factors

1.14 In principle, we agree that it may be appropriate to treat failure to comply with competition law following receipt of a warning letter in respect of the same or similar conduct as an aggravating factor at Step 3 of the penalty calculation (paragraph 2.18 of the Revised Draft Guidance). However, given the conceptually different nature of advisory

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[7] Case CE/9784/13 **Conduct in the ophthalmology sector** (CMA infringement decision dated 20 August 2015).

letters compared to warning letters, we would question whether it is necessarily appropriate to treat failure to comply with competition law following receipt of an advisory letter in exactly the same manner as failure to comply with competition law following receipt of a warning letter.

1.15 We note in this regard that the CMA's guidance draws a distinction between the two types of letter, and makes clear that a warning letter will be sent in cases which involve more serious potential anti-competitive practices with greater potential to harm competition in the relevant market, and where the CMA has stronger evidence of the suspected anti-competitive practices.[8] A business which has received a warning letter is required to write to the CMA with details of what it has done or is planning to do to ensure compliance with competition law; if that business is subsequently found to have engaged in the same or similar conduct in the future, it seems reasonable, subject to consideration of the specific circumstances, to treat this as an aggravating factor in the context of the penalty calculation for the subsequent infringement. By contrast, a business which has received an advisory letter is only required to confirm to the CMA that it has received the letter. Against that background, we do not consider that when assessing potentially aggravating conduct at Step 3 it is proportionate to treat a failure to comply with competition law following receipt of an advisory letter in the same way as a failure to comply with competition law following receipt of a warning letter.

1.16 We are also concerned that the wording of footnote 37 to the Draft Revised Guidance appears to suggest that there may be circumstances in which failure to comply with competition law following receipt of a warning or advisory letter would be treated as an aggravating factor even if the infringing conduct in question was not the same or similar to the conduct identified in the warning or advisory letter.[9] We do not consider that this would be justified, and indeed it contradicts the wording of the final bullet point in the main text of paragraph 2.18, which expressly refers only to a warning letter or advisory letter "*in respect of the same or similar conduct*". In the interests of legal certainty, we would therefore suggest that the words "*is likely only to impose an uplift*" in footnote 37 should be replaced with "*will only impose an uplift*".

1.17 In addition, we consider that the words "*depending on the circumstances of the case"* at the beginning of the final bullet point added to paragraph 2.18 of the Revised Draft Guidance should be deleted, on the basis that this wording is redundant: the adjustment of the amount of a financial penalty to reflect any aggravating (or indeed mitigating) factors should always depend on the particular circumstances of the case.

1.18 We would therefore suggest that these words are instead added to the previous paragraph (2.17), such that it reads "*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, depending on the circumstances of the case."*

Adjustment for mitigating factors

Taking adequate steps to ensure future competition law compliance

1.19 We welcome the additional clarification in footnote 38 of the Draft Revised Guidance of what the CMA will require in order to treat compliance activities as a mitigating factor at Step 3 of the penalty calculation. In general, we support the CMA's proposed approach.

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8 https://www.gov.uk/guidance/warning-and-advisory-letters-essential-information-for-businesses

9 The footnote states that the CMA is "*likely only to impose an uplift in these circumstances where the warning letter or advisory letter related to conduct the CMA considers to be the same or similar to the conduct under investigation*" (emphasis added).

1.20 However, it is currently unclear from footnote 38 what the CMA expects in terms of reporting to the CMA of a business' periodic review of its compliance activities. The footnote states, *inter alia*, that the steps the CMA will expect to see evidence of include the business "*conducting periodic review of its compliance activities, and reporting that to the CMA*" (emphasis added). It would be helpful to clarify in the final version of the guidance exactly what is required. For example, does the CMA envisage some form of formal reporting obligations and monitoring commitments? If so, would these only apply in circumstances where a firm has been found to be involved in a competition law infringement, or is the CMA expecting every firm engaged in competition law compliance activities to submit periodic review reports to the CMA in order to be eligible for a penalty adjustment at Step 3 in the event of a future competition investigation? Does the CMA expect firms to report merely the fact that a periodic review will be undertaken, or is the outcome of each periodic review also to be reported?

1.21 From a purely practical perspective, we would question whether an ongoing reporting obligation, and the related demands on resources, would be desirable for either the CMA or the parties involved. Any such requirement would also arguably be disproportionate, given the possibility of applying a recidivism uplift to any penalty imposed in respect future anti-competitive conduct, should the undertaking's ongoing commitment to competition law compliance prove to be lacking.

1.22 If the CMA does indeed envisage requiring some form of ongoing reporting obligation, it would be helpful to explain in the final version of the guidance what would happen if a firm did not continue to undertake periodic reviews of its compliance activities and submit the required reports thereof to the CMA. Would any related fine reduction be revoked and additional monies become payable to the CMA? If so, over what time period would this contingent liability exist? In this regard, we would question whether it is appropriate for the amount of a penalty to be set in such a way that the figure stated in the infringement decision may not be absolute.

Provision of voluntary witness interviews and/or witness statements as a mitigating factor

1.23 In principle, we support the proposal in footnote 40 of the Draft Revised Guidance that the provision of staff for voluntary interviews and/or arranging for staff to provide witness statements should be treated as a form of co-operation which enables the enforcement process to be concluded more effectively and/or speedily, such as to merit a reduction at Step 3 of the penalty calculation.

1.24 However, for the avoidance of doubt, we would welcome express clarification in the final version of the guidance that this is not intended to imply that a decision *not* to offer witness interviews and/or witness statements voluntarily could be treated as an *aggravating* factor at this stage of the penalty calculation.

Financial indicators typically used when assessing proportionality and deterrence

1.25 In relation to paragraph 2.20 of the Draft Revised Guidance, we note that the term "*liquidity*" is proposed to replace the term "*cash flow*" in the Current Guidance. It would be helpful to clarify in the final guidance (perhaps by way of a footnote) what the CMA considers to be the difference between these two terms, and the reasoning behind the amendment. Assuming that an assessment of "liquidity" would involve a broader consideration than an assessment of "cash flow", in the context of considering an undertaking's ability to pay a fine being imposed for a competition law infringement, we would support this change.

1.26 We also consider that it would be helpful to include some illustrative examples of the circumstances in which the CMA may consider it appropriate to look at indicators of an

undertaking's size and financial position from the time of the infringement, rather than at the time the penalty is being imposed.

New text relating to discounts in respect of voluntary redress schemes

1.27 We welcome the inclusion of additional text in the Draft Revised Guidance to reflect the possibility of a discount at Step 6 of the penalty calculation where an undertaking provides an approved voluntary redress scheme (which was not available at the time the Current Guidance was published).

1.28 We note in this regard that the order in which the discounts for leniency, settlement and voluntary redress are applied does not actually have any impact on the final figure reached. What is key is whether each percentage discount is applied against the original penalty figure, or against the penalty figure resulting from the application of any previous discount. In practice, this can have a significant impact on the final penalty figure reached at the end of Step 6.

1.29 This is well illustrated by considering an example scenario in which a penalty is set at £100m at the end of Stage 5 of the penalty calculation, with discounts to be applied for leniency (50%), settlement (20%) and voluntary redress (10%) at Stage 6. If each of these discounts is applied against the original £100m figure and then added together to give a total discount, the final penalty figure is £20m (i.e. an effective discount of 80% from the original figure). In contrast, if the discounts are applied in turn against the penalty figure resulting from the application of the previous discount – as proposed in footnote 50 of the Draft Revised Guidance – the final penalty figure is £36m (i.e. an effective discount of 64% from the original figure).

1.30 Whilst it is understandable that the CMA would wish to pursue an approach which will result in a higher final penalty figure, there is a risk that in doing so, the incentives to pursue settlement and, in particular, voluntary redress, will be significantly reduced. In the example set out above, the effective discount received for offering an approved voluntary redress scheme is reduced to just 4% under the CMA's proposed approach.

1.31 Moreover, we believe that the CMA's proposed approach is inconsistent with the approach adopted by the European Commission to the same question. When calculating penalties for infringements of EU competition law in cases where leniency and settlement discounts are both applicable, paragraphs 32 and 33 of the European Commission's Settlement Notice[10] provide that the 10% settlement discount is to be added to any leniency discount, but calculated by applying the 10% discount against the amount of the fine to be imposed after the application of the cap of 10% of worldwide turnover (i.e. the amount of the fine prior to the application of any leniency discount). The detail of the step-by-step calculation is not included in published non-confidential versions of European Commission settlement decisions, but it appears that under the European Commission's approach an undertaking benefitting from a 50% leniency reduction and a 10% settlement reduction would receive a 60% discount overall, whereas following the CMA's proposed approach the total reduction received would effectively only amount to a 55% discount.

1.32 Whilst we recognise that the CMA is not obliged to follow the same approach as the European Commission, adopting a different approach is likely to be confusing for businesses. Should the CMA decide to maintain its proposed approach, we would suggest that the text of footnote 50 should be moved into the main body of the final guidance in paragraph 2.32, to more clearly highlight the way in which the CMA will approach this final step of the penalty calculation.

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[10] 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 C167, 2.7.2008., pages 1-6).

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

2.1 We do not have any further comments.

Ashurst LLP

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