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

Re: CMA consultation on proposed revisions to its published guidance on penalty setting in Competition Act 1998 (CA98) cases.

Dear Sir/Madam

Please find enclosed a submission that has been prepared by the Cartels Working Group of the Antitrust Committee of the International Bar Association.

The Co-chairs and representatives of this Working Group of the Antitrust Committee of the IBA would be delighted to discuss the enclosed submission in more detail with the representatives of the CMA.

Your faithfully

[redacted]

Janet McDavid and Pieter Steyn
Co-Chairs, Antitrust Committee
International Bar Association

Cc: Mariana Tavares de Araujo and Kristina Nordlander
Co-Chairs of the Cartel Working Group

IBA CARTELS WORKING GROUP COMMENTS ON THE DRAFT REVISED CMA GUIDANCE ON THE APPROPRIATE AMOUNT OF A PENALTY

1. INTRODUCTION

This submission is made to the Competition and Markets Authority ("**CMA**") on behalf of the Cartels Working Group (**"Working Group"**) of the Antitrust Committee of the International Bar Association (**"IBA"**) in relation to the CMA's public consultation version of its draft revised guidance on the appropriate amount of a penalty (**"Draft Revised Guidance"**).

The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at http://www.ibanet.org.

The Working Group hopes to contribute constructively to the CMA's public consultation on the Draft Revised Guidance.

2. RESPONSE TO THE CMA'S PUBLIC CONSULTATION

The Working Group welcomes the CMA's clarification of its approach to calculating financial penalties in cases under the Competition Act 1998 ("**CA98**") in order better to reflect decisional practice. Detailed comments on the particular steps are set out below. As a general comment, the Working Group suggests that it may be helpful for the CMA to include more illustrations of how its guidelines may apply in practice, to provide greater certainty to business.

2.1 Step 1 – seriousness of the infringement

Starting point range:

The Draft Revised Guidance provides additional clarity as to the assessment the CMA makes when deciding on an appropriate starting point for the financial penalty calculation (which can be up to 30% of an undertaking's relevant turnover). The following starting points are specified:

- A starting point between 21 and 30% for the most serious types of infringement, including cartel activities, which are defined as involving price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market sharing. This starting point will also apply to other, non-cartel object infringements which are inherently likely to cause significant harm to competition.
- A starting point between 10 and 20% for certain, less serious object infringements, and for infringements by effect.
- A starting point of less than 10% where the assessment of specific circumstances of the case leads to a downwards adjustment.

The Working Group agrees with the CMA's tiered approach to the starting point. It is internationally recognised that cartel conduct, such as price fixing and market sharing, causes significant consumer harm and can have few, if any, procompetitive benefits. It is also internationally accepted that public enforcement of the competition rules must be sufficient to have a deterrent effect on such conduct. In light of these factors, it is therefore appropriate that the highest starting point is applied to cartel conduct.[1]

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1 The Working Group notes, however, that in larger markets, the use of such a high starting point could result in very significant fines (albeit bounded by the maximum level of 10% of the undertaking's worldwide turnover). It therefore suggests that the CMA may wish to consider whether a lower starting point may be appropriate in certain cases.

With respect to the range, the Working Group agrees that there needs to be sufficient flexibility in the setting of penalties to allow for the severity of the conduct to be appropriately taken into account. A 9% range therefore appears appropriate.

The European Commission's approach to setting the basic amount of a fine is set out in its 2006 Fining Guidelines,[2] which provides that the basic amount of a fine is set by reference to a proportion of the value of sales multiplied by duration, at a level of up to 30 % of the value of sales. With respect to cartel conduct, such as horizontal price-fixing, market-sharing and output-limitation agreements, the basic amount will "generally be set at the higher end of the scale". Paragraph 25 of the 2006 Fining Guidelines provides that "irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15 % and 25 % of the value of sales ... in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements". The inclusion of this additional amount implies that the basic amount of a fine for cartel conduct will be in excess of the 15% to 25% range. The basic amount of the fine under the EC's approach is therefore likely to result in a similar lever of fine to the CMA's approach under the Draft Revised Guidance (bearing in mind, however, that the EC's approach already takes into account duration, which is at step 2 of the CMA's penalties methodology).

In Canada, the Competition Bureau recommends fines for cartel behaviour starting at 20% of the affected turnover, in line with the CMA's highest tier. Financial penalties for effects-based infringements in Canada are rare, although administrative monetary penalties ("**AMPs**") are available against companies that abuse their dominant position. Like the factors considered by the CMA, Canada's Competition Act requires the court imposing an AMP to consider the conduct's competitive effect, the gross affected revenue, the affected profits, the infringer's financial position, and the infringer's history of compliance (or non-compliance). In the United States enforcement authorities rely on a proxy of a 10% overcharge, doubled to 20%, purportedly to reflect the totality of the harm caused by a cartel.

Finally, the Working Group suggests that it would be helpful if the CMA could provide further guidance as to the type of infringements of the Chapter I prohibition and/or Article 101 that it considers are likely to be "less serious object infringements" and thus to warrant a lower starting point of between 10 and 20%.

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2 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (2006/C 210/02).

Adjustment for likely harm:

The CMA's guidance also specifies that specific circumstances may lead to an upward or downward adjustment in the starting point to take account of specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately to consumers.

The Working Group welcomes the clarification that the need for an adjustment will be judged by reference to the extent and likelihood of harm to competition and ultimately consumers. The factors to be taken into account include, for example: (i) the nature of the product including the nature and extent of demand for that product; (ii) the structure of the market, including the market share(s) of the undertaking(s) involved in the infringement, market concentration and barriers to entry; (iii) the market coverage of the infringement; (iv) the actual or potential effect of the infringement on competitors and third parties; and (v) the actual or potential harm caused to consumers whether directly or indirectly. The Working Group notes that these factors are, at least in theory, applicable to cartel conduct cases as well as to other forms of conduct, and therefore provide the necessary flexibility to ensure that the generally applicable starting point does not result in excessive penalties in a given market situation. Such flexibility should include the recognition that some effect-based infringements are not obviously different from aggressive competition. Although financial penalties should be calibrated to ensure effective deterrence, they may chill aggressive competition if applied too rigidly based on after-the-fact determinations.

Finally, the Working Group notes the CMA's explicit separation of the above adjustment from the need to ensure adequate deterrence for other undertakings, whether in the same market or more broadly, from engaging in the same or similar conduct.

2.2 Step 3 - adjustment for aggravating and mitigating factors

New aggravating factor – warning letters:

The Draft Revised Guidance adds a new factor to the non-exhaustive list of factors that may cause a penalty to be adjusted upwards for aggravation. That new factor is "failure to comply with competition law following receipt of a warning or advisory letter in respect of the same or similar conduct".

The Draft Revised Guidance highlights that this addition stems from the CMA's practice of issuing warning and advisory letters to businesses in circumstances where the CMA suspects that a business may be breaching competition law, but decides not to prioritise a formal investigation. The CMA notes that it will consider the specific circumstances of

each case, and would generally expect to uplift a penalty for this factor only where the failure to comply with competition law after receipt of a warning letter or advisory letter issued related to the same or similar conduct. The CMA also notes that the possibility of an uplift in these circumstances will be drawn to the recipient's attention in the warning or advisory letter.

The Working Group accepts that issuing warning and advisory letters to undertakings can be an important and cost-effective tool in the CMA's enforcement regime. It also agrees that it is important that undertakings in receipt of such letters pay due regard to them and adapt their conduct accordingly.

However, the Working Group notes that the CMA's guidance on warning and advisory letters states that receiving a letter "doesn't necessarily mean that you've broken the law". As a result, the Working Group would highlight the need for the CMA to take a measured approach to this new factor, such that it does not result in an uplift in circumstances where a undertaking, following self-assessment, could reasonably have considered that its conduct was not an infringement.

Indeed, given this and the fact that there may be other legitimate reasons why a undertaking might not take action following receipt of a warning letter (for example, if it was not received by the correct internal department), it may be more reasonable for the CMA to consider that failure to comply with a follow-up to a warning letter, rather than the warning letter itself, would be an aggravating factor. This is particularly the case if the warning letter is widely drafted, giving it the potential to catch conduct beyond that which prompted the sending of the letter. Indeed, the Working Group would strongly encourage the CMA to provide sufficient detail in its warning and advisory letters to permit companies to recognize and understand the CMA's concerns. Penalizing companies for not heeding unclear or vague warnings would be fundamentally unfair and risk eroding the effectiveness of such letters generally.

In light of the above, the Working Group also suggests that whenever the CMA uplifts a penalty on this basis, it makes its reasoning sufficiently public to provide ongoing guidance on the application of this factor.

The Working Group notes that Canada's Competition Bureau may issue similar warning letters to companies, but typically in the context of an effects-based civil infringement, not a cartel infringement. As noted above, Canada's Competition Act requires a court to consider historical compliance when determining the quantum of an AMP.

The European Commission does not issue warning letters to potential infringers of the competition rules, but does retain the ability to increase a penalty for recidivism where an

undertaking "continues or repeats the same or a similar infringement". The CMA also has an equivalent power to increase financial penalties for recidivism, and so already has a mechanism for penalising companies who do not take account of the CMA's previous interventions. The CMA ought, therefore, to take a reasonably cautious approach to increasing penalties for failure to comply competition law following receipt of a warning letter. The United States also does not issue warning letters to potential infringers.

Reduction for compliance activities:

The Draft Revised Guidance also provides additional clarifications regarding the possibility of a reduction in penalty for compliance activities. While this is already a factor that the CMA takes into account, the Draft Revised Guidance highlights the detailed elements that will go into the CMA's consideration of whether a reduction on this basis is warranted.

The Working Group welcomes this additional clarification. In particular, it notes the clarification that the steps taken to ensure compliance must be appropriate to the size of the business concerned, which is likely to ensure an appropriately nuanced approach to the compliance capabilities of smaller undertakings with limited resources in comparison to large, multinational corporations.

The requirement for a public statement of commitment to compliance and the requirement for periodic review of compliance activities may be somewhat easier for larger undertakings with compliance departments to meet than smaller undertakings. The Working Group would suggest that the CMA take the capabilities and resources of undertakings into account when considering the extent to which a undertaking complies with these requirements.

For a participant in its Leniency Program, Canada's Competition Bureau will recommend a fine reduction for a credible and effective compliance program in place at the time the criminal offence occurred.[3] Whether the program qualifies as such is in the Bureau's discretion, as is the amount of the recommended fine reduction.[4] The Bureau lists seven components of a credible and effective program: (i) management commitment and support, (ii) risk-based corporate compliance assessment, (iii) corporate compliance policies and procedures, (iv) compliance training and communication, (v) monitoring,

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3 Competition Bureau, Corporate Compliance Programs, June 3, 2015 http://www.competitionbureau. gc.ca/eic/site/cb-bc.nsf/eng/03927.html

4 Remarks by John Pecman, Commissioner of Competition, CBA Competition Law Fall Conference, September 18, 2014 http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03815.html. In his live remarks the Commissioner suggested that the Bureau would consider reductions in the order of 5-10%: http://www.terralex.org/publication/9e4f1551ab.

verification and reporting mechanisms, (vi) consistent disciplinary procedures and incentives for compliance and (vii) compliance program evaluation.

In contrast to Canada and the UK, the European Commission and the United States continue to take a neutral approach to compliance programmes and do not include such activities as a reason for mitigation of a penalty. Specifically, the United States credits compliance programmes for penalty mitigation, but only where the compliance efforts were undertaken as remediation after the infringement. The Working Group suggests that the CMA's (and Canadian authority's) approach is to be preferred, as this is more likely to incentivise undertakings to engage in a proper review of their practices and to maintain their compliance efforts.

Reduction for cooperation:

Finally, with respect to the potential for a reduction in penalty as a result of cooperation, the Draft Revised Guidance states that this must go beyond respecting time limits and explicitly notes the "provision of staff for voluntary interviews and/or provision of witness statements."

First, with respect to time limits, the Working Group recognises that cooperation warranting a reduction in penalty should require more than simply meeting reasonable deadlines. Nonetheless, the Working Group would suggest that timeliness of responses should be recognised as part of the undertaking's overall cooperation and that, where deadlines are particularly tight or requests are particularly voluminous, timeliness could justify a reduction for cooperation.

Second, with respect to voluntary interviews, the Draft Revised Guidance suggests that such cooperation may not be sufficient to warrant a reduction in penalty in all cases, stating that the CMA "will carefully assess whether any interviews and/or witness statements have indeed led to the investigation concluding more effectively and/or speedily in deciding whether or not this cooperation merits a reduction".

Given the importance of this issue for undertakings under investigation and the potential for interview evidence that is subsequently relied on in an infringement decision to be used in follow-on litigation, the Working Group considers that the provision of staff for voluntary interview should always be considered as significant cooperation. Further, the Working Group would suggest that, as undertakings cannot compel their employees to attend an interview, reasonable and demonstrable efforts to encourage and persuade employees to attend a voluntary interview ought to be regarded as significant cooperation by an undertaking.

Finally, the Working Group notes that there may be inherent risks with promoting voluntary interviews as a primary means of securing a reduction in penalty for cooperation in all cases. The upcoming changes to the Japanese antitrust law, for example, specifically state that interviews taken by the JFTC would not result in discounts to penalties, as this may give the employees of cooperating undertakings an incentive to provide misleading information in an attempt to assist the antitrust authority. The CMA may therefore wish to consider in individual cases whether the production of corroborative documentation, rather than the procurement of witnesses, may be a more effective means of cooperating with the investigation. Similarly, while the European Commission's 2006 Fining Guidelines allow for the possibility of a reduction in penalty "where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so", the Working Group understands that it focuses here on the provision of written evidence allowing it to establish the existence of the infringement more easily.

Given the complexities surrounding voluntary interviews, the Working Group would encourage the CMA to provide other examples of cooperation that it considers sufficient to warrant a reduction in penalty.

2.3 Step 4 - adjustment for specific deterrence and proportionality

The Working Group welcomes the clarifications with respect the financial information the CMA will normally have recourse to and the time period over which it will assess a undertaking's financial position for purposes of the deterrence calculation. The Working Group notes that, with respect to the financial information that the CMA takes into account, it may be useful for the CMA to engage directly with the undertaking on whether there are external events that may affect its financial health that are not readily apparent from the undertaking's historic financials.

2.4 Step 6 - Application of reductions under the CMA's leniency programme and for settlement

The Draft Revised Guidance amends the CMA's practice at step 6 to take account of the CMA's new power to approve certain voluntary redress schemes.

The Working Group notes that this additional discounting power is consistent with the EU Damages Directive,[5] which aims to encourage agreement between infringers and injured parties on compensating for the harm caused by a competition law infringement

5 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

through consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation. The Directive therefore provides at Article 18(3) that "a competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor".

The Working Group welcomes the addition to the CMA's penalties methodology, noting that its implementation by the CMA is likely to provide a strong incentive to undertakings to engage in such schemes where appropriate. This is particularly the case as the discount in respect of an approved voluntary redress scheme is applied at the end of step 6, after application of the leniency discount and settlement discount.