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

Summary of responses to the consultation

18 April 2018
CMA73resp

Contents

1. Introduction and summary

Introduction

1.1 The Competition and Markets Authority (CMA)[1] may impose financial penalties on undertakings for 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 section 38(1) of the CA98, the CMA is obliged to publish guidance as to the appropriate amount of any such penalty and to consult on proposed alterations to the guidance. The Secretary of State must approve the CMA's revised guidance before it is published.

1.3 The current guidance, fulfilling the obligation in section 38(1), is contained in OFT423, *OFT's guidance as to the appropriate amount of a penalty*, which was published in September 2012 ('the Current Guidance'), and subsequently adopted by the CMA Board. 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 On 2 August 2018, the Competition and Markets Authority (CMA) consulted on a limited number of proposed changes to the Current Guidance reflecting the CMA's experience of applying the Current Guidance, and its decisional practice over the past five years. The CMA published a consultation document which considered the proposed changes ('the Consultation Document') and included a draft revised version of the Current Guidance showing the proposed changes ('the Draft Revised Guidance').[2]

1.5 We received 11 written responses to the consultation. The list of respondents is at Annex A, and non-confidential versions of all submissions are available on the consultation page. The CMA has considered respondents' view carefully. This document sets out a summary of the responses and the CMA's decisions on the changes proposed in the consultation having taken account of the responses.

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[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] These documents are available on the consultation page.

1.6 The consultation document accompanying the Draft Guidance (the Consultation Document) set out two questions on which respondents' views were sought:

(i) Do you agree with the proposed changes set out in chapter 5? Please give reasons for your views.

(ii) Are there any other areas of the Current Guidance which you consider could be usefully clarified? Please explain which areas and why.

This document sets out a summary of the responses received to each of those questions and the CMA's views on those responses.

1.7 The CMA has made a number of amendments to the Draft Revised Guidance in line with the decisions on the consultation proposals that are described below. On 23 January 2018, the CMA submitted the final draft guidance to the Secretary of State for approval. Following approval by the Secretary of State on 16 April 2018, new penalties guidance was published and came into force on 18 April 2018.

2. Issues raised by the consultation and our response

2.1 Respondents' views on questions (i) and (ii) addressed a number of the penalty-setting steps. In view of overlaps in responses to these questions, these have been grouped together with reference to the relevant step of the Draft Revised Guidance.

Step 1 – starting point

2.2 The Consultation Document stated that 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.

Summary of responses

Assessment of how likely the type of infringement at issue is, by its nature, to harm competition

2.3 A number of respondents considered it was useful to provide an indication of what the likely starting point may be for a particular infringement within the 30% range. Many respondents noted that it would be useful if the guidance provided further explanation and/or examples (for example, from past-CMA cases) of where certain types of infringement would fall. It was noted by one respondent that the appropriate balance should be struck between transparency and allowing sufficient discretion to reflect the circumstances of each case, particularly given the wide range of potential infringements which cannot be easily categorised.

2.4 Other comments on this section of the guidance included:

- Request for an explanation as to which infringements are considered to be "non-cartel object infringements" and "less serious object infringements".
- Concern that additional guidance proposed on assessment of types of infringement could lead to a 'de facto' minimum starting point for certain infringements (and a possible 'floor' of 10%).
- Suggestions that application of a 21-30% starting point for the most serious types of infringements would be inconsistent with the practice of the European Commission ('the Commission').
- Guidance should recognise difference in severity of vertical restraints from cartel activities.

- Excessive pricing should not be included as an example of a type of abusive conduct which would typically be assessed as attracting a starting point of between 21 and 30%.

- Use of illustrative examples from CMA's decisional practice could be used instead of the current proposed approach.

- Concern that while the CMA acknowledges it may still apply a starting point of below 10%, that the proposed changes may act as an artificial floor for starting points for any non-hardcore infringements.

The CMA's views

2.5 The CMA acknowledges respondents' concerns regarding the description of the types of infringement which the CMA considers will typically fall within 21-30% and 10-20% of the starting point range. Given the wide variety of possible infringement types and the need for the CMA to retain sufficient discretion and flexibility in setting starting points, the CMA does not consider it practicable or appropriate to provide further detail. As noted in the Consultation Document, the starting point for any particular infringement is necessarily dependent on the facts of each case. The assessment of how likely a type of infringement is by its nature to harm competition is the first part of the overall assessment of seriousness. The CMA further considers that to provide a more detailed explanation could lead to the concerns expressed by one respondent that there is some form of 'pre-set' tariff of starting points.

2.6 The CMA considers that its approach to generally use a starting point of 21-30% for the most serious types of infringements is appropriate and consistent with its decisional practice. The CMA does not consider that this is inconsistent with the Commission's approach to setting penalties, notwithstanding that in any event the CMA is not required to take the same approach as the Commission when setting financial penalties. The CMA also notes that the responses given do not appear to take into account the fact that the Commission generally applies an entry fee in addition to the starting point.

Summary of responses

<u>Consideration of the extent and likelihood of harm to competition in the specific relevant circumstances of the individual case</u>

2.7 One respondent welcomed the clarification in the Draft Revised Guidance, noting that the factors provide the necessary flexibility to assessing the starting point but warning against rigid application. Other respondents asked for clarification on specific aspects (for example, the relevance of the nature of the product to the assessment of seriousness and for examples of when the factors may apply).

The CMA's views

2.8 The CMA sought in the Draft Revised Guidance to provide some further detail on particular factors. Given the case specific nature of the assessment the CMA does not consider that further examples would be appropriate. The CMA notes that further information as to how it has previously considered such factors can be seen in its decisional practice, where the full context can be considered.

Summary of responses

Assessment of whether the starting point is sufficient for the purposes of general deterrence

2.9 A number of comments were received on how general deterrence should be assessed, including that the CMA,

- Explain when the starting point would be increased.
- Limits the amount by which a starting point may be increased.
- Does not treat general deterrence as a separate consideration, only as implicit in the initial calculation when severity of the infringement is considered.

The CMA's views

2.10 The CMA has carefully considered respondents' comments. However the CMA does not consider it is appropriate to be prescriptive as to the level of any adjustment for general deterrence, to do so may risk fettering the CMA's discretion. The CMA considers that – given that the statutory framework refers to the need to ensure deterrence of both the infringing undertakings (considered at Step 4 of the Draft Revised Guidance) and other undertakings that may be considering engaging in anti-competitive activities – express reference to general deterrence at Step 1 of the guidance is warranted.

Summary of responses

Infringements involving more than one undertaking will be expected to receive the same starting point for all undertakings concerned

2.11 Two respondents noted that the starting point may not be the same if the severity of the conduct was different for different undertakings.

The CMA's views

2.12 As noted in the Draft Revised Guidance, the starting point is intended to reflect the seriousness of the infringement rather than the particular circumstances of each

undertaking's unlawful conduct which are taken into account more fully at other steps. Therefore, the CMA does not propose to make any further changes in the Final Guidance.

Step 3 – adjustment for aggravating and mitigating factors

2.13 The Draft Revised Guidance provided some further detail in relation to certain aggravating and mitigating factors, the following paragraphs summarise the responses received in respect of the proposed changes.

Summary of responses

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

2.14 While noting the importance of undertaking complying with warning letters, a number of respondents highlighted concerns regarding potentially uplifting a penalty for non-compliance, including:

- Receipt of a warning letter does not mean an undertaking has breached competition law.
- If such an approach were adopted the level of detail included in warning letters should be increased so that an undertaking can better determine the specific conduct they are being warned about.
- Whether it is necessary to distinguish this aggravating factor given that the CMA can already take account of a failure to comply with a CMA intervention via an uplift for recidivism.
- Recipients of warning letters have not been formally investigated or provided with an opportunity to exercise their rights of defence.
- Given that the CMA draws a distinction between warning and advisory letters, an uplift should not be considered in respect of the advisory letters.

The CMA's views

2.15 The CMA has carefully considered the respondents' comments in respect of the addition of failure to comply with a warning or advisory letter in certain circumstances. The CMA notes the comments made. The CMA considers that it is important to mention non-compliance with a warning or advisory letter among the non-exhaustive list of possible aggravating factors in order to further encourage businesses to comply with competition law. The CMA notes that an uplift for recidivism is only available where an infringement has been found, therefore is

different to the circumstances in which the CMA would uplift for failure to comply with a warning or advisory letter.

2.16 The CMA fully accepts that a warning or advisory letter does not prove that an undertaking has breached competition law. Neither the Consultation Document nor the Draft Revised Guidance suggest that such a letter is a finding of a breach by the undertaking or that the CMA would treat the undertaking as having been in breach. Nevertheless, a warning or advisory letter puts the undertaking on notice about: a) the need to ensure that it complies with competition law; and b) that if, following a full investigation, there is subsequently found to be a breach of competition law by the undertaking for the same or similar conduct, that the fact that the undertaking was specifically put on notice about the need to ensure compliance can be a relevant factor in assessing the penalty for that undertaking's breach.

2.17 The CMA considers the detail provided to undertakings in a warning or advisory letter gives sufficient information to enable the undertaking to understand the conduct the CMA is concerned about. It is open to undertakings to contact the CMA should anything be unclear. As noted in the Consultation Document and now clarified in the Final Guidance, paragraph 2.17, the application of aggravating and mitigating factors is discretionary; while the CMA will consider whether such factors apply for each individual undertaking, this consideration does not mean that an increase or decrease in penalty will always result. The specific circumstances of the sending of the warning letter, the particular concerns raised in it, and the company's response will all be carefully considered in determining whether or not to uplift.

2.18 On this basis the CMA also considers that it is appropriate to include the possibility of an uplift in the case of an advisory letter. However the CMA does consider that it is less likely that circumstance would arise where it would uplift for non-compliance with an advisory letter.

2.19 In light of some of the responses the CMA has made some minor drafting changes in the Final Guidance to paragraphs 2.17 to 2.19.

Summary of responses

Compliance activities

2.20 Many respondents sought further details as to the relevant factors taken in to account when assessing whether to make a reduction in penalty for compliance activities, in particular as to the requirements for undertakings to review their compliance activities periodically and report on this to the CMA.

The CMA's views

2.21 The CMA does not consider it is appropriate to give further details on this relevant factor for assessing compliance. The guidance sets out what steps the CMA will

take into account when making an assessment, but it will be for each undertaking to frames its own compliance activities in a way in which works for their business. While the CMA agrees it is important for each individual undertaking to be able to understand the requirement, it will depend on elements such as the nature of the specific compliance activities provided to the CMA for assessment and the size and structure of the undertaking.

2.22 The CMA therefore does not consider that there is 'one-size fits all' approach and discusses its expectations for reporting requirements with undertakings on a case-by-case basis, if the undertaking intends to make this part of their compliance activities.

Summary of responses

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

2.23 Several of respondents welcomed the addition of the example of provision of staff for voluntary interviews and/or witness statements. A small number noted that even where an undertaking made efforts but was ultimately unable to provide staff that this should be recognised as a mitigating factor. One respondent noted that the Draft Revised Guidance should clarify that a decision not to provide staff for voluntary interviews will not be considered an aggravating factor.

2.24 A few respondents requested that the CMA consider providing further examples, perhaps from CMA decisional practice, noting that this may incentivise further cooperation. Two respondents stated that timeliness of responses should be recognised as part of overall cooperation, especially where deadlines are short and/or requests voluminous.

The CMA's views

2.25 The CMA notes respondents' comments and would highlight that the assessment for cooperation will be made on a case-by-case basis, taking into account the specific circumstances and efforts to cooperate by each individual undertaking. There are many potential forms which such cooperation, going beyond mere compliance with obligations, could take. As such the CMA has chosen not to provide any further examples in the Final Guidance.

Step 4 – Adjustment for specific deterrence and proportionality

Summary of responses

2.26 Many respondents welcomed the clarification in respect of which financial indicators the CMA typically considers at Step 4. Two respondents suggested it would be useful to have examples or some form of benchmarks to further explain what may

be considered as excessive or disproportionate. One respondent suggested that the CMA included in the Draft Revised Guidance reference to the fact that the CMA usually considers financial indicators over a three-year period (as explained in the Consultation Document).

The CMA's views

2.27 The CMA welcomes the respondents' views on financial indicators. The CMA notes that as the assessment at Step 4 is specific to each undertaking's financial size and position it is difficult and not necessarily helpful to provide any 'benchmarks'. The CMA is not providing further guidance in this respect.

2.28 The CMA agrees that it would be helpful to provide further clarity to include reference to the fact that the CMA will typically consider financial indictors over a period of three years in the Final Guidance (see paragraph 2.20).

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

Summary of responses

<u>Reduction where the CMA considers approving a voluntary redress scheme</u>

2.29 A number of respondents agreed it was helpful to update the Current Guidance to reflect the possibility of a discount at Step 6 in respect of voluntary redress schemes. One respondent noted that it would be useful for the CMA to specify the maximum discount available for such schemes and to provide further details on the assessment of redress schemes, as provided in published CMA guidance on voluntary redress schemes.

The CMA's views

2.30 The CMA has not provided any further detail on the assessment of redress schemes or the application of the discount in the Final Guidance. As with settlement, the detailed process associated with voluntary redress schemes is housed in separate guidance which is cross referenced to in the Final Guidance.

<u>Application of discounts at Step 6</u>

2.31 Two respondents considered that the consecutive application of discounts at Step 6 will significantly reduce incentives for undertakings to settle and/or apply for voluntary redress schemes, where undertakings have already secured leniency. The respondents also noted that the CMA's proposed approach was different from that of the European Commission.

The CMA's views

2.32 The CMA acknowledges respondents' concerns but considers that, in line with decisional practice, discounts at Step 6 should be applied consecutively. Based on experience, the CMA does not consider that incentives for undertakings to settle will be affected. Undertakings receive significant benefits from settling including a shorter, streamlined investigation, as well a discounted penalty.

Other matters

2.33 In response to the second question in the Consultation Document, many respondents highlighted some other areas of the Current Guidance which they considered could be usefully clarified, including:

- Updating the guidance in light of Brexit, in order to avoid further revisions where possible.
- Inclusion of further examples from the CMA's decisional practice.

The CMA's views

2.34 The CMA has carefully considered the areas highlighted by respondents but has not made any changes to the guidance. The purpose of revising the guidance was to add greater clarity and transparency to the penalty setting process in line with decisional practice. While the CMA is mindful of the implications Brexit may have on the competition regime, any changes are a matter for government and Parliament, it is therefore not appropriate to make any changes to the guidance at this time.

2.35 The CMA notes that many respondents suggested it would be useful to have further examples and/or worked through calculations in the guidance. The CMA has decided not to provide any further examples at this time. However, as with all of its published guidance, the CMA will continue to keep this guidance under review and may, building on decisional practice, consult on other amendments (which may include examples) where it considers these will usefully provide further transparency and clarity to the guidance.