CONSULTATION: CMA'S GUIDANCE AS TO THE APPROPRIATE AMOUNT OF A PENALTY

Baker McKenzie welcomes the opportunity to respond to the CMA's consultation on its proposed amendments to its Guidance As To the Appropriate Amount of a Penalty ("Draft Guidance"). Our comments are based on our experience of advising clients on UK and EU competition law.

As a general point, we agree that it is appropriate for the CMA to update its penalties guidance to reflect its practice since the publication of the current guidance. We have a number of observations on some of the proposed changes, as set out below.

1. Step 1 - starting point

1.1 We note that the CMA intends to retain the maximum starting point of 30% of relevant turnover and that it proposes to use a starting point of between 21% and 30% for the most serious infringements. The CMA has applied starting points of 18% - 28% in recent cases[1] which have typically involved relatively small markets. In such circumstances, we can see that the application of a high starting point might be desirable in order to give a fine that is at such a level so as to clearly discourage parties from engaging in cartel conduct whilst also encourage those who have been involved in cartels to apply for immunity/leniency. If the starting point is low, and thus results in a very small fine, the costs of putting together a leniency application may not necessarily be outweighed by the penalty, making leniency less appealing for small market players.

1.2 However, we are concerned that such a high starting point could result in excessively high fines in cartel cases that involve much larger markets than those that the CMA typically investigates. The CMA has stated that it intends to focus its enforcement actions in relation to small and large markets and post-Brexit, there is a real possibility that the CMA may open parallel investigations alongside the European Commission into cartels that involve very large markets and undertakings. A starting point of 21% - 30% would not be appropriate in such cases as the fines would be excessive and possibly reach the 10% threshold much more frequently beyond cases involving "single product firms".

1.3 We note that a starting point of between 21% and 30% of the relevant turnover is not line with the European Commission's practice in cartel cases where broadly speaking the Commission has applied a gravity percentage of over 20% only on very rare occasions. The Commission typically applies a starting point of 15%-20% when fining participants in cartel cases.

1.4 The application of a high starting point of between 21% and 30% is likely to result in significant pressure on the CMA at a later stage to reduce fines to ensure proportionality. Given that the CMA has the ability to uplift fines at Step 4 if the level of the fine is still not considered deterrent enough, we consider that it is appropriate to use a lower starting point in Step 1 and then make any adjustments at Step 4.

2. Types of infringement

2.1 We understand that the CMA seeks to impose higher fines in relation to the most serious types of infringement and that it seeks to do so in a transparent manner. However we are concerned that the proposal to apply a 10% - 20% starting point to "less serious object infringements" lacks clarity. There is no discernible pattern or clarity in the CMA's practice.

[1] For example, 18% and 19% in *Light Fittings*; 28% in *Supply of products to the furniture industry*; 21% in *Conduct in the modelling sector*.

The CMA says that it does not consider it appropriate to try and detail every type of infringement given the range of conduct that will be encountered in different cases. We respectfully disagree and consider that in order to provide meaningful guidance, the CMA should give examples of infringements that are "less serious object infringements".

3. Determination of relevant turnover

3.1 We agree that the penalty should be calculated by reference to turnover in the relevant market affected by the infringement in the undertaking's last business year, as is the approach in the current and Draft Guidance. However, we consider that it may be helpful to introduce some wording to allow flexibility to depart from this approach where appropriate. This is an approach frequently adopted by the European Commission[2] and reflects the statement of the European Court of Justice when emphasising the importance of taking into account "*turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed*."[3]

3.2 The CMA could consider including wording such as "*The CMA normally takes the sales made by the undertakings during the last full business year of their participation in the infringement. If the last year is not sufficiently representative, the CMA may take into account another year or other years for the determination of the value of sales*."

4. Adjustment for aggravating and mitigating factors

4.1 The CMA proposes to add to the list of aggravating factors "*a failure to comply with competition law following receipt of a warning letter or advisory letter in respect of the same or similar conduct*" (para 2.18 of the Draft Guidance and paras 5.15-16 of the accompanying consultation document). As such letters do not typically contain the same level of detail as formal decisions, it may be difficult for an undertaking to determine whether the conduct under investigation is the same as or similar to conduct set out previously in a warning letter. We therefore strongly encourage the CMA to provide greater detail in its warning and advisory letters to enable businesses to assess whether they are engaging in "the same or similar conduct".

4.2 We also note that the CMA already has the ability to increase fines for recidivism, and so already has the power to penalise businesses who fail to take account of the CMA's previous interventions. In our view, therefore, the CMA should take a cautious approach to applying an uplift to penalties for failure to comply with competition law following receipt of a warning letter.

4.3 Footnote 38 of the Draft Guidance and paras 5.18-19 of the accompanying consultation document suggest that businesses must put in place a compliance programme and periodically submit reports evidencing this to the CMA, in order to benefit from a reduction in fines. What would be the detailed requirements for this? Further guidance and clarification as to the precise intention and practical arrangements that the CMA is considering in this regard would be very helpful.

5. Settlement discount

5.1 In our view there is a missed opportunity to clarify the availability of a settlement discount where parties choose to appeal a settlement decision. At present, according to paragraph 14.26 of the CMA's Guidance on Investigation Procedures, the settlement discount set out in the infringement decision will no longer apply if a settling business appeals the infringement decision to the Competition Appeal Tribunal. This is in contrast to the EU settlement

---

2 CASE AT.39748 – *Automotive Wire Harnesses*; para. 128; CASE AT.39960 – *Thermal Systems*; para. 118.

3 Case C-76/06P *Britannia Alloys v Commission* [2007] I-4405, at paragraph 25.

procedure and indeed the settlement procedures of other EU Member States, where parties who appeal a settlement decision do not automatically lose their settlement discount, irrespective of the outcome of the appeal.