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Re: Consultation on the draft revised CMA guidance on the appropriate amount of a penalty

Penalties Guidance Team
Policy and International
Competition and Markets Authority
6th Floor
Victoria House
37 Southampton Row
London WC1B 4AD

Dear Sirs,

We welcome this opportunity to comment on the CMA's proposed amendments to its guidance as to the appropriate amount of a penalty (the "**Draft Guidance**"). The Office of Fair Trading's prior guidance, published in September 2012 (the "**Current Guidance**"), has worked well. However, given the decisional practice of the CMA and the CAT, the core objective of providing greater transparency as to the methodology by which penalties are set and the need for consistent application of that methodology, we agree that further clarification is desirable.

As a general observation, the CMA should have regard to how the Draft Guidance will be interpreted following the UK's departure from the European Union. It is clearly sensible to amend the Guidance with a view to minimizing any further refinements needed and to give parties involved in any investigations that are ongoing at the point of the UK's exit, certainty as to how penalties are to be calculated.

Furthermore, the CMA will, in all likelihood, investigate a larger number of complex cases post-Brexit which will warrant the imposition of higher fines. The methodology by which these fines are calculated will therefore need to stand up to closer scrutiny, with the underlying principles as set out in the Guidance being applied consistently across cases.

We are supportive of the proposed amendments set out in the Draft Guidance which will provide greater clarity as to how penalties are calculated. Our comments below are limited to sections of the Draft Guidance which could be further refined to provide greater transparency.

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a. General Deterrence

The policy objectives of imposing fines are twofold: (i) to punish wrongdoers in a manner that is proportionate to the severity of the infringement; and (ii) to deter undertakings more generally from engaging in anti-competitive activities. The Draft Guidance specifies (at paragraphs 2.5 and 2.9) that the CMA will have regard during the Step 1 process to whether the starting point is sufficient for the purpose of general deterrence as a separate, third stage in the calculation. We agree that both general and specific deterrence are relevant considerations for the fine ultimately imposed on a wrongdoer. However, in our view, the objective of general deterrence is implicit in the initial calculation, where the severity of the infringement is considered, and should not be presented as a standalone assessment conducted in step 1. More properly it could be included as a factor in the second stage calculation, set out as a final bullet point to 2.8 of the Draft Guidance.[1]

b. Relevance of EC aggravating and mitigating factors

To provide further clarity, the CMA has extended the list of aggravating and mitigating factors, albeit noting that the summary provided in the Draft Guidance is "*non-exhaustive*". The European Commission ("**EC**") also provides a non-exhaustive list of mitigating circumstances in its fining guidelines (the "**EC Fining Guidelines**").[2] In particular, the EC references the following as relevant mitigating circumstances, which could reasonably be adapted for inclusion in the Draft Guidance:

- where evidence is provided that an infringement has been "*committed as a result of negligence*";[3]
- "*where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount*";[4] and
- "*where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation*".[5]

These factors are, in our opinion, relevant considerations to a fine calculation and should therefore be included in the list of mitigating factors in the Draft Guidance. This would remove

[1] The Current Guidance specifies at 2.6 that the "*seriousness assessment will also take into account the need to deter other undertakings from engaging in such infringements in the future*". This language more closely ties general deterrence to the assessment of severity and is preferable to the proposed amended language.

[2] See, e.g., *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN.

[3] Point 29 of the EC Fining Guidelines.

[4] Point 29 of the EC Fining Guidelines.

[5] Point 29 of the EC Fining Guidelines.

inevitable future uncertainty as to whether the non-exhaustive UK list encompasses mitigating circumstances considered in the EU courts.

UK and EU fining practices need not be aligned. However, there is a benefit in being able to consider case law and relevant mitigating and aggravating circumstances considered by the EC and EU courts. The current EC fining guidelines came into effect in 2006. A considerable number of cases have applied the EC Fining Guidelines in practice. Aligning the language of the Draft Guidance more closely with that of the EC and considering EC decisional practice would provide greater clarity.

c. Incentives to cooperation

The final mitigating circumstance listed in the Draft Guidance is "*cooperation which enables the enforcement process to be concluded more effectively and/or speedily*".[6] This language is unchanged from the Current Guidance, other than some minor amendments to footnote 40 which provides the example of undertakings making staff available "*for voluntary interviews and/or arranging for staff to provide witness statements*". The only other guidance provided is that cooperation must be "*over and above*" the respecting of CMA imposed time limits.

We consider that it would be beneficial to provide further examples of what types of cooperation may be considered relevant for fine adjustments.[7] Setting out a non-exhaustive list of categories of cooperation, separate to the leniency programme, would provide additional incentives for undertakings to cooperate fully with the CMA during the course of an investigation.

d. Role of fines imposed by EC and EU member states

Companies involved in cross-border infringements are typically investigated and fined in a large – and increasing – number of jurisdictions. Currently, provision is made for the CMA to have regard to fines imposed by other regulators within the EU, including the EC.[8] In light of the UK's impending departure from the EU, there is merit in expanding the scope of the Draft Guidance to have regard to fines imposed in **all** other jurisdictions investigating alleged wrongdoing so that the CMA can determine the appropriate level of fine through reference to the relevant context.

Irrespective of the outcome of the current exit negotiations, it is expected that the CMA will continue to have a close working relationship with the EC and the regulators of EU Member States but it is also likely to work more closely with regulators outside of Europe. To the extent that an infringement relates to cross-border conduct under investigation by a number of different jurisdictions and given the ever closer coordination of the investigative activities of regulators, it is reasonable for the CMA to have regard to fines imposed in all other jurisdictions.

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[6] Paragraph 2.8 of the Draft Guidance.

[7] By way of example, the voluntary provision of evidence that allows the CMA to find an infringement to be of a longer duration or of greater severity could be considered relevant.

[8] Paragraph 2.28 of the Draft Guidance states that the CMA must take into account a penalty or fine imposed by the EC or by a court or other body in another member states in respect of an agreement or conduct.

Yours faithfully,

Davis Polk & Wardwell London LLP