

Draft revised CMA's guidance as to the appropriate amount of a penalty

Consultation document

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1. About the consultation

Introduction

- 1.1 The Competition and Markets Authority (CMA)¹ may impose financial penalties on undertakings in respect of infringements of the prohibitions against anti-competitive agreements and abuse of a dominant position contained in the Competition Act 1998 (CA98).
- 1.2 Under section 38(1) of the CA98, the CMA is obliged to prepare and publish guidance as to the appropriate amount of any such penalty. The guidance for the time being in force is CMA73, *CMA's guidance as to the appropriate amount of a penalty*, which was published in April 2018 (the Current Guidance). The Current Guidance also applies to concurrent regulators² and the Competition Appeal Tribunal (CAT) both of whom must have regard to it when setting penalties.
- 1.3 The guidance is intended to explain how the CMA calculates financial penalties in cases under the CA98. The Current Guidance sets out a six-step procedure designed to achieve the twin policy objectives set out in section 36(7A) of the CA98 of imposing financial penalties that (i) reflect the seriousness of the infringement and (ii) ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.
- 1.4 At the time of publication of this consultation document, the United Kingdom's exit from the European Union (EU Exit) will be effective in the UK from 11 p.m. on 29 March 2019 (Exit Day, as defined in the European Union (Withdrawal) Act 2018³). The draft guidance (Draft Revised Guidance) makes some limited revisions to the Current Guidance to reflect how the CMA will calculate penalties on and after EU Exit in the event of the UK leaving the European Union without a Withdrawal Agreement in place ('no deal'). Delivering the deal negotiated with the EU remains the Government's top priority; however, the amendments made in the Draft Revised Guidance are intended to address the consequences of a 'no deal' EU Exit only. These updates are not related to the reforms proposed in a letter from the Chair of the Competition and Markets Authority to the Secretary of State for Business,

¹ The CMA was established under the Enterprise and Regulatory Reform Act 2013 as the UK's economy-wide competition and consumer authority, taking over a number of functions formerly carried out by the Office of Fair Trading (OFT) and the Competition Commission. The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy as a whole.

² See note 5.

³ To the extent the definition of exit day in the European Union (Withdrawal) Act 2018 is amended, the term Exit Day in this document and the Draft Revised Guidance should be read accordingly.

Energy and Industrial Strategy outlining proposals for reform of the competition and consumer protection regimes, dated 21 February 2019. The guidance may be updated further in due course to reflect the outcome of any such reforms.⁴

Scope of this consultation

- 1.5 This consultation seeks the views of interested parties on the CMA's proposed revisions to the Current Guidance, set out in the Draft Revised Guidance, as required by section 38(6) of the CA98.
- 1.6 The specific questions on which we are seeking respondents' views are provided in chapter 6.
- 1.7 The geographical scope of this consultation is the UK.
- 1.8 This consultation is aimed at those who have an interest in the CMA's investigations under the CA98. In particular, it may be of interest to businesses and their legal and other advisers.

Consultation process

- 1.9 We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments. We would welcome your comments on the changes to the Current Guidance that are proposed in the Draft Revised Guidance.
- 1.10 We encourage you to respond to the consultation in writing (by email or alternatively by letter) using the contact details provided at paragraph 1.13 below.
- 1.11 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If responding on behalf of an organisation, please make it clear who you are representing and, where applicable, how the views of the members of the organisation were assembled.
- 1.12 In the event of a 'no deal' scenario and in pursuance of our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide a non-

⁴ See [A letter and summary outlining proposals for reform of the competition and consumer protection regimes from the Chair of the Competition and Markets Authority](#), published 25 February 2019.

confidential version for publication on our webpages which omits that material and explain why you regard it as sensitive at the same time.

Duration

- 1.13 The consultation will run for four weeks, from 18 March 2019 to 15 April 2019. Responses should be submitted by post or email, by no later than 5pm on 15 April 2019, and should be sent to:

EU Exit No Deal Guidance Team
Policy and International
Competition and Markets Authority
6th Floor
Victoria House
37 Southampton Row
London WC1B 4AD
Email: PenaltiesGuidanceEUExitNoDeal@cma.gov.uk

Compliance with government consultation principles

- 1.14 In preparing this consultation, the CMA has taken into account the published [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.
- 1.15 The consultation period is four weeks. We consider that this is appropriate in light of the limited extent of the proposed changes.

Statement about how we use information and personal data that is supplied in consultation responses

- 1.16 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
- 1.17 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the proposed amendments to the guidance on the calculation of penalties for infringements of the CA98 to reflect the effects of the UK's 'no deal' EU Exit, before it is finalised and issued.

- 1.18 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).
- 1.19 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 1.20 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration any representations made by you here in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 1.21 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

After the consultation

- 1.22 After the consultation, in the event of a 'no deal' scenario, we will decide whether any changes are necessary to the Draft Revised Guidance. We will then submit the guidance to the Secretary of State for approval. If the Secretary of State's approval is obtained, we will publish the final version of the guidance on our webpages at www.gov.uk/cma. We will also publish a summary of the responses received during the consultation. These documents will be available on our webpages and respondents will be notified when they are available.

2. Legal framework

The Competition Act 1998

2.1 The CMA has powers to apply and enforce the prohibitions contained in the CA98.⁵ The CA98 prohibits:

- agreements between undertakings,⁶ decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the UK (or a part thereof) and which may affect trade within the UK ('the Chapter I prohibition'); and
- conduct by one or more undertakings which amounts to an abuse of a dominant position in a market and which may affect trade within the UK ('the Chapter II prohibition').

2.2 In some cases, agreements may fall outside the scope of the Chapter I prohibition because they meet the criteria for an exemption. Further information on the scope of the Chapter I and Chapter II prohibitions is available on our webpages.⁷ Reference should also be made to the CMA's guidance on the effects of a 'no deal' EU Exit on the functions of the CMA (CMA106).

Power to impose financial penalties

2.3 Section 36 of the CA98 provides that the CMA may impose a financial penalty on an undertaking which has intentionally or negligently committed an

⁵ A number of sectoral regulators also have concurrent powers under the CA98 ('concurrent regulators'). As at 18 March 2019, the sectoral regulators with concurrent powers were the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Northern Ireland Authority for Utility Regulation, the Water Services Regulation Authority (Ofwat), the Office of Rail and Road (ORR), the Civil Aviation Authority (CAA), NHS Improvement, the Financial Conduct Authority (FCA) and the Payment Systems Regulator (PSR).

⁶ The term undertaking is not defined in UK legislation, but its meaning has been set out in EU case law pre-EU Exit. Under section 60A of the CA98, when determining a question arising under Part I of the CA98, the CMA is required to act with a view to securing that there is no inconsistency between (i) the principles it applies and the decisions it reaches and (ii) the principles laid down by the Treaty on the Functioning of the European Union (TFEU) and European Court prior to EU Exit and any relevant decision made by the European Court prior to EU Exit so far as applicable immediately before EU Exit in determining any corresponding questions arising in EU law. This is subject to the exceptions in section 60A of the CA98, including if the CMA thinks that it is appropriate to act otherwise in light of one of the circumstances set out in that section. According to pre-EU Exit case law, an undertaking means any natural or legal person carrying on commercial or economic activities relating to goods or services, irrespective of legal status. For example, a sole trader, partnership, company or a group of companies can each be an undertaking. Further guidance on the meaning of 'undertaking' can be found in [Agreements and concerted practices](#) (OFT401, adopted by the CMA Board).

⁷ See, [Agreements and concerted practices](#) (OFT401, adopted by the CMA Board) and [Abuse of a dominant position](#) (OFT402, adopted by the CMA Board).

infringement of the Chapter I or II prohibitions. The amount of the penalty imposed may be up to a maximum of 10% of the undertaking's worldwide turnover.⁸ Section 36(9) provides that financial penalties must be paid into the Consolidated Fund once received by the CMA.⁹

- 2.4 The CMA is not able to impose a financial penalty on undertakings which benefit from limited immunity under sections 39 or 40 of the CA98 relating to small agreements and conduct of minor significance, unless it withdraws the immunity under sections 39(4) or 40(4) as appropriate. Small agreements are agreements which are not price-fixing agreements (as defined by section 39(9)), but which are made between undertakings with a combined turnover of £20 million or less; conduct of minor significance is conduct carried out by a dominant undertaking whose turnover does not exceed £50 million.¹⁰

Duty to publish guidance on financial penalties

- 2.5 Section 38 of the CA98 requires the CMA to prepare and publish guidance as to the appropriate amount of any penalty under the CA98. The obligation to prepare and publish guidance is on the CMA alone, but the CMA and the concurrent regulators¹¹ must have regard to the guidance when setting the level of a penalty.¹²
- 2.6 Section 38(8) of the CA98 requires the CAT to have regard to the guidance when setting penalties.

Role of Secretary of State to approve guidance

- 2.7 Section 38(4) of the CA98 provides that the CMA may not publish guidance as to the appropriate amount of a penalty without the approval of the Secretary of State. In addition, sections 38(6) and 38(7) of the CA98 provide

⁸ See section 36(8) of the CA98 and The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259) and, post-EU Exit, The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) (Competition SI).

⁹ The Consolidated Fund is the government's general bank account at the Bank of England. For more information see the [UK Parliament website](#).

¹⁰ See also The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262) (as amended by The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) post-EU Exit).

¹¹ See note 5 above.

¹² Section 38(8) provides that the CMA must have regard to the guidance in force when setting financial penalties. By virtue of the legislation that gave the concurrent regulators power to impose financial penalties under the CA98, the concurrent regulators must also have regard to the guidance in force under section 38(8) of the CA98.

that prior to preparing or altering such guidance the CMA must consult such persons as it considers appropriate, including the concurrent regulators.

3. Role of enforcement action and competition law penalties

- 3.1 One of the CMA's key goals is to deliver effective enforcement. Enforcement action plays a central role in the CMA's work to secure compliance with competition law and, in turn, enables markets to work better, to the overall benefit of the economy and our society. In particular, the CMA seeks to ensure that undertakings do not enter into agreements which prevent, restrict or distort competition and that dominant undertakings do not abuse their market position. Financial penalties for breaches of competition law are seen not only within the UK, but also globally, as the main sanction for competition law infringements.
- 3.2 Appropriate penalties sanction breaches of competition law, but they also help to raise awareness across the economy of the risks of infringing competition law and so deter businesses from doing so in the future.
- 3.3 The CMA's experience, and that of its predecessor – from casework, research and engagement with business – suggests that substantial penalties play a key role in making undertakings, and those that manage and administer them, 'take notice' of the need to comply with competition law. This applies within undertakings that are subject to penalties, within the sector with which the case is concerned and more broadly across the economy and further afield. Thus, penalties are an effective way to deter both infringing undertakings and undertakings more widely from breaching competition law.

4. Current guidance on financial penalties

- 4.1 The Current Guidance, which explains the steps taken and the factors to which the CMA has regard when setting the level of a penalty, is contained in *CMA's guidance as to the appropriate amount of a penalty* (CMA73).¹³
- 4.2 The Current Guidance sets out the following twin objectives of the CMA's policy on financial penalties:
- to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and
 - to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anticompetitive activities from engaging in them.
- 4.3 When the Current Guidance was published in April 2018, it introduced certain limited changes to the previous guidance to reflect the CMA's decisional practice. The Current Guidance also reflected the introduction of a new power, for the CMA and concurrent regulators, under the Consumer Rights Act 2015 to approve voluntary redress schemes and grant a penalty reduction where such a scheme is approved.¹⁴
- 4.4 The Current Guidance sets out a six-step calculation procedure for determining penalties, as follows:
- 4.5 Step 1 sets a starting point by applying a percentage figure reflecting the seriousness of the infringement (up to 30%) to the business' relevant turnover in the last business year.¹⁵ The Current Guidance provides that the starting point is a case specific assessment of the seriousness of the infringement and of the need to deter the infringing undertaking and other undertakings generally from engaging in that type of infringement in the future. It sets out a number of non-exhaustive factors that the CMA will consider when determining the starting point, including: the nature of the product, the structure of the market including the market share(s) of the undertaking(s) involved in the infringement, the market coverage of the infringement, the effect on competitors and third parties and the harm caused to consumers. It

¹³ *CMA's guidance as to the appropriate amount of a penalty* (CMA73).

¹⁴ Section 49C CA98, for further information: *Guidance on the approval of voluntary redress schemes for infringements of competition law* (CMA40).

¹⁵ The last business year is the financial year preceding the date when the infringement ended, paragraph 2.11 of the Current Guidance.

provides that the CMA may also take into account effects in another member state of the agreement or conduct concerned.

- 4.6 At Step 2, the starting point can be increased (or in particular circumstances decreased) to take account of an infringement's duration. Penalties for infringements lasting longer than a year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years of the infringement.
- 4.7 At Step 3, the Current Guidance provides that the penalty for each infringing undertaking at the end of Step 2 can be adjusted for aggravating and mitigating factors. The illustrative list of aggravating factors includes: the role of the undertaking as a leader in, or an instigator of, the infringement, involvement of directors or senior management, repeated infringements by the same undertaking or other undertakings in the same group (recidivism) and failure to comply with competition law following receipt of a warning or advisory letter in respect of the same or similar conduct. The illustrative list of mitigating factors includes: the role of the undertaking, for example, where the undertaking is acting under severe duress or pressure, genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement, whether adequate steps having been taken with a view to ensuring compliance with the relevant competition legislation and cooperation which enables the enforcement process to be concluded more effectively and/or speedily.
- 4.8 At Step 4, the Step 3 figure may be increased to ensure that it is sufficient to deter the undertaking at hand from engaging in future anti-competitive activity (specific deterrence¹⁶) or decreased to ensure that it is not disproportionate or excessive. The Current Guidance notes that the CMA will have regard to appropriate indicators of the size and financial position of the undertaking, including total turnover, profitability, net assets and dividends, liquidity and industry margins. The CMA will generally consider three year averages for profits and turnover.
- 4.9 At Step 5, the CMA checks to ensure that the penalty is not above the statutory maximum penalty of 10% of the undertaking's worldwide turnover.¹⁷ Under the Current Guidance, the CMA must take into account any penalty or fine that has been imposed by the European Commission or by a court or

¹⁶ The Step 3 figure may also be increased at this step in exceptional circumstances where an undertaking's relevant turnover is very low or zero, see paragraph 2.22 of the Current Guidance.

¹⁷ See section 36(8) of the CA98 and The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259) and, post-EU Exit the Competition SI.

other body in another Member State in respect of the agreement or conduct in question.

- 4.10 At Step 6, the CMA applies any penalty reductions resulting from the operation of its leniency and settlement policies to the figure reached at the end of Step 5. The CMA may also apply a penalty reduction where an undertaking obtains approval for a voluntary redress scheme.
- 4.11 In addition to setting out how the CMA will calculate penalties under the CA98, the Current Guidance also sets out the basics of the leniency policy operated by the CMA. Under the CMA's leniency programme,¹⁸ undertakings may obtain immunity from, or a reduction in, their penalty for confessing their involvement in cartel activity to the CMA and cooperating with the CMA's investigation. The Current Guidance also explains the operation of leniency programmes within the European Competition Network (ECN).

¹⁸ More detailed guidance on the CMA's leniency programme is included in [Applications for leniency and no-action in cartel cases](#) (OFT1495, adopted by the CMA Board)

5. Proposed changes to the current guidance on financial penalties

Introduction

- 5.1 The Current Guidance reflects that the UK is a member of the European Union; however, the UK is due to leave the European Union on Exit Day. The limited changes proposed in the Draft Revised Guidance therefore reflect how the CMA will exercise its powers and processes in setting penalties on and after Exit Day in the event of a ‘no deal’ EU Exit, including to reflect the changes which will be created by Competition (Amendment etc.) (EU Exit) Regulations 2019 (Competition SI) in the event of a ‘no deal’ EU Exit.

Proposed changes

- 5.2 The Draft Revised Guidance removes references to the CMA’s power to apply and enforce Articles 101 and 102 of the TFEU in the United Kingdom throughout, as this will no longer be the case from EU Exit. The Draft Revised Guidance also removes the paragraph in the introduction (paragraph 1.2 of the Current Guidance) regarding the Modernisation Regulation as well as the section on the ‘Parallel application of Articles 101 and 102 and the Chapter I and Chapter II prohibitions’, also in the introduction of the Current Guidance.
- 5.3 Where the Current Guidance contains references to decisions of the European Court made prior to EU Exit, the Draft Revised Guidance has added new text to explain the CMA’s obligations and discretion under section 60A of the CA98, introduced by the Competition SI. This proposed clarification is reflected in paragraph 1.2 (footnote 6) and paragraph 2.1 (footnote 14) of the Draft Revised Guidance.
- 5.4 Prior to EU Exit, the CMA is required (under section 38(1A) of the CA98) to publish guidance on the circumstances in which, in determining a penalty, it may take into account the effects of an infringement in another European Union member state. From EU Exit, the Competition SI revokes this requirement. References to this statutory obligation, as well as the guidance on this point (in relation to when the CMA would take into account effects in European Union member states in calculating the starting point (Step 1) and in adjusting for specific deterrence and proportionality (Step 4)) are therefore removed in the Draft Revised Guidance. This proposed change is reflected in the deletion of:

(a) wording from the preface;

- (b) wording from paragraph 1.8 of the Current Guidance (paragraph 1.7 in the Draft Revised Guidance);
 - (c) paragraph 2.14 of the Current Guidance; and
 - (d) wording from paragraph 2.21 (footnote 36) of the Current Guidance (paragraph 2.20 (footnote 33 in the Draft Revised Guidance).
- 5.5 In the Current Guidance (paragraph 2.18, footnote 30), the aggravating factor of repeated infringements by the same undertaking or other undertakings in the same group (recidivism) (considered at Step 3) refers to the circumstances where an undertaking continues or repeats the same or a similar infringement after the CMA, one of the Regulators or the European Commission has made a decision that the undertaking infringed Article 101 and/or the Chapter I prohibition, or Article 102 and/or the Chapter II prohibition. The Draft Revised Guidance maintains decisions finding infringements of Articles 101 and/or 102 TFEU as being relevant for this assessment only where the infringement occurred prior to EU Exit. The proposed change is reflected in paragraph 2.17 (footnote 27) of the Draft Revised Guidance.
- 5.6 The CA98 (section 38(9)) and the Current Guidance require the CMA, in setting the amount of a penalty in respect of an agreement or conduct, to take into account any penalty or fine imposed by the European Commission, or by a court or other body in another Member State, in respect of that agreement or conduct. The Competition SI removes this requirement from the CA98 and reference to this is therefore removed in the Draft Revised Guidance. The proposed change is reflected in the deletion of paragraph 2.28 of the Current Guidance.
- 5.7 In light of EU Exit, references to the European Competition Network (ECN) are removed in the Draft Revised Guidance. The Commission Notice on Cooperation within the Network of Competition Authorities,¹⁹ including its provisions on the exchange of leniency application information within the ECN, will no longer apply to the CMA.²⁰ The CMA will also no longer accept

¹⁹ *Commission Notice on Cooperation within the Network of Competition Authorities*, Official Journal C101, 27.04.04.

²⁰ However, as noted in paragraphs 3.12 – 3.13 of its Annual Plan, the CMA intends to make full use of its existing close relationships with international agencies to work together, to seek and share information to the extent permissible, and to develop new ways of working to protect UK consumers from harm. While it is possible the CMA will not in future be a member of the ECN, the CMA would expect to maintain strong and effective relationships with European competition authorities through new bilateral or multilateral arrangements with the European Commission and EU Member States. See further the CMA's guidance on the effects of a 'no deal' EU Exit on the functions of the CMA (CMA106).

short form 'summary applications', as contemplated in the ECN Model Leniency Programme in certain cartel cases, from EU Exit. The proposed changes are reflected in the deletions of paragraphs 3.8 to 3.12 and certain text in paragraph 3.24 of the Current Guidance.

- 5.8 The CMA considers that these proposed revisions will add greater clarity to the penalty setting process after EU Exit in the event of a 'no deal' EU Exit. The Draft Revised Guidance is available on the consultation page both in a clean copy and a marked-up version showing the changes to the Current Guidance. References to paragraphs and footnotes in the Draft Revised Guidance in this consultation document are to the clean copy.

6. Questions for consideration

- 6.1 Do you agree with the proposed changes set out in chapter 5? Please give reasons for your views.
- 6.2 Are there any other areas of the Current Guidance which you consider should be amended in light of EU Exit? Please explain which areas and why.