

Draft revised CMA guidance on 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 (the 'CA98'). The CMA may also impose financial penalties for infringements of the equivalent European Union competition provisions contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union (the 'TFEU').
- 1.2 Under sections 38 and 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 OFT423, *OFT's guidance as to the appropriate amount of a penalty*, which was published in September 2012 ('the Current Guidance'), subsequently adopted by the CMA Board.² The Current Guidance also applies to concurrent regulators³ 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 and/or Articles 101 and 102 of the TFEU. 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 Since the Current Guidance was published in 2012, the CMA has had experience of applying the Current Guidance in a number of cases and considers that it is now an appropriate time to make some limited incremental revisions to the Current Guidance in order better to reflect decisional practice.

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 The Current Guidance represented a change from the methodology previously utilised by the OFT, in particular introducing a starting point of up to 30%, rather than up to 10%, of an undertakings relevant turnover.

³ See note 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 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 primarily 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 guidance.
- 1.10 Please provide supporting evidence for your views where appropriate. 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 accordance with its policy of openness and transparency, the CMA will publish non-confidential versions of responses on the CMA's webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please also provide a non-confidential version for publication on the CMA's webpages and explain why you regard the excluded information as confidential (see further paragraphs 1.16 to 1.19 below).

Duration

- 1.13 The consultation will run for eight weeks, from 2 August 2017 to 27 September 2017. Responses should be submitted by post or email, by no later than 5pm on 27 September 2017, and should be sent to:

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

Email: penaltiesguidance-consultation@cma.gsi.gov.uk

Compliance with government consultation principles

- 1.14 In consulting, 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 eight weeks. We consider that this is appropriate in light of the limited extent of the proposed changes.

Data use statement for responses

- 1.16 Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is 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.
- 1.17 Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering

such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

- 1.18 If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

After the consultation

- 1.19 After the consultation, we will decide whether any changes are necessary to the draft 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 CA98.⁴ The CA98 prohibits:

- agreements between undertakings,⁵ 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 individual exemption or fall within the scope of a block exemption. Further information on the scope of the Chapter I and Chapter II prohibitions is available on our webpages.⁶

2.3 The CMA has additional powers to apply and enforce Articles 101 and 102 of the TFEU alongside the European Commission. These two provisions are similar to the Chapter I prohibition and the Chapter II prohibition under the CA98. The main difference between the UK and the EU provisions is the geographic scope of the effect on trade. Articles 101 and 102 of the TFEU only apply to agreements and conduct which may affect trade between Member States.⁷ The Chapter I and Chapter II prohibitions apply to agreements and conduct which may affect trade within the UK.

⁴ A number of sectoral regulators also have concurrent powers under the CA98 ('concurrent regulators'). As at 2 August 2017, 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).

⁵ The term undertaking is not defined in EU or UK legislation but its meaning has been set out by the EU courts. 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).

⁶ See, [Agreements and concerted practices](#) (OFT401, adopted by the CMA Board) and [Abuse of a dominant position](#) (OFT402, adopted by the CMA Board).

⁷ The case law of the European Court has interpreted the phrase 'may affect trade between Member States' broadly.

Power to impose financial penalties

- 2.4 Section 36 of the CA98 provides that the CMA may impose a financial penalty on an undertaking which has intentionally or negligently committed an infringement of the Chapter I or II prohibitions or Articles 101 or 102 of the TFEU.⁸ The amount of the penalty imposed may be up to a maximum of 10% of the undertaking's worldwide turnover.⁹ Section 36(9) provides that financial penalties must be paid into the Consolidated Fund once received by the CMA.¹⁰
- 2.5 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.¹¹

Duty to publish guidance on financial penalties

- 2.6 Sections 38 and 38(1A) of the CA98 require the CMA to prepare and publish guidance as to the appropriate amount of any penalty under the CA98, including guidance as to the circumstances in which, in determining a penalty, the CMA may take into account the effects of an infringement in another Member State. The obligation to prepare and publish guidance is on the CMA alone, but the CMA and the concurrent regulators¹² must have regard to the guidance when setting the level of a penalty.¹³
- 2.7 Section 38(8) of the CA98 requires the CAT to have regard to the guidance when setting penalties.

⁸ Formerly Articles 81 and 82 of the EC Treaty, respectively.

⁹ 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).

¹⁰ The Consolidated Fund is the government's general bank account at the Bank of England. For more information see the [UK Parliament website](#).

¹¹ See also The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262).

¹² See note 4 above.

¹³ 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.

Role of Secretary of State to approve guidance

- 2.8 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 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 The CMA considers that the limited changes proposed to the Current Guidance build on the CMA's decisional practice since its creation to support the CMA's goals in delivering effective enforcement, including through imposing deterrent sanctions. The changes aim to provide further transparency to the process of penalty-setting and thereby increase certainty for businesses.
- 3.2 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 within the European system and globally, as the main sanction for competition law infringements.
- 3.3 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.
- 3.4 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.
- 3.5 The findings of the 2015 report from IFF Research for the CMA also highlighted the importance of the existence of an effective penalties regime in incentivising compliance.¹⁴ IFF Research conducted a survey of over 1,000 private sector businesses to measure UK businesses' awareness of competition law including their understanding of anti-competitive behaviours and the resulting penalties. When asked about the reasons for complying with competition law, three-quarters of respondents reported it was because non-

¹⁴ [IFF Research Report: UK businesses' understanding of competition law](#).

compliance risked fines. This emphasises the importance of 'end-to-end' enforcement in which educating business and gaining compliance with competition law is a cornerstone.

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 *OFT's guidance as to the appropriate amount of a penalty* (OFT423, adopted by the CMA Board).¹⁵
- 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 anti-competitive activities from engaging in them.
- 4.3 The Current Guidance also sets out a six-step calculation procedure for determining penalties, as follows:
- 4.4 Step 1 sets a starting point by applying a percentage figure reflecting the seriousness of the infringement (up to 30%) to the business's relevant turnover in the last business year.¹⁶ The Current Guidance provides that the more serious and widespread the infringement, the higher the starting point is likely to be. 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/services, the structure of the market, the market shares of the undertakings involved in the infringement(s), the effect on competitors and third parties and the damage caused to consumers.
- 4.5 At Step 2, the starting point can be increased (or in exceptional 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.
- 4.6 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, the involvement of directors or senior management, and repeated infringements

¹⁵ [OFT's guidance as to the appropriate amount of a penalty](#).

¹⁶ The last business year is the financial year preceding the date when the infringement ended, paragraph 2.7 of the Current Guidance.

by the same undertaking or other undertakings in the same group. 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.

- 4.7 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 deterrence¹⁷) 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; such indicators include total turnover, profits, cash flow and industry margins.
- 4.8 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.¹⁸ The CMA also must take into account any penalty or fine that has been imposed by the European Commission or by a court or other body in another Member State in respect of the agreement or conduct in question to avoid 'double-jeopardy' in relation to the same anti-competitive effects.
- 4.9 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.
- 4.10 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,¹⁹ undertakings may obtain immunity from, or a reduction in, penalty for confessing their involvement in cartel activity to the CMA and cooperating with the CMA's investigation.

¹⁷ 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 2.18 of the Current Guidance.

¹⁸ 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).

¹⁹ 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 When the Current Guidance was published in December 2012 it introduced a number of changes from the previous guidance including, for example, moving from a 10% starting point range to a 30% range. The CMA has gained considerable experience of applying the Current Guidance effectively across a variety of cases and does not propose to make any fundamental changes to its approach at this stage. However, based on that experience, the CMA proposes to make certain limited changes to the guidance to reflect decisional practice since the publication of the Current Guidance. The proposed changes also reflect 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.²⁰

5.2 In summary, the proposed changes are:

- further details as to how the CMA will assess the seriousness of an infringement and in particular apply the starting point range (Step 1);
- addition of a further illustrative example of an aggravating factor and some further detail on the requirements for certain mitigating factors (Step 3);
- additional details concerning the financial indicators which the CMA typically uses when assessing proportionality and deterrence (Step 4);
- new text detailing the possibility of a discount where the CMA considers approving a voluntary redress scheme (Step 6); and
- clarification of how the CMA will apply discounts for leniency, settlement or redress schemes (Step 6).

5.3 The CMA considers that these proposed revisions will add greater clarity and transparency to the penalty setting process in line with decisional practice. The remainder of this chapter provides further detail on the proposed changes. The Draft Revised Guidance is available on the consultation page

²⁰ Section 49C CA98, for further information: [Guidance on the approval of voluntary redress schemes for infringements of competition law \(CMA40\)](#).

both in a clean copy and a marked up version showing the changes to the Current Guidance.

Minor drafting changes

- 5.4 The Draft Revised Guidance also contains a number of non-substantive amendments reflecting legislative and institutional changes since the Current Guidance was published.

Starting point (Step 1)

- 5.5 The Current Guidance provides that a starting point of up to 30% of an undertaking's relevant turnover will be applied in order to meet the twin objectives of the penalty setting regime. Prior to 2012, a starting point of up to 10% had been in place. The Current Guidance explains that more serious infringements will receive higher starting points, giving examples of some of the most serious infringements of competition law.
- 5.6 The CMA considers that in light of its practical application of the Current Guidance and decisional practice it would be useful to provide clarity as to the assessment the CMA makes when deciding on an appropriate starting point. In particular, the Current Guidance only describes how the 'upper end' of the 30% range will be applied.²¹ The Draft Revised Guidance also describes how the remainder of the range will be applied.
- 5.7 While determination of the starting point for any particular infringement is necessarily dependent on the facts of each case, the CMA will first assess how likely the type of infringement at issue is, by its nature, to harm competition. Second, the CMA will consider the extent and likelihood of harm to competition in the specific relevant circumstances of the individual case and finally, whether the starting point is sufficient for the purpose of general deterrence.
- 5.8 The CMA does not consider it practicable or appropriate to try and detail every type of infringement given the range of conduct that will be encountered in different cases and to which the CMA must have regard in setting an appropriate penalty for the case in question. Therefore, there is no pre-set starting point 'tariff' for different types of infringement. However, the CMA is proposing to include the following principles in the Draft Revised Guidance.

²¹ See paragraph 2.5 of the Current Guidance.

- 5.9 The CMA will generally use a starting point between 21 and 30% for the most serious types of infringement, that is, those which the CMA considers are most likely by their very nature to harm competition. In relation to infringements of the Chapter I prohibition and/or Article 101, this includes cartel activities,²² such as price fixing and market sharing, and other, non-cartel object infringements which are inherently likely to cause significant harm to competition. In relation to infringements of the Chapter II prohibition and/or Article 102, this will typically include conduct which is inherently likely to have a particularly serious exploitative or exclusionary effect, such as excessive and predatory pricing. In relation to infringements of the Chapter I prohibition and/or Article 101, a starting point between 10 and 20% is more likely to be appropriate for certain, less serious object infringements, and for infringements by effect. A 10 to 20% starting point is also more likely to be appropriate in relation to infringements of the Chapter II prohibition and/or Article 102 involving conduct which is less likely to be inherently harmful. The CMA considers that a starting point of less than 10% may be applied, where the assessment of specific circumstances of the case (described further below) leads to a downwards adjustment.
- 5.10 The CMA will then decide whether the starting point should be adjusted to reflect specific circumstances of the case. Paragraph 2.7 of the Current Guidance describes how, when assessing seriousness, the CMA will consider a number of factors including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. This list is non-exhaustive and the CMA may not necessarily consider all of these factors and/or may consider other relevant issues.
- 5.11 The CMA is proposing to amend paragraph 2.7 to clarify that the assessment is made with regards to case-specific circumstances and their relevance to the extent and likelihood of harm to competition and ultimately to consumers. The CMA also proposes to clarify the factors listed at paragraph 2.7.
- 5.12 In respect of infringements involving more than one undertaking, the CMA expects to apply the same starting point for each undertaking.²³ It is proposed to now include an express statement to this effect in the detail provided at Step 1 of the penalties guidance.
- 5.13 The proposed changes are reflected in paragraphs 2.4 to 2.10 of the Draft Revised Guidance.

²² See paragraph 3.1 of the Current Guidance.

²³ See *Eden Brown v Office of Fair Trading* [2011] CAT 8, paragraph 80.

Adjustment for aggravating and mitigating factors (Step 3)

5.14 The CMA is proposing to make changes to provide some further details relating to the adjustment for aggravating and mitigating factors, as described below. As with the decision as to whether the CMA will impose a penalty, the decision to apply these factors is discretionary and will depend on the circumstances of each case.

Failure to comply with competition law following receipt of a warning letter or advisory letter in respect of the same or similar conduct

5.15 As described in paragraph 3.5 above, the penalties regime is a key tool for incentivising compliance of businesses with competition law. In January 2016, the CMA published guidance to businesses on warning and advisory letters.²⁴ These letters may be issued 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 purpose of warning and advisory letters is to explain that the CMA is concerned that they may be breaching competition law and to encourage them to comply with competition law. Warning letters include a recommendation that the business carries out a self-assessment of its practices to ensure compliance with competition law and requests that the business informs the CMA of what the business has done and/or plans to do to ensure compliance with competition law. Advisory letters do not request that the CMA be informed of any steps taken following receipt of the letter but do suggest recipients consider assessing the compatibility of the suspected anti-competitive practice brought to their attention with competition law and making any appropriate changes to their behaviour.

5.16 The CMA plans to include failure to comply with competition law following the receipt of a warning letter or an advisory letter in certain circumstances as a further illustrative example of a potential aggravating factor at Step 3.²⁵ Should the CMA decide, after issuing a warning letter or an advisory letter to an undertaking, to open an investigation into suspected anti-competitive activities, it is possible that where the CMA goes onto make an infringement finding it may also take into account the failure to comply with competition law after receipt of a warning or advisory letter as a reason to uplift any penalty imposed. 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

²⁴ See, [Warning and advisory letters: essential information for businesses](#).

²⁵ For example, the CMA uplifted for failure to comply with competition law following the receipt of a warning letter. See, [Lighting company fined £2.7 million for restricting online prices](#).

letter or advisory letter issued related to the same or similar conduct. The possibility of an uplift in these circumstances will be drawn to the recipient's attention in the warning or advisory letter. The CMA's view is that this additional factor will further encourage businesses to comply with competition law.

- 5.17 The proposed change is reflected at paragraph 2.18 of the Draft Revised Guidance.

Compliance activities

- 5.18 The Current Guidance provides that where the CMA considers that adequate steps have been taken in order to ensure competition law compliance in future and that a penalty reduction is justified, it will consider reducing the penalty by up to 10%.²⁶ The Current Guidance details relevant factors that the CMA will take into account when assessing whether the steps taken by the business are sufficient in order to merit a reduction in penalty.
- 5.19 In order to grant a reduction, the Current Guidance notes that a business must show a clear and unambiguous commitment to compliance. The CMA considers that this should include a public statement on its website(s) regarding its commitment to comply with competition law. In addition to this, and to ensure compliance activities are maintained and monitored, the CMA will typically expect that these activities should be reviewed periodically and a report of this made to the CMA. These steps reflect the CMA's recent decisional practice in respect of assessing compliance activities at Step 3.²⁷
- 5.20 The CMA is proposing to amend the Current Guidance to explicitly include the additional relevant factors described above, reflecting the CMA's decisional practice and position on compliance (see paragraph 2.19, footnote 38²⁸ of the marked up version of the Draft Revised Guidance).

Cooperation which enables the enforcement process to be concluded more effectively and/or speedily

- 5.21 The Current Guidance states that in certain circumstances a reduction in penalty may be made where a business cooperates with an investigation in such a way that this cooperation enables the CMA to conclude the investigation more effectively and/or speedily.²⁹ Under the Current Guidance,

²⁶ See paragraph 2.15, footnote 26 of the Current Guidance.

²⁷ For example see decisions in CMA cases: [Lighting fittings sector](#) and [Supply of galvanised steels tanks](#).

²⁸ Footnote 34 of the clean version of the Draft Revised Guidance.

²⁹ See paragraph 2.15, footnote 28 of the Current Guidance.

in order for the CMA to consider a reduction in penalty, cooperation must be over and above the respecting of time limits.

- 5.22 An example of such cooperation may be the provision of staff for voluntary interviews and/or provision of witness statements.³⁰ Depending on the circumstances of the case, businesses voluntarily making members of staff available for interview can lead to the CMA being able to more readily gain information. This may lead to the investigation being progressed more effectively, and/or quicker, than had the CMA needed to rely on only the provision of written materials. 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.
- 5.23 The CMA proposes to amend the Current Guidance to include the provision of voluntary witness interviews and/or the provision of witness statements as an example of when it may make a reduction for cooperation at Step 3 (see paragraph 2.19, footnote 40³¹ of the marked up version of the Draft Revised Guidance).

Adjustment for specific deterrence and proportionality (Step 4)

- 5.24 In considering whether any adjustments for specific deterrence or proportionality should be made at Step 4, the CMA will have regard to appropriate indicators of the size and financial position of the undertaking. This assessment helps to ensure adequate deterrence of future anti-competitive activity by the undertaking concerned and properly to assess whether a proposed penalty is proportionate. The Current Guidance indicates that this may include, where available, total turnover, profits, cash flow and industry margins.
- 5.25 Having now had experience of applying the Current Guidance, the CMA has found that:
- When making its assessment at Step 4, in practice, it typically will have regard to profit after tax, net assets and dividends. These are generally included as standard items in a business's accounts and will typically give a reliable indication of the business's size and financial position.

³⁰ For example see decisions in CMA cases: [Supply of products to the furniture industry](#).

³¹ Footnote 36 of the clean version of the Draft Revised Guidance.

- In addition, the CMA may consider any particular indicator over a period of time (usually three years). Examining financial indicators over a period of time can provide the CMA with a more accurate picture of a business's true financial position when considering the level of any adjustment at this step.

5.26 The CMA is proposing to include these additional financial indicators in the guidance, in line with published decisional practice (see paragraph 2.20 of the Draft Revised Guidance).

Application of reductions under the CMA's leniency programme and for settlement

5.27 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.

Reductions where the CMA considers approving a voluntary redress scheme

5.28 In 2015, the CMA and concurrent regulators were given the power to approve certain voluntary redress schemes.³² Approved voluntary redress schemes are a form of alternative dispute resolution. An application for approval of a scheme may be submitted by a business who has infringed competition law, either during the course of an ongoing investigation or where an infringement decision has already been made by the CMA or the European Commission.

5.29 The CMA's published guidance on the approval of voluntary redress schemes for infringements of competition law³³ (CMA40) provides that, were it to approve a scheme, the CMA will consider making a reduction in penalty and that any discount will be taken in account at Step 6 of the penalty calculation.³⁴

5.30 The CMA intends to update the Current Guidance to reflect the possibility of a discount at Step 6 of the penalty calculation in respect of voluntary redress schemes (see paragraph 2.31 of the Draft Revised Guidance).

³² Under the Competition Act 1998 and the Competition Act 1998 (Redress Scheme) Regulations 2015.

³³ For further information see, [Approval of voluntary redress schemes for infringements of competition law \(CMA40\)](#).

³⁴ See paragraphs 3.25 to 3.33 of [CMA40](#), specifically paragraph 3.32.

Application of discounts at Step 6

- 5.31 In light of decisional practice and the possible additional discount for an approved voluntary redress scheme, the CMA considers that it would be beneficial to clarify how it will apply these discounts in cases where two or more discounts are applicable.
- 5.32 As reflected in paragraph 2.32 of the Draft Revised Guidance, these reductions will be applied consecutively, ie a leniency discount will be applied to the penalty after Step 5, then any settlement discount will be applied to the figure reached after application of the leniency discount. Where a discount in respect of an approved voluntary redress scheme is granted, this will be applied to the figure reached after the application of the settlement discount.

Related matters to this consultation

- 5.33 The CMA is currently considering responses to a consultation on arrangements for the handling of leniency applications within the regulated sectors.³⁵ The CMA will update section 3 of the Current Guidance to the extent necessary following the outcome of the consultation.

³⁵ [Leniency arrangements in the regulated sector](#).

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 could be usefully clarified? Please explain which areas and why.