CMA's Consultation: Revised guidance as to the appropriate amount of a penalty, 2 August 2017

Response by Freshfields Bruckhaus Deringer LLP

28 September 2017

Freshfields Bruckhaus Deringer

RESPONSE TO THE CMA'S CONSULTATION ON REVISED GUIDANCE AS TO THE APPROPRIATE AMOUNT OF A PENALTY

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP (***Freshfields***) welcomes the opportunity to comment on the CMA's consultation dated 2 August 2017 (the ***Consultation***) on revisions to the CMA's guidance as to the appropriate amount of a penalty (the ***Guidance***).

1.2 Our comments are based on our substantial experience of representing clients in investigations by the CMA and the sector regulators under the Competition Act 1998 (***CA98***) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (***TFEU***), as well as competition and regulatory investigations by authorities across Europe, the US and Asia.

1.3 The comments in this response are those of Freshfields and do not purport to represent the views of our clients.

1.4 The terms defined in the Consultation have the same meaning in this response.

2. Question for consideration: "Do you agree with the proposed changes set out in chapter 5? Please give reasons for your views."

Step 1: Provision of additional details as to how the CMA will assess the seriousness of an infringement and apply a starting point range

2.1 We welcome greater transparency from the CMA on how it determines financial penalties and, overall, regard the amendments to the Guidance as clear and helpful. We do, however, have a small number of concerns as to how the suggested changes may operate in practice.

2.2 With respect to the categorisation of infringements, we welcome the CMA's position that "there is no pre-set "tariff" for different types of infringement". However, given the judicial significance of the Guidance as statutory guidance, an appropriate balance needs to be struck between transparency and allowing sufficient discretion for the starting point to reflect the circumstances of each case, particularly for the wide range of potential infringements which cannot easily be categorised.

2.3 We note that footnote 27 of the draft Guidance refers to the CMA's guidance on "Agreements and concerted practices" which provides helpful information on the CMA's approach to a number of potential object and effect infringements. We would, however, make the following comments:

(a) for Chapter I behaviour outside the cartel sphere or vertical behaviour, it may not be appropriate to have a prescriptive starting point range where the alleged infringement may be new or novel due to new technology or dynamic market conditions including disruptive entry. In some cases, some effect based infringements may have originated as an attempt to compete aggressively. If the CMA's fining policy is overly-prescriptive, it risks having the effect of dampening such

competition. Retaining discretion is important to allow for other appropriate ways to address such behaviour;

(b) similarly, there is a wide range of conduct of differing severity which would fall under the umbrella of information exchange, and it would be inappropriate to have an inflexible starting point range where the effect of the infringement may be unclear or where alleged behaviour is novel;

(c) likewise, the clarification in footnote 25 as to the status of RPM is helpful. This does, however, imply that the starting point for such an infringement would be between 21 and 30%. This range may not in principle be the most appropriate approach given that, under the EC's Guidelines on Vertical Restraints, it is possible for undertakings to plead an efficiencies defence. There may well, therefore, be compelling reasons why RPM does not justify a 21% starting point;

(d) for Chapter II behaviour, the range of conduct that may be caught is so broad and rapidly evolving that prescriptive guidance such as this may be counterproductive and remove the element of discretion required in penalty setting;

(e) it would be helpful, in particular, for the Guidance to address the meaning of a "less serious object infringement" or "conduct which is less likely to be inherently harmful", perhaps by including more examples in order to provide greater certainty for business; and

(f) it would also be helpful for the Guidance to indicate the likely status and treatment of vertical behaviour other than RPM.

2.4 Using a starting point of 10-20% with an apparently catch all provision for "less serious object infringements and infringements by effect" could mean that in practice 10% operates as a floor for the starting point for any infringements which are not hard core. The CMA's comment in paragraph 2.7 suggests that starting points below 10%, even for less serious conduct, will be rare unless there are special circumstances. We would be concerned if an artificially high floor hampered, for example, settlement discussions, where it is important for the reduced penalty imposed to reflect all of the circumstances of the case and the settling party's conduct.

2.5 More generally, we note the additional statement (at paragraph 2.10) that all undertakings to the same infringement will have the same percentage starting point, recognising the seriousness of the infringement. The severity of the conduct, however, may not have been the same for all participants and so it may be inappropriate to give every participant the same starting point. If the CMA considers this position unworkable, we suggest that the mitigating factors are more explicit as to how each participant's conduct is assessed and that this is always considered rather than being a discretionary element in the process.

2.6 It would be helpful if the Guidance were to clarify at what stage in proceedings the parties would be told of the starting point range, and at what stage there would be the opportunity to discuss this with the CMA.

Step 3: adjustment for aggravating and mitigating factors

2.7 In relation to the voluntary provision of witnesses for interviews or witness statements as an example of cooperation which may be taken into account as a mitigating factor (footnote 40), we consider that it would be helpful for the CMA to provide other examples of such cooperation, particularly given the complexities often involved in providing staff for interviews and the importance of this issue for the undertakings concerned:

(a) we consider that voluntary interviews and witness statements should always be considered a significant cooperation, but also recognise that it is not always possible for undertakings to secure the cooperation of their employees. In these cases, all reasonable efforts of the undertakings to achieve this should be recognised;

(b) in some cases, it would be inappropriate to use witnesses but the provision of supporting documents could be equally useful to the CMA's investigation and should be recognised as valuable cooperation; and

(c) there may be additional ways in which undertakings could cooperate and which may also demonstrate cooperation over and above what is required; for instance, where there are short timelines or burdensome requests which the parties work hard to meet.

2.8 We welcome the additional clarification around the possibility of adequate compliance activities acting as a mitigating factor, and the clarification around the application of any discount relating to a voluntary redress scheme.

3. Question for consideration: "Are there any other areas of the Current Guidance which you consider could be usefully clarified? Please explain which areas and why.

Application of the duration multiplier for infringements starting before 1998

3.1 We have observed in long running cartel cases that it may still be relevant to consider how fining principles are applied to infringements starting before 1 March 2000 (the date that the CA98 came into force), on which the Guidance is currently silent.

Transitional Brexit arrangements

3.2 In due course it would be useful for the CMA to provide guidance on the transitional arrangements which will deal with cases which will straddle the date of Brexit, or for cases in which there is a UK nexus but where the EC has conduct of the case under Article 11 of Regulation 1/2003, given the possibility that the two authorities may take different approaches towards fines.

3.3 We would be happy to discuss any of these issues further with the CMA at any time.

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