

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

© Crown copyright 2021

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, Richmond, Surrey, TW9 4DU, or email: psi@nationalarchives.gov.uk.

Preface

The Competition and Markets Authority (CMA) has the power to apply and enforce the Competition Act 1998 (CA98). In relation to the regulated sectors these provisions are applied and enforced, concurrently with the CMA, by the regulators listed below (under section 54 and schedule 10 of the CA98) (the Regulators). Throughout this guidance, references to the CMA should be taken to include the Regulators in relation to their respective sectors, unless otherwise specified.

The following are the Regulators, as at [DATE]:

- the Office of Communications (Ofcom) (communications);
- the Office of Gas and Electricity Markets (Ofgem) (gas and electricity markets in Great Britain);
- the Northern Ireland Authority for Utility Regulation (NIAUR) (gas, electricity, water and sewerage services in Northern Ireland);
- the Water Services Regulation Authority (Ofwat) (water and sewerage markets in England and Wales);
- the Office of Rail and Road (ORR) (railway services in Great Britain);
- the Civil Aviation Authority (CAA) (air traffic services and airport operation services);
- NHS Improvement (healthcare services in England);
- the Financial Conduct Authority (FCA) (financial services); and
- the Payment Systems Regulator (PSR) (participation in payment systems).¹

This guidance is issued in performance of the statutory obligation on the CMA, contained in section 38(1) and (1A) of the CA98 (and pursuant to section 38(3) of the CA98), to publish guidance as to the appropriate amount of a penalty. The CMA is required to have regard to the guidance for the time being in force when setting the amount of any penalty to be imposed. Although there is no equivalent statutory obligation on the Regulators to publish guidance as to the appropriate amount of a penalty, the Regulators are required to have regard to the CMA's published guidance

¹ The list is correct as at [DATE]. The list may change from time to time if further sector regulators are given concurrent powers or existing sectoral regulators are given concurrent powers over a wider range of markets. Some of these Regulators have or may issue guidance on other specific issues, such as competition law compliance, which may interact with this guidance. These documents are not referred to in this guidance.

for the time being in force when setting the amount of any penalty to be imposed under the CA98. The Competition Appeal Tribunal (CAT) also must have regard to the CMA's published guidance.²

² Section 38(8) of the CA98.

Contents

	<i>Page</i>
1. Introduction	4
2. Steps for determining the level of penalty	8

1. Introduction

1.1 This guidance³ sets out the basis on which the CMA will calculate penalties for infringements of the CA98 where it decides to exercise its discretion to impose a penalty under section 36(1) and 36(2) of the CA98. The CMA is issuing this guidance in performance of its statutory obligation to publish guidance as to the appropriate amount of a penalty.

Policy objectives

1.2 Consistent with section 36(7A) of the CA98, the twin objectives of the CMA's policy on financial penalties are:

- to impose penalties on infringing undertakings⁴ 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.

The CMA has a discretion to impose financial penalties and intends, where appropriate, to impose financial penalties which are severe, in particular in respect of agreements⁵ between undertakings which fix prices or share markets, other cartel activities and serious abuses of a dominant position. The CMA considers that these are among the most serious infringements of competition law.

1.3 There are two aspects to deterrence in this context. First, there is a need to deter the undertakings which are subject to the decision from engaging in future anti-competitive activity (often referred to as 'specific deterrence'). Second, there is a need to deter other undertakings which might be

³ This revised guidance replaces the CMA's [Guidance as to the appropriate amount of a penalty](#) (CMA73, issued April 2018).

⁴ The term 'undertaking' is not defined in the CA98, but its meaning has been set out in EU case law prior to the UK's exit from the European Union (EU Exit), which remains relevant pursuant to section 60A CA98. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, associations of undertakings (for example, trade associations) non profit-making organisations and (in some circumstances) public entities that offer goods or services on a given market. A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of each case.

⁵ References in this guidance to 'agreements' should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices.

considering activities contrary to the Chapter I or Chapter II prohibitions⁶ from breaching the law (often referred to as 'general deterrence').

- 1.4 It is important to ensure that penalties imposed on individual undertakings are proportionate and not excessive. In assessing the appropriateness and proportionality of the penalty, the CMA is not bound by its previous decisions, but it should ensure there is broad consistency in its approach.⁷

Statutory background

- 1.5 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 and/or Chapter II prohibitions.⁸ It is therefore for the CMA to determine in a given case whether or not a financial penalty should be imposed.
- 1.6 Section 38(1) and (1A) of the CA98 requires the CMA to prepare and publish guidance as to the appropriate amount of a penalty, Section 38(2) of the CA98 provides that the CMA may alter the guidance on penalties at any time. Section 38(3) of the CA98 provides that, if altered, the CMA must publish the amended guidance. Under section 38(4) the Secretary of State must approve any guidance on penalties before it can be published. When preparing or altering guidance on penalties, section 38(6) and (7) requires the CMA to consult such persons as it considers appropriate, including the Regulators. These particular provisions apply to the CMA alone and not also to the Regulators.
- 1.7 This guidance was approved by the Secretary of State as required under section 38(4) of the CA98 on [DATE]. It was published and came into effect on [DATE]. Before finalising this revised guidance, the CMA conducted a consultation in accordance with sections 38(6) and (7) of the CA98.
- 1.8 By virtue of section 38(8) of the CA98, the CMA must have regard to the guidance for the time being in force when setting the amount of any financial penalty to be imposed. A similar requirement applies to the Regulators by

⁶ For further details, see the competition law guidelines [Agreements and concerted practices](#) (OFT401, adopted by the CMA Board) and [Abuse of a dominant position](#) (OFT402, adopted by the CMA Board).

⁷ See *Eden Brown Limited v Office of Fair Trading* [2011] CAT 8 at [78].

⁸ Section 36(3) of the CA98 provides that the CMA may impose a penalty on an undertaking only if it is satisfied that the infringement has been committed intentionally or negligently. It does not, for the purposes of crossing that threshold, have to determine specifically which it was. See *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 at [455]-[457], [2002] CompAR 13 (*Napp*) and *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 11 at [484] and [485] (*Aberdeen Journals (No.2)*). See also Case C-137/95 P, *SPO and Others v Commission* [1996] ECR I-1611 at [53]-[57].

virtue of the legislation that conferred on them concurrent powers under the CA98. The CAT also must have regard to the CMA's published guidance.⁹ The financial penalty may not in any event exceed the maximum penalty of 10% of the worldwide turnover of the undertaking.¹⁰

- 1.9 This guidance applies from the date of publication to new CA98 cases and to ongoing CA98 cases in which a Statement of Objections has not yet been issued.¹¹
- 1.10 This guidance on penalties will continue to be kept under review in the light of experience in its application.

Exceptions

- 1.11 Sections 39 and 40 of the CA98 provide limited immunity from financial penalties for **small agreements** in relation to infringements of the Chapter I prohibition and for **conduct of minor significance** in relation to infringements of the Chapter II prohibition.¹² This immunity does not apply to infringements of the Chapter I prohibition which are price-fixing agreements. It may be withdrawn by the CMA in certain circumstances.

Criminal cartel offence

- 1.12 Section 188 of the Enterprise Act 2002 introduced a criminal offence for individuals who engage in cartel arrangements that fix prices, limit supply or production, share markets, or rig bids in the UK. The criminal cartel offence only applies to relevant agreements in respect of arrangements between undertakings operating at the same level of the supply chain, known as horizontal agreements. Vertical agreements which are intended to operate between undertakings at different levels in the supply chain, for example

⁹ Section 38(8) of the CA98.

¹⁰ Calculated in accordance with 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 the Competition (Amendment etc.) (EU Exit) Regulations 2019 (as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020).

¹¹ The amendments which have been made to reflect EU Exit on exit day (as defined in the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020)) including the changes made to the relevant legislation by the Competition (Amendment etc.) (EU Exit) Regulations 2019 (as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020), apply from the date of publication to all CA98 cases.

¹² See further 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)) and the Competition (Amendment etc.) (EU Exit) Regulations 2020.

between a manufacturer and a distributor, or between a distributor and a retailer, are not covered by the offence.

- 1.13 The cartel offence operates alongside the provisions of the CA98, and further information can be found in the [Cartel Offence Prosecution Guidance](#) (CMA9, March 2014). The guidance document [Applications for leniency and no action in cartel cases](#) (OFT1495, adopted by the CMA Board) sets out how the CMA will handle applications for immunity from prosecution for the criminal cartel offence under section 190(4) of the Enterprise Act 2002. The prosecution or conviction of individuals under section 188 of the Enterprise Act 2002 in connection with an infringement is not relevant for the purpose of setting the amount of financial penalties payable by undertakings under section 36 of the CA98.

2. Steps for determining the level of penalty

Method of calculation

2.1 A financial penalty imposed by the CMA under section 36 of the CA98 will be calculated following a six-step approach:¹³

- Step 1: Calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking.
- Step 2: Adjustment for duration.
- Step 3: Adjustment for aggravating or mitigating factors.
- Step 4: Adjustment for specific deterrence.
- Step 5: Adjustment to ensure that the penalty is proportionate and the maximum penalty of 10% of the worldwide turnover of the undertaking¹⁴ is not exceeded.
- Step 6: Adjustments for leniency, settlement discounts and approval of a voluntary redress scheme.¹⁵

Details on each of these steps are set out in paragraphs 2.2 to 2.35 below.

¹³ In applying the steps to individual undertakings in multi-party cases, the CMA has a duty to observe the requirements of procedural fairness and rationality (R (on the application of *Gallaher Group Ltd and others*) (*Respondents*) v *The Competition and Markets Authority*, [2018] UKSC 25, at [24] to [41]). In doing so, the CMA will take account of the judgment of the CAT in *Kier* that, '...it is perfectly rational for a bigger undertaking to receive a more severe penalty than a smaller company ... However, this does not mean that penalties should be precisely proportionate to the relative sizes of the undertakings on which they are imposed ... it will not necessarily be fair or proportionate to impose on a bigger company a penalty which reflects the same proportion of its total worldwide turnover as a penalty imposed on a smaller company represents in relation to the latter's turnover.' (See *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, at [177]). In this context, the CMA also notes the CAT's judgment in *GF Tomlinson Group Limited v Office of Fair Trading* [2011] CAT 7 at [158] which recognises that the principle of equal treatment is not breached where fines imposed on undertakings vary in size as a result of other factors coming into play. This has also been articulated by the Court of First Instance (now the General Court) in the *Tokai Carbon* case as follows: 'The fact none the less remains that ... [the Commission] must comply with the principle of equal treatment, according to which it is prohibited to treat similar situations differently and different situations in the same way, unless such treatment is objectively justified (FETTCSA, paragraph 406).' (See Case T-236/01 *Tokai Carbon Co. Ltd and Others v Commission* [2004] ECR II-1181, at [219]).

¹⁴ See note 10 above.

¹⁵ A voluntary redress scheme is a method of alternative dispute resolution, via which a business may apply to the CMA for approval of a scheme where it is seeking to offer compensation to victims of competition law breaches.

Step 1 – starting point

2.2 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to:

- the seriousness of the infringement and the need for general deterrence;¹⁶ and
- the relevant turnover of the undertaking.¹⁷

The starting point will be calculated as described below.

Assessment of seriousness – application of percentage starting point to relevant turnover

2.3 The CMA will apply a starting point of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular infringement (and ultimately the extent and likelihood of actual or potential harm to competition and consumers). In applying the starting point, the CMA will also reflect the need to deter the infringing undertaking and other undertakings from engaging in that type of infringement in the future.

2.4 This is a case specific assessment, taking into account overall:

- how likely it is for the type of infringement at issue, by its nature, to harm competition;
- the extent and likelihood of harm to competition in the specific relevant circumstances of the individual case (as discussed in paragraph 2.7 below); and
- whether the starting point is sufficient for the purpose of general deterrence.

2.5 The CMA will consider the likelihood that the type of infringement at issue will, by its nature, cause harm to competition. There is no pre-set 'tariff' of starting points for different types 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. However, in making its assessment, the CMA will have regard to the following principles:

¹⁶ This is distinct from the need to deter the specific infringing undertaking from further breaches of the Chapter I or Chapter II prohibitions ('specific deterrence'), which is assessed at Step 4 (see paragraphs 2.19 to 2.23).

¹⁷ See paragraphs 2.10 to 2.13.

- The CMA will generally use a starting point between 21 and 30% of relevant turnover for the most serious types of infringement, that is, those which the CMA considers are likely by their very nature to harm competition most. In relation to infringements of the Chapter I prohibition, this includes cartel activities,¹⁸ such as price-fixing and market sharing, and other, non-cartel object infringements which are inherently likely to cause harm to competition. In relation to infringements of the Chapter II prohibition, this will 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, a starting point between 10 and 20% is more likely to be appropriate for certain, less serious object infringements, and for infringements by effect.¹⁹ A 10 to 20% starting point is also more likely to be appropriate in relation to infringements of the Chapter II prohibition involving conduct which is inherently likely to be less harmful.

2.6 The above principles do not prevent the CMA from applying a starting point of below 10%. However, the CMA considers that this is likely to occur as a result of the CMA having made a downwards adjustment to reflect the particular circumstances of the case, as described below.

2.7 The CMA will then consider whether it is appropriate to adjust the starting point upwards or downwards 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. When making its case-specific assessment, the CMA will consider the relevant circumstances of the case. These may include, for example:

- the nature of the product including the nature and extent of demand for that product;
- the structure of the market including the market share(s) of the undertaking(s) involved in the infringement, market concentration and barriers to entry;
- the market coverage of the infringement;

¹⁸ For the definition of 'cartel activities' see the CMA's guidance [Applications for leniency and no-action in cartel cases](#) (OFT1495, adopted by the CMA Board), paragraph 2.2.

¹⁹ For further information on object and effect infringements see [Agreements and concerted practices](#) (OFT401, adopted by the CMA Board).

- the actual or potential effect of the infringement on competitors and third parties; and
- the actual or potential harm caused to consumers whether directly or indirectly.

2.8 In setting the starting point, the CMA will also consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence. In particular the CMA will consider the need to deter other undertakings, whether in the same market or more broadly, from engaging in the same or similar conduct.

2.9 In the case of infringements involving more than one undertaking, the assessment outlined above will be consistent for each undertaking. The starting point is intended to reflect the seriousness of the infringement at issue, rather than the particular circumstances of each undertaking's unlawful conduct (which are taken into account at other steps). As a result, for infringements involving more than one undertaking, the CMA expects to adopt the same percentage starting point for each undertaking to the infringement.²⁰

Determination of relevant turnover

2.10 The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market²¹ affected by the infringement in the undertaking's last business year.²² In this context, an undertaking's last business year is the financial year preceding the date when the infringement ended.

2.11 Normally, the CMA will base relevant turnover on figures from an undertaking's audited accounts. However, in certain circumstances it may be

²⁰ See *Eden Brown Limited v Office of Fair Trading* [2011] CAT 8, at [80].

²¹ See the competition law guideline [Market Definition](#) (OFT403, adopted by the CMA Board) for further background information on the relevant product market and relevant geographic market. The CMA notes also that the Court of Appeal in its judgment in the *Toys and Kits* appeals stated that: '...neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty' and that it was sufficient for the OFT to 'be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement.' See *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, at [169] and [170] - [173] respectively. Where the affected product or geographic market is wider than the relevant product market in the UK, the relevant turnover of the undertakings within the UK may not fully reflect the role of an undertaking in the infringement. In such circumstances, the CMA may also take into account each undertaking's share of turnover in the wider affected product or geographic market(s) when determining the relevant turnover. This may be the case, for example, with geographic market sharing agreements.

²² Relevant turnover will be calculated after the deduction of sales rebates, value added tax and other taxes directly related to turnover.

appropriate to use a different figure as reflecting the true scale of an undertaking's activities in the relevant market.²³

- 2.12 The CMA recognises that such an approach may be appropriate where, in particular, the remuneration for services supplied is based on commission fees. When deciding whether it is appropriate to depart from its general rule of using turnover from audited accounts in this way, the CMA will consider a number of factors, in particular: (i) whether the remuneration for the services in question is decided by the seller of the services or the client, and (ii) whether the undertaking is purchasing inputs in order to supply a fresh product incorporating those inputs to its client.²⁴ Other factors such as whether a person is taking ownership of goods or services and whether the person bears risks resulting from the operation of the business in question may also be relevant. In addition, the CMA notes that specific situations for the calculation of 'turnover' may arise in the areas of credit, financial services and insurance, as is recognised in the statutory instrument which relates to the determination of the maximum penalty that the CMA may impose.²⁵
- 2.13 As stated in paragraph 2.3 above, the starting point may not in any event exceed 30% of the relevant turnover of the undertaking.

Step 2 – adjustment for duration

- 2.14 The starting point may be increased or, in particular circumstances, decreased to take into account the duration of the infringement. Penalties for infringements which last for more than one 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. Where the total duration of an infringement is less than one year, the CMA will treat that duration as a full year for the purpose of calculating the number of years of the infringement. In exceptional circumstances, the starting point may be decreased where the duration of the infringement is less than one year. Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter

²³ See *Eden Brown Limited and others v Office of Fair Trading* [2011] CAT 8, at [44] to [59]. See also *FP McCann Limited v CMA* [2020] CAT 28, at [179]: 'the Penalty Guidance is to be applied in the normal case so that there must be something out of the norm to justify departing from it and using an average of the turnovers for the whole period of the infringement (or some other approach)'.

²⁴ See *Eden Brown Limited and others v Office of Fair Trading* [2011] CAT 8, at [44] to [59].

²⁵ See 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 the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) (as amended by and the Competition (Amendment etc.) (EU Exit) Regulations 2020).

year, although the CMA may in exceptional cases decide to round up the part year to a full year.

Step 3 – adjustment for aggravating and mitigating factors

2.15 The amount of the financial penalty may be increased at step 3 where there are aggravating factors, or decreased where there are mitigating factors. The CMA will consider whether any adjustments are appropriate in all cases for each undertaking based on the specific circumstances of the infringement. A non-exhaustive list of factors is provided in the following paragraphs.

2.16 Aggravating factors may include:

- persistent and repeated unreasonable behaviour that delays the CMA's enforcement action;²⁶
- role of the undertaking as a leader in, or an instigator of, the infringement;
- involvement of directors or senior management (notwithstanding paragraph 1.13 above);
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuing the infringement after the start of the investigation;
- repeated infringements by the same undertaking or other undertakings in the same group (recidivism);²⁷

²⁶ This will include situations where an undertaking persistently and repeatedly disrespects CMA time limits specified (for example for providing representations on confidentiality) or otherwise persistently delays the CMA's investigation. The CMA will not treat the full exercise of the party's rights of defence as unreasonable behaviour.

²⁷ Where an undertaking **continues or repeats** the same or a similar infringement after the CMA or one of the Regulators has made a decision that the undertaking infringed the Chapter I prohibition, or the Chapter II prohibition, or in relation to an infringement which occurred prior to EU Exit, after the CMA, one of the Regulators or the European Commission has made a decision that the undertaking infringed Article 101 TFEU or Article 102 TFEU, the amount resulting from the application of steps 1 and 2 may be increased by up to 100% for each such infringement established. The CMA would expect to apply such an increase only where the prior decision found that the infringement or infringements had a UK impact. The actual amount of any such increase for recidivism will be determined on a case-by-case basis having regard to all relevant circumstances. The CMA would not expect to apply an uplift for recidivism in respect of prior infringement decisions made more than 15 years before the start of the infringement for which the current penalty is being set. The CMA considers that infringements are the 'same or similar' where they fall under the same provision of the CA98 or (for an infringement which occurred prior to EU Exit) equivalent provision of the TFEU. For instance, an infringement decision under the Chapter I prohibition or Article 101 could be counted as a 'same or similar' infringement when assessing the penalty for another infringement of Chapter I or Article 101.

- infringements which are committed intentionally rather than negligently;²⁸
- retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant;
- failure to comply with competition law following receipt of a warning or advisory letter in respect of the same or similar conduct.²⁹

2.17 Mitigating factors may include:

- role of the undertaking, for example, where the undertaking is acting under severe duress or pressure;
- termination of the infringement as soon as the CMA intervenes;³⁰
- cooperation which enables the enforcement process to be concluded more effectively and/or speedily.³¹

2.18 The CMA will not generally make any reduction at step 3 on the grounds of the novelty of the infringement, or uncertainty on the part of the undertaking as to whether the agreement constituted an infringement. This is because only in limited circumstances will it be appropriate to treat any novelty of the infringement or uncertainty on the part of the undertaking as a mitigating factor, given that the undertaking must have been aware, could not have been unaware, or at least ought to have known, that its conduct would result in a restriction or distortion of competition, for it to be found to have committed the

²⁸ The CAT has defined the terms 'intentionally' and 'negligently' as follows: an infringement is committed 'intentionally' if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition; and an infringement is committed 'negligently' if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition. See *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, at [221], *Napp* at [466] and *Aberdeen Journals (No.2)*, at [484] and [485].

²⁹ When considering whether to uplift, the CMA will take into account the individual circumstances of the failure and will impose an uplift in these circumstances only where the warning letter or advisory letter related to conduct the CMA considers to be the same or similar to the conduct under investigation. See CMA guidance on [warning and advisory letters](#). The Regulators may use different terminology for their equivalents of warning and advisory letters.

³⁰ Intervention by the CMA would be by the exercise of its powers under sections 26 to 28A of the CA98.

³¹ Respecting CMA time limits specified or otherwise agreed will be a necessary but not sufficient criterion to merit a reduction at this step, that is to say, cooperation over and above this will be expected. An example of such cooperation may be the provision of staff for voluntary interviews and/or arranging for staff to provide witness statements. Note that in cases of cartel activity an undertaking which cooperates fully with the investigation may benefit from total immunity from, or a significant reduction in the level of, a financial penalty, if it satisfies the requirements for lenient treatment; see the CMA's guidance [Applications for leniency and no-action in cartel cases](#) (OFT1495, adopted by the CMA Board). Undertakings benefiting from the leniency programme will not receive an additional reduction in financial penalties under this head (since continuous and complete cooperation is a condition of leniency).

infringement intentionally or negligently.³² For instance, a reduction will not be warranted simply because an undertaking (or its professional advisers) mischaracterised the infringing conduct in law. A reduction may, however, be warranted as a result of exceptional circumstances specific to the conduct of the investigation which created genuine uncertainty.³³ It may also be merited in situations where the legal characterisation of the infringement is truly novel; though such situations are to be distinguished from the application of established competition law principles to a novel pattern of facts.³⁴

Step 4 – adjustment for specific deterrence

- 2.19 The penalty figure reached after steps 1 to 3 may be increased to ensure that the penalty to be imposed on the undertaking is sufficient to deter the infringing undertaking from breaching competition law in the future. The CMA may increase the penalty reached after step 3 where this is appropriate in order to ensure that the penalty achieves deterrence given the undertaking's specific size and financial position, and any other relevant circumstances of the case. This is an important step for the purposes of achieving deterrence in accordance with the statutory objective set out in section 36(7A)(b) of the CA98. Any penalty that is too low to deter an infringing undertaking from breaching competition law in the future is also unlikely to deter other undertakings that may be considering anti-competitive activities.
- 2.20 It will often be necessary to impose a higher penalty on a larger undertaking than a smaller undertaking involved in the same infringement to achieve the required deterrent effect.³⁵ In that regard, when assessing an undertaking's financial position for the purposes of deterrence, the CMA will generally take into account the undertaking's total worldwide turnover as the primary indicator of the size of the undertaking and its economic power, unless the circumstances of the case indicate that other metrics are more appropriate.³⁶

³² See note 28 above.

³³ See CMA decision on *restrictive arrangements preventing estate and lettings agents from advertising their fees in a local newspaper*, Case CE/9827/13, May 2015.

³⁴ This factor may also be relevant to the assessment at step 4, on the basis that a lower (or no) uplift to the penalty may be sufficient to achieve deterrence in those circumstances, or to the assessment of the proportionality of the penalty (see *Generics (UK) Limited, GlaxoSmithKline PLC and others v CMA*, [2021] CAT 9, where the penalty was reduced on proportionality grounds for, among other reasons, the novelty of the infringement).

³⁵ See *Eden Brown Limited v Office of Fair Trading* [2011] CAT 8, at [98] and *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, at [177].

³⁶ For example, in unusually high or low profit margin industries the worldwide turnover may not play a central role in the assessment and other financial indicators may be more suitable in terms of reflecting the undertaking's size and financial position (such as profits, net assets, dividends and industry margins).

The CMA will consider indicators of size and financial position at the time the penalty is being imposed and may consider three-year averages for turnover.

- 2.21 The CMA considers that an increase at this step will be appropriate, for example, in situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the potential fine is otherwise too low to achieve the objective of deterrence in view of the undertaking's size and financial position.
- 2.22 Another important part of effective deterrence is that an undertaking should not be in a position in which it is able to make a profit from infringing competition law, even after having paid any penalty levied in respect of an infringement. Nor is it sufficient for any penalty only to neutralise an undertaking's likely gains from an infringement. To constitute an effective deterrent in this context, any penalty imposed should also exceed an undertaking's likely gains from an infringement by a material amount.³⁷ Therefore, an increase at this step will also be appropriate where the CMA has evidence that the infringing undertaking has made, or is likely to derive, an economic or financial benefit from the infringement that is above the level of penalty reached at the end of step 3. Where relevant, the CMA's estimate would account for any gain which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration.³⁸ The assessment of the need to adjust the penalty will be made on a case-by-case basis for each individual infringing undertaking.
- 2.23 In addition, there may be cases where an undertaking's relevant turnover is very low or zero with the result that the figure at the end of step 3 would be very low or zero. In such cases, the CMA would expect to make more significant adjustments, both for general and specific deterrence, at this step. Such an approach may also be appropriate where the relevant turnover did not accurately reflect the scale of an undertaking's involvement in the infringement or the likely harm to competition. This might be the case, for example, in relation to bid-rigging cases or where an undertaking's turnover in the last business year before the infringement ended was unusually low.

³⁷ If the penalty imposed on an undertaking which infringes competition law only neutralises the gains made (i.e. puts the undertaking in the same position as it would have been absent the infringement) there is little economic incentive for the undertaking not to infringe competition law as it has the potential to gain without the risk of any material losses, even if the undertaking is caught and sanctioned.

³⁸ For example, in a predation case the relevant market may be very small. However, the act of predation might provide an undertaking with a reputation for aggressive behaviour which it could use to its advantage in many other markets.

Step 5 – adjustment to check that the penalty is proportionate and prevent the maximum penalty being exceeded

2.21 At this step, the CMA will:

- assess whether, in its view, the overall penalty proposed is appropriate in the round; and
- adjust the penalty, if necessary, to ensure that it does not exceed the maximum penalty allowed by statute.

Assessment of whether the penalty is proportionate

2.22 The CMA will take a step back to check whether, in its view, the overall penalty reached after steps 1 to 4 is proportionate ‘in the round’. The assessment of proportionality is not a mechanistic assessment, but one of evaluation and judgement. The CMA is not restricted to imposing the lowest penalty that could reasonably be justified and it will select the figure which it considers is appropriate in the circumstances of the case.³⁹ Where necessary, the penalty may be decreased to ensure that the level of penalty is not disproportionate.

2.23 In carrying out the overall assessment of whether a penalty is proportionate, the CMA will have regard to all relevant circumstances including the nature of the infringement, the role of the undertaking in the infringement, the impact of the undertaking's infringing activity on competition, and the undertaking's size and financial position. The overall assessment should appropriately reflect the seriousness of the infringement and the need sufficiently to deter both the infringing undertaking and other undertakings from engaging in anti-competitive activity.

2.24 A penalty may be proportionate even if it exceeds the statutory cap.⁴⁰ However, if that is the case, a further adjustment will be needed, as set out below.

Adjustment to ensure that the maximum penalty is not being exceeded

2.25 The final amount of the penalty calculated according to the method set out above may not in any event exceed 10% of the worldwide turnover of the undertaking in its last business year.⁴¹ The business year on the basis of

³⁹ See *FP McCann Limited v CMA* [2020] CAT 28, at [347].

⁴⁰ See *FP McCann Limited v CMA* [2020] CAT 28, at [354].

⁴¹ See note 10 above.

which worldwide turnover is determined will be the one preceding the date on which the decision of the CMA is taken or, if figures are not available for that business year, the one immediately preceding it. The penalty will be adjusted if necessary to ensure that it does not exceed this maximum.⁴²

- 2.26 Where any infringement by an association of undertakings (for example, a trade association) relates to the activities of its members, the penalty shall not exceed 10% of the sum of the worldwide turnover of each member of the association of undertakings active on the market affected by the infringement. See the competition law guideline *Trade associations, professions and self-regulating bodies* (OFT408, adopted by the CMA Board) for further details on the imposition and enforcement of penalties on associations of undertakings.⁴³

Step 6 – application of reductions including under the CMA's leniency programme, settlement and approval of voluntary redress schemes

- 2.27 The CMA will reduce an undertaking's penalty where the undertaking has a leniency agreement with the CMA, and in accordance with the CMA's published guidance on leniency, provided always that the undertaking meets the conditions of the leniency agreement.⁴⁴
- 2.28 The CMA will also apply a penalty reduction where an undertaking settles with the CMA, which will involve, among other things, the undertaking admitting its participation in the infringement.⁴⁵
- 2.29 The CMA may also apply a penalty reduction where an undertaking obtains approval for a statutory voluntary redress scheme.⁴⁶ The procedure for applying for approval is set out in the CMA's *Guidance on the approval of voluntary redress schemes for infringements of competition law* (CMA40).

⁴² In addition, where an infringement ended prior to 1 May 2004, any penalty imposed in respect of an infringement of the Chapter I prohibition or the Chapter II prohibition will, if necessary, be adjusted further to ensure that it does not exceed the maximum penalty applicable in respect of an infringement of the Chapter I prohibition or the Chapter II prohibition prior to 1 May 2004, that is, 10% of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended (multiplied pro rata by the length of the infringement where the length of the infringement was in excess of one year, up to a maximum of three years). The adjustments referred to in paragraph 172.25 will be made after all the relevant adjustments have been made in steps 2 to 4 above and also before adjustments are made under step 6.

⁴³ *Trade associations, professions and self-regulating bodies* (OFT408, adopted by the CMA Board).

⁴⁴ See the CMA's guidance *Applications for leniency and no-action in cartel cases* (OFT1495).

⁴⁵ See *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), Chapter 14.

⁴⁶ See *Guidance on the approval of voluntary redress schemes for infringements of competition law* (CMA40), paragraph 3.32.

- 2.30 The CMA may also reduce an undertaking's penalty where it considers that an undertaking has made appropriate redress⁴⁷ for an infringement outside the framework of the statutory voluntary redress scheme.⁴⁸
- 2.31 Where the CMA applies discounts at this step, these discounts will be applied consecutively.⁴⁹

Financial hardship

- 2.32 In exceptional circumstances, the CMA may reduce a penalty where an undertaking is unable to pay the penalty proposed due to its financial position. A financial hardship claim needs to be made by the undertaking concerned, and that undertaking has the burden of proving that it merits such a reduction.
- 2.33 The CMA will only grant such a reduction on the basis of objective evidence that the imposition of the proposed penalty would jeopardise irretrievably an undertaking's viability. The CMA will have regard to the undertaking's financial position (including cash flow and ability to borrow), evidence of dividends and other forms of value extracted from the firm, and submissions about the specific social and economic context. The CMA will not base any reduction on the mere finding of an adverse or loss-making financial situation.
- 2.34 Where appropriate, the CMA may enter into an agreement with an undertaking providing for additional time to pay its penalty ('time to pay agreement'). The CMA will only reduce a penalty for financial hardship in circumstances where it considers that the undertaking merits such a reduction in addition to any time to pay agreement.
- 2.35 The CMA emphasises that any financial hardship adjustments will be exceptional and there can be no expectation that a penalty will be adjusted on this basis.⁵⁰

⁴⁷ Where individuals or businesses, including customers and competitors, suffer harm due to others breaking competition law they are entitled to seek redress including compensation for any loss, see the CMA's guidance [Competition law redress \(CMA55\)](#).

⁴⁸ Such a discount will likely be granted only in situations where the redress option proposed by the undertaking is more effective in achieving redress than the statutory voluntary redress scheme (for example where only one party has been harmed by the infringement).

⁴⁹ For example, any leniency discount will be applied to penalty after Step 5, then any settlement discount will be applied to the figure reached after application of the leniency discount, with finally any discount in respect of an approved voluntary redress scheme being applied to the figure reached after the application of the settlement discount.

⁵⁰ See *Sepia Logistics Limited (formerly known as Double Quick Supplyline Limited) v Precision Concepts Ltd* [2007] CAT 13, at [94]. See also *GF Tomlinson Group Limited and Others v Office of Fair Trading* [2011] CAT 7, at [262].