Draft CMA's guidance on the appropriate amount of a penalty

Consultation document

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CMA73CON

Contents

Page

1. About the consultation 2
2. Legal framework 8
3. Current guidance on financial penalties 10
4. Proposed changes to the current guidance on financial penalties 12
5. Questions for consideration 22

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).

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 CMA73, *CMA's guidance as to the appropriate amount of a penalty*, which was published in April 2018 (the Current Guidance). The Current Guidance also applies to concurrent regulators and the Competition Appeal Tribunal (CAT), all of which must have regard to it when setting the amount of a penalty.

1.3 The guidance is intended to explain how the CMA calculates financial penalties in cases under the CA98. The Current Guidance sets out a six-step procedure designed to achieve the twin policy objectives set out in section 36(7A) of the CA98 of imposing financial penalties on infringing undertakings that (i) reflect the seriousness of the infringement and (ii) 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.

1.4 In February 2019, the CMA published a letter to the Secretary of State for Business, Energy and Industrial Strategy, setting out proposals for a series of reforms to the CMA's competition, consumer protection, markets and mergers tools.[2] The letter noted that '*the CMA is planning to review the guidance on competition law fines, and if appropriate, make proposals for amendment to the Secretary of State*'.[3]

1.5 The CMA has subsequently undertaken a review of the Current Guidance in light of experience from past cases and in anticipation of the likely increased caseload following the UK's withdrawal from the European Union (EU Exit).

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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] See A letter and summary outlining proposals for reform of the competition and consumer protection regimes from the Chair of the Competition and Markets Authority, published 25 February 2019.
[3] Ibid, p.40.

The government has recognised that questions remain about whether further reforms are required to ensure that the end-to-end competition enforcement regime operates as effectively as possible to deliver robust sanctions and effective deterrence in a timely way. These challenges were, in the government's view, likely to be magnified following EU Exit.[4] The CMA considers that it is necessary and appropriate to take forward the proposed changes to the Current Guidance regardless of any wider legislative reform proposals.

1.6 In the light of these considerations, the CMA has conducted a review of the Current Guidance with the goal of ensuring that the guidance on setting penalties achieves the objectives set out in section 36(7A) CA98, and continues to lead to appropriate penalties being set in a fair, consistent, predictable and transparent manner across the range of cases in the CMA's enforcement portfolio, reflecting the seriousness of the case at hand and the need for effective deterrence.

1.7 The CMA is particularly mindful of the need to ensure that the level of penalty ensures effective deterrence, especially in cases involving large undertakings. The CMA considers it is important to make these revisions now, as the CMA will be taking on an increased caseload following EU Exit and is likely to need to take enforcement action and ensure effective deterrence in respect of large, multi-national companies active in the UK. Bearing this in mind, and reflecting the likely profile of the cases that the CMA may be investigating post-EU Exit, the CMA expects that there may be an overall increase in the level of penalties imposed.

1.8 The CMA proposes to make the following changes to the Current Guidance, and this consultation seeks views on these proposed changes:

(a) To separate the two elements of the current Step 4 (adjustment for specific deterrence and proportionality). Step 4 would become a self-standing consideration of specific deterrence, with Step 5 comprising an assessment to check that the overall penalty proposed is proportionate and appropriate in the round, as well as allowing for an adjustment of the penalty, if necessary, to ensure it does not exceed the maximum penalty that can be imposed. The CMA considers that the changes to Step 4 will provide greater transparency and consistency in how the CMA will apply the guidance in relation to adjustments for specific deterrence, in particular by being clearer as to the weight that will be placed on the

[4] See BEIS (July 2019), Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013.

factors taken into account at Step 4, including the overall size of the undertaking and the proportion of turnover outside the relevant market.

(b) To remove some of the mitigating factors included in Step 3 of the Current Guidance, relating to compliance programmes and genuine uncertainty, and to provide clarity as to when an adjustment might be made for truly novel situations.

(c) To clarify the determination of relevant turnover in Step 1 in circumstances where the affected product or geographic market affected by the infringement is wider than the relevant product market in the UK.

(d) To add penalty reductions for redress made outside of a voluntary redress scheme.

(e) To clarify the circumstances under which a financial hardship reduction may be considered.

(f) To remove Chapter 3 of the Current Guidance, on leniency, given that this is fully covered in *Applications for leniency and no-action in cartel cases* (OFT1495, as adopted by the CMA's Board) (the 'CMA's Leniency Guidance').

1.9 The draft guidance (Draft Revised Guidance) makes some limited revisions to the Current Guidance to reflect how the CMA calculates penalties after the end of the Transition Period for EU Exit (i.e. after 11:00pm on 31 December 2020), pursuant to article 126 of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the Withdrawal Agreement).[5]

1.10 Finally, the Draft Revised Guidance also contains a number of minor clarificatory drafting amendments.

1.11 The amendments to the Current Guidance which are the subject of this consultation are shown in underline and ~~strikethrough~~ text in the marked-up copy of the Draft Revised Guidance.

[5] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement) (2019).

Scope of this consultation

1.12 This consultation seeks the views of interested parties on the CMA's proposed revisions of the Current Guidance as required by section 38(6) of the CA98.

1.13 The specific questions on which we are seeking respondents' views are provided in Chapter 5.

1.14 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

1.15 We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments. We would welcome your comments on the changes to the Current Guidance that are proposed in the Draft Revised Guidance.

1.16 Please provide supporting evidence for your views where appropriate. We encourage you to respond to the consultation in writing (by email) using the contact details provided in paragraph 1.19 below.

1.17 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 whom you are representing and, where applicable, how the views of the members of the organisation were assembled.

1.18 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 1.24 to 1.26 below).

Duration

1.19 The consultation will run for 4 weeks, from 2 July 2021 to 30 July 2021. Responses should be submitted by email, by no later than 5:00 p.m. on 30 July 2021 to: penaltiesguidance-consultation@cma.gov.uk.

Compliance with government consultation principles

1.20 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.

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

1.21 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.

1.22 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the proposed changes to the Current Guidance.

1.23 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our Privacy Notice.

1.24 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.

1.25 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration any representations made by you here in support of confidentiality. We will also be mindful of our responsibilities under the data

protection legislation referred to above and under Part 9 of the Enterprise Act 2002.

1.26 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

After the consultation

1.27 After the consultation, we will decide whether any changes are necessary to the Current Guidance. If we conclude that such changes are necessary, we will then submit the Draft Revised 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 in the CA98.[6] The CA98 prohibits:

- agreements between undertakings,[7] 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 (or part thereof) ('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 because they are 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.[8]

Power to impose financial penalties

2.3 Section 36 of the CA98 provides that the CMA may impose a financial penalty on an undertaking which has intentionally or negligently committed an infringement of the Chapter I or II prohibitions. The amount of the penalty imposed may be up to a maximum of 10% of the undertaking's worldwide

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[6] A number of sectoral regulators also have concurrent powers under the CA98 ('concurrent regulators'). As at 2 July 2021, 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 (NIAUR), the Water Services Regulation Authority (Ofwat), the Office of Rail and Road (ORR), the Civil Aviation Authority (CAA), NHS Improvement (NHSI), the Financial Conduct Authority (FCA) and the Payment Systems Regulator (PSR). In February 2021, the government published its white paper with proposals to remove NHSI's competition roles as introduced in the Health and Social Care Act 2012 (including concurrency and its general duty to prevent anti-competitive behaviour), so that it can focus fully on NHS provider development and oversight. When the NHSI's remit is formally removed, we will update the list of concurrent regulators that apply this Guidance.

[7] The term undertaking is not defined in EU or UK legislation, but its meaning has been set out by the EU courts case law prior to the UK's exit from the European Union (EU Exit). 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).

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

turnover in its last business year preceding the decision.[9] Section 36(9) provides that financial penalties must be paid into the Consolidated Fund once received by the CMA.[10]

2.4 The CMA is not able to impose a financial penalty on undertakings which benefit from limited immunity under sections 39 or 40 of the CA98 relating to small agreements and conduct of minor significance, unless it withdraws the immunity under sections 39(4) or 40(4) as appropriate. Small agreements are agreements which are not price-fixing agreements (as defined by section 39(9)), but which are made between undertakings with a combined turnover of £20 million or less; conduct of minor significance is conduct carried out by a dominant undertaking whose turnover does not exceed £50 million.[11]

Duty to publish guidance on financial penalties

2.5 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 regulators[12] must have regard to the guidance when setting the level of a penalty.[13]

2.6 Section 38(8) of the CA98 requires the CAT to have regard to the guidance when setting penalties.

Role of the Secretary of State to approve guidance

2.7 Section 38(4) of the CA98 provides that the CMA may not publish guidance as to the appropriate amount of a penalty without the approval of the Secretary of State. In addition, sections 38(6) and 38(7) of the CA98 provide that prior to preparing or altering such guidance the CMA must consult such persons as it considers appropriate, including the concurrent regulators.

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[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 6 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.

3. Current guidance on financial penalties

3.1 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 CMA73, the CMA's *Guidance as to the appropriate amount of a penalty*.[14]

3.2 Consistently with section 36(7A) of the CA98, the Current Guidance pursues 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.

3.3 For that purpose, the Current Guidance sets out a six-step calculation procedure for determining penalties. The steps are as follows:

- 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.[15] The Current Guidance provides that the more likely an infringement is, by its nature, to harm competition, the higher the starting point is likely to be. It sets out that when assessing the extent and likelihood of harm to competition and consumer, the CMA will consider the relevant circumstances of the case. The Current Guidance provides that the need to deter other undertakings from engaging in the same or similar conduct will also be considered in setting a starting point (general deterrence).
- 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 at this step by not more than the number of years of the infringement.
- 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. A non-exhaustive list of factors is provided.

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[14] *Guidance as to the appropriate amount of a penalty*, CMA73.
[15] The last business year is the financial year preceding the date when the infringement ended, see paragraph 2.11 of the Current Guidance.

3.4 At Step 4, there is a separate provision under which the figure after Step 3 may be increased to ensure that it is sufficient to deter the undertaking at hand from engaging in future anti-competitive activity (specific deterrence[16]) or decreased to ensure that it is not disproportionate or excessive. In carrying out the assessment of whether the level of penalty is proportionate, the CMA will have regard to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition. The Current Guidance notes that the CMA will consider appropriate indicators of the size and financial position of the undertaking; such indicators may include total turnover, profitability, net assets and dividends, liquidity, and industry margins.

3.5 At Step 5, the CMA must ensure that the penalty is not above the statutory maximum penalty of 10% of the undertaking's worldwide turnover.[17] 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.

3.6 At Step 6, the CMA applies any penalty reductions resulting from the operation of its policies on leniency, settlement and voluntary redress scheme to the figure reached at the end of Step 5.

3.7 In addition to setting out how the CMA will calculate penalties under the CA98, the Current Guidance also sets out the basics of the leniency policy operated by the CMA. Under the CMA's leniency programme,[18] undertakings may obtain immunity from, or a reduction in, penalty for confessing their involvement in cartel activity to the CMA and cooperating with the CMA's investigation.

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[16] The Step 3 figure may also be increased at Step 4 in exceptional circumstances where an undertaking's relevant turnover is very low or zero, see paragraph 2.22 of the Current Guidance.
[17] See section 36(8) of the CA98 and The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).
[18] More detailed guidance on the CMA's leniency programme is included in *Applications for leniency and no-action in cartel cases* (OFT1495, adopted by the CMA Board)

4. Proposed changes to the current guidance on financial penalties

Introduction

4.1 One of the CMA's key goals is to deliver effective enforcement of the competition law prohibitions applicable in the UK. 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 consumers, businesses and, more generally, the economy and 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.

4.2 Financial penalties perform a crucial function in signalling the unacceptability of commercial practices that infringe competition law and the serious potential consequences of engaging in such practices. Financial penalties for breaches of competition law are seen not only within the UK, but also globally, as the main corporate sanction to penalise and deter competition law infringements. Effective deterrence helps protect consumers, businesses, and the wider economy from anti-competitive practices.

4.3 Penalties should reflect the seriousness of the infringement, provide an incentive to firms whose infringements have been detected to avoid recidivism, and also prompt other firms which are (or which might be tempted to become) participants in infringing conduct to change their behaviour. Since detection is both costly and uncertain, penalties must work to provide proper deterrence. Penalties also incentivise the infringing undertakings and other undertakings to put robust pro-compliance measures in place to ensure that they avoid participating in infringing conduct.

4.4 As set out above, the CMA has conducted a review of its penalty-setting methodology, as was indicated in the CMA's February 2019 proposals for competition law reform.[19] The purpose of this review is to ensure that the guidance on setting penalties achieves the objectives set out at section 36(7A) CA98, and continues to lead to appropriate penalties being set in a fair, consistent, predictable and transparent manner across the range of cases in the CMA's enforcement portfolio, taking into account the anticipated increased caseload following EU Exit.

[19] See paragraph 1.4.

4.5 In addition, the CMA has also reviewed the Current Guidance to make the amendments necessary to reflect how the CMA exercises its powers and processes in setting penalties following EU Exit, including the changes to relevant legislation made by the Competition (Amendment etc.) (EU Exit) Regulations 2019 (as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020) (the Competition SI).

Proposed changes

Step 1 – clarification in the determination of relevant turnover

4.6 Under the Current Guidance, at Step 1 the relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year.[20]

4.7 The CMA proposes to clarify in the Draft Revised Guidance that in circumstances where the affected product or geographic market affected by the infringement is wider than the relevant product market in the UK[21] and, in particular, where the turnover generated in the UK does not fully reflect the role of an undertaking in the infringement, the CMA can take into account each undertaking's share of turnover in the wider affected product or geographic market(s) when determining the relevant turnover for the purposes of Step 1. In such circumstances, the CMA can take into account the share of each participant in the wider market when determining relevant turnover. For example, this may be the case where a geographic market wider than the UK is shared on the basis of territory and the UK turnover of some participants might be very low or even zero because of the market-sharing agreement.

Step 3 - Changes to the adjustment for mitigating factors

4.8 Following a review of its recent decisional practice, the CMA proposes to remove some of the mitigating factors included in Step 3 of the Current

[20] Current Guidance, paragraph 2.11.
[21] Market Definition (OFT403, adopted by the CMA Board), paragraph 4.1: "*The geographic market may be national (i.e. the United Kingdom), smaller than the United Kingdom (e.g. local or regional), wider than the United Kingdom (e.g. part of Europe including the United Kingdom), or even worldwide.*"

Guidance,[22] and provide clarity as to when an adjustment might be made for truly novel situations.

Genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement and novelty of an infringement

4.9 In the Current Guidance, the non-exhaustive list of mitigating circumstances includes the concept of genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement. However, the CMA considers that there are only very limited circumstances, in which there might be genuine uncertainty (as contemplated in the Current Guidance) deserving a discount on the part of an undertaking that was found to have committed an infringement intentionally or negligently.[23] For instance, such a discount would not be applied to an undertaking simply because it (or its professional advisers) mischaracterised the infringing conduct in law. This is supported by the CMA's decisional practice, where such reductions are rare, relating to very specific factual circumstances.[24]

4.10 The CMA is concerned that the Current Guidance fails to convey the fact that this mitigating factor will apply only in very limited circumstances. On this basis, the CMA wishes to remove from the non-exhaustive list of mitigating factors circumstances of genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement.

4.11 Step 3 of the Current Guidance does not currently contemplate any discount in circumstances where the infringement was truly novel at the time of the conduct. Again, the CMA considers that there are only very limited circumstances in which a discount could be merited on such a basis by an undertaking that was found to have committed an infringement intentionally or negligently. The CMA proposes to make this clear in the Guidance, whilst allowing for the possibility that a discount may be merited in circumstances where the legal characterisation of the infringement is truly novel. However, this is to be distinguished from the application of established competition law principles to a novel pattern of facts.[25]

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[22] The removal of the factors does not mean that these cannot be used where appropriate in the future, given that the current list of aggravating/mitigating factors is non-exhaustive.
[23] Also, the current penalty-setting methodology already distinguishes the position of an undertaking that committed the infringement intentionally (or was the ringleader) from that of an undertaking that was merely negligent. This is because an aggravating factor may be applied to the former.
[24] See specifically *Cleanroom laundry services and products*, paragraphs 6.65 to 6.71, and *Estate and lettings agents restrictive arrangements*, paragraphs 6.39 to 6.40.
[25] See *Generics (UK) Limited, GlaxoSmithKline PLC and others* v CMA, [2021] CAT 9.

Adequate steps having been taken with a view to ensuring compliance

4.12 The CMA has a firm commitment to promoting improved levels of compliance with competition law among UK businesses. A greater awareness of competition law helps prevent anti-competitive practices which harm the economy, businesses, and consumers alike.

4.13 The Current Guidance provides that the CMA may give a discount of up to 10% where evidence is presented of an undertaking's compliance activities, and where in the CMA's view the steps taken by the undertaking merit a reduction in the penalty. However, it is a legal obligation of businesses (even small ones) to respect competition rules which are nowadays very well embedded and should be widely understood. The CMA expects that businesses should, as a matter of course, take steps to ensure they comply with competition law. Moreover, the specific deterrent effect of an infringement finding and any related penalty (provided that the penalty is sufficient to achieve deterrence), should incentivise an undertaking to take appropriate compliance steps for the future in any event.

4.14 On this basis, the CMA is of the view that the existence of a compliance policy should not be viewed as a mitigating factor which may justify a lower penalty than would otherwise be applied. Therefore, the CMA proposes to remove this factor from Step 3.

Step 4 – Separate step for specific deterrence

4.15 The CMA proposes to replace the current Step 4 (adjustment for specific deterrence and proportionality) with two separate steps: the first step to consider the need for any adjustment for specific deterrence (Step 4) and the second step to assess whether the overall penalty proposed is proportionate and appropriate 'in the round' (Step 5).

4.16 The CMA views both as critical elements of the penalty-setting process that serve different purposes and therefore warrant being addressed in separate steps. Specific deterrence shapes the penalty to ensure that it is sufficient to deter the undertaking from breaching competition law, having regard to its size and financial position and any other relevant circumstances of the case.[26] This is particularly important given that infringements generally are hard for authorities to detect. The CMA considers that the possibility of an uplift for

[26] The CAT has also recognised that it is reasonable for a larger undertaking to receive a more severe penalty than a smaller company because, '*having regard to its size and financial strength, such a company will require a larger fine to produce the desired deterrent effect than a smaller undertaking*', *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, at [177].

specific deterrence is critical in order to ensure that the undertaking in question is properly incentivised not to infringe competition law again (either by engaging in the same or different conduct). The CMA is also of the view that any penalty that is too low to deter infringing undertakings from breaching competition law in the future will also likely fail to deter other undertakings that may be considering anti-competitive activities. Proportionality ensures that the overall penalty figure arrived at is appropriate 'in the round', taking into account all the circumstances of the case, to ensure that the penalty is not excessive relative to its objectives.[27]

4.17 The CMA considers that a separation of these two elements will provide a clearer framework for both decision-makers and parties, by allowing the factors taken into account and reasons given for them to be clearly distinct and any uplifts or reductions to be made in a more consistent and transparent way. Although the Current Guidance already states that specific deterrence uplifts may be applied, the CMA wishes to ensure that the Guidance is clear that, in order to achieve effective specific deterrence, the CMA would generally expect to apply such uplifts when appropriate given the overall size and financial position of the undertaking, including where an undertaking has a significant proportion of its turnover outside the relevant market.

4.18 Equally, in order to achieve effective deterrence, the CMA considers that a penalty should generally materially exceed the level of any financial benefit derived from the infringement. Consequently, where such economic or financial benefit can be identified and is above the level of the penalty reached at Step 3, the CMA will generally apply an uplift for specific deterrence at Step 4 (unless circumstances of the case dictate that this would not be appropriate). More generally, the CMA will also consider whether an uplift is required to achieve effective deterrence in light of any other relevant circumstances in the case. The CMA proposes to make these changes in order to provide transparency and greater certainty as to how the CMA approaches this assessment, as well as to ensure consistency of approach. The CMA also notes that deterrence is a 'standalone' step in other major jurisdictions.[28]

4.19 In addition, the CMA is proposing to provide further clarification in the Draft Revised Guidance that the worldwide turnover is the main factor that the CMA

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[27] As noted by some respondents during the 2012 OFT consultation, factors that are relevant for the assessment of proportionality at Step 4 can and should be addressed at other steps and, hence, any downward adjustment for proportionality should be limited to situations where the penalty goes beyond what is necessary to punish the undertaking and achieve deterrence (see, *OFT's guidance as to the appropriate amount of a penalty: Summary of responses to the OFT's consultation (OFT423resp)*, paragraph 5.21).

[28] See for example the European Commission's *Guidelines on the method of setting fines* (2006) which have a separate section (C) for increases for deterrence.

takes into account when assessing the financial position of the undertaking for the purposes of specific deterrence, unless the specific circumstances of the case indicate that other metrics are more appropriate (although we expect these cases to be rare). For example, in unusually high or low profit margin industries, the worldwide turnover may not the most appropriate indicator of financial strength and other financial indicators may more suitably reflect the undertaking's size and financial position (such as profits, net assets, dividends or industry margins).[29] The CMA will also clarify that it will consider such indicators of size and financial position at the time the penalty is being imposed (not from the time of the infringement) and may consider three-year averages for turnover.

Step 5 – Proportionality assessment and statutory cap

4.20 The need for a proportionality assessment was clearly articulated in the Competition Appeal Tribunal's judgment in the *Kier* case: '*it is particularly important that at some stage the OFT* [whose relevant functions are now vested in the CMA] *should take a step back and ask itself whether* ***in all the circumstances*** *a penalty at the proposed level is necessary and proportionate*' [emphasis added].[30]

4.21 Such a proportionality assessment can therefore only occur once all steps (including seriousness, general and specific deterrence) have been taken and the CMA can thus check whether the penalty is appropriate 'in the round' and, if necessary, adjust it. Therefore, the CMA envisages that proportionality is better assessed in a separate 'standing back' step *after* those previous calculations. Therefore, Step 5 will operate as a **check** that guarantees the appropriateness of the penalty by ensuring that the figure is (a) proportionate and (b) below the 10% statutory cap.[31]

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[29] The CMA notes the CAT's statement in *Kier*, which noted that "*Turnover is of course an indication of the size and financial status of a commercial entity, but it is not the only one, and it too can be subject to distortion*", *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, at [170].
Alongside financial indicators, the CMA may also take account of the economic and financial benefit accrued to the undertaking for the purpose of assessing whether the penalty is necessary and proportionate to punish the undertaking and achieve deterrence. The CMA will also have regard to any other relevant circumstances of the case, including the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.

[30] *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, at [166].

[31] The CMA notes that these two assessments (proportionality and compliance with the statutory cap) are two distinct 'checks'. This was also recently confirmed by the CAT which noted that *'the figure of 10% of worldwide turnover in the year preceding the year of the decision was not taken as specifying the maximum penalty for the most serious offence but instead operated as a cap on the amount of the penalty which, having regard to the seriousness of the infringement and aggravating and mitigating circumstances, would otherwise be appropriate*'. Therefore, '*it is open to the CMA to form an assessment that the appropriate figure, when expressed as a percentage of the turnover of the last year before the Decision, should be greater than 10% of the relevant turnover*' (see *FP McCann Limited v CMA* [2020] CAT 28, at [92] and [354]).

4.22 In addition, the CMA intends to clarify in the Guidance that, in line with recent case law,[32] the proportionality assessment is one of evaluation and judgement and the CMA is not restricted to imposing the lowest penalty that could reasonably be justified. Rather, when considering the penalty 'in the round', where a penalty requires a reduction for proportionality, the CMA will select the figure which it considers is appropriate in the circumstances of the case.

4.23 Finally, the CMA considers these changes make it clearer that there is a distinction between proportionality and reductions for financial hardship after Step 6. The CMA may consider that a penalty figure is appropriate and proportionate pursuant to the circumstances of a case (and hence, arrive at such a conclusion at Step 5), but it may not be affordable due to the financial position of an undertaking. Such considerations are properly addressed under 'financial hardship' after Step 6 which assesses whether, for reasons specific to a given undertaking, it is appropriate to reduce the penalty so as to avoid that the penalty drives a financially distressed but competitive business out of the market and causes adverse social and economic consequences. The CMA wishes to make certain clarifications on the financial hardship section which are analysed in paragraph 4.26 below.

Step 6 – Penalty discounts for redress payments

4.24 Step 6 of the Current Guidance, among other things, provides that the CMA may apply a penalty reduction where an undertaking obtains approval for a statutory voluntary redress scheme.[33] 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). 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.

4.25 The CMA has added text to the Draft Revised Guidance stating that it may also apply a penalty reduction where it considers that an undertaking has made appropriate redress for an infringement other than under an approved statutory voluntary redress scheme.[34] The level of any such discount is likely to be assessed by reference to factors similar to those discussed in paragraph 3.31 of CMA40. Such discounts will likely be granted only in situations where the redress option proposed by the undertaking is more effective in achieving

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[32] *FP McCann Limited v CMA* [2020] CAT 28.
[33] See *Guidance on the approval of voluntary redress schemes for infringements of competition law* (*CMA40),* paragraph 3.32.
[34] See press releases issued on 4 March 2020 and 9 July 2020.

redress than the statutory voluntary redress scheme. This might be the case for example where only one party has been harmed by the infringement.

Financial hardship

4.26 As set out in the Current Guidance, in exceptional circumstances the CMA may reduce a penalty where an undertaking is unable to pay due to its financial position. The CMA has added text to the Draft Revised Guidance clarifying the circumstances under which such a reduction may be considered. The CMA has also reflected its practice of considering requests for 'time to pay' agreements, whereby the undertaking agrees to pay the penalty via instalments. Such agreements may in some circumstances be a viable alternative to obviate or reduce the need for financial hardship reductions, and the CMA will therefore only grant a financial hardship reduction where it considers that the undertaking merits such a reduction in addition to any 'time to pay' agreement. The CMA will consider any requests from undertakings for a financial hardship reduction, and the appropriateness of any 'time to pay' agreements, on a case-by-case basis based on the evidence provided.

Removal of Chapter 3 – Lenient treatment for undertakings coming forward with information in cartel activity cases

4.27 The CMA considers that the removal of Chapter 3 from the Current Guidance is a purely 'tidying-up' proposal. The CMA's leniency programme, under which it is prepared to give lenient treatment to undertakings coming forward with information about cartel activity, is the subject of Chapter 3 in the Current Guidance. However, the CMA's Leniency Guidance provides detailed guidance on the CMA's approach to the lenient treatment of undertakings that come forward with information,[35] including that contained in the Current Guidance, and the CMA therefore intends to remove Chapter 3 to avoid having duplicative guidance. Going forward, undertakings will therefore only need to refer to the CMA's Leniency Guidance.

4.28 For the avoidance of doubt, the CMA proposes to retain in the Draft Revised Guidance the text in relation to Step 6 of the penalty-setting process making it clear that any reductions to the amount of the penalty for leniency are to be made in accordance with the relevant leniency agreement and the CMA's Leniency Guidance, as published at the relevant time.

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[35] OFT1495 also includes guidance as to the CMA's approach to granting no action letters confirming immunity from prosecution for the criminal cartel offence under section 190(4) of the Enterprise Act 2002, and also on the interface of leniency with the Competition Disqualification Order regime under the Company Directors Disqualification Act 1986.

EU Exit changes

4.29 The Draft Revised Guidance removes references to the CMA's power to apply and enforce Articles 101 and 102 of the TFEU in the United Kingdom throughout, as this is no longer the case after EU Exit. The Draft Revised Guidance also removes the paragraph in the introduction (paragraph 1.2 of the Current Guidance) regarding the Modernisation Regulation as well as the section on the 'Parallel application of Articles 101 and 102 and the Chapter I and Chapter II prohibitions', also in the introduction of the Current Guidance.

4.30 Prior to EU Exit, the CMA was required (under section 38(1A) of the CA98) to publish guidance on the circumstances in which, in determining a penalty, it could take into account the effects of an infringement in another European Union member state. Following EU Exit, the Competition SI revokes this requirement. References to this statutory obligation, as well as the guidance on this point (in relation to when the CMA would take into account effects in European Union member states in calculating the starting point (Step 1) and in adjusting for specific deterrence (Step 4)) are therefore removed in the Draft Revised Guidance. This proposed change is reflected in the deletion of:

a) wording from the preface;

b) wording from paragraph 1.8 of the Current Guidance (paragraph 1.6 in the Draft Revised Guidance);

c) paragraph 2.14 of the Current Guidance; and

d) wording from paragraph 2.21 (footnote 36) of the Current Guidance (paragraph 2.22 (footnote 47 in the Draft Revised Guidance).

4.31 In the Current Guidance (paragraph 2.18, footnote 30), the aggravating factor of repeated infringements by the same undertaking or other undertakings in the same group (recidivism) (considered at Step 3) refers to the circumstances where an undertaking continues or repeats the same or a similar infringement after the CMA, one of the Regulators or the European Commission has made a decision that the undertaking infringed Article 101 and/or the Chapter I prohibition, or Article 102 and/or the Chapter II prohibition. The Draft Revised Guidance maintains decisions finding infringements of Articles 101 and/or 102 TFEU as being relevant for this assessment only where the infringement occurred prior to EU Exit. The proposed change is reflected in paragraph 2.16 (footnote 35) of the Draft Revised Guidance.

4.32 Before EU Exit, in setting the amount of a penalty in respect of an agreement or conduct, the CMA was required to take into account any penalty or fine

imposed by the European Commission, or by a court or other body in another Member State, in respect of that agreement or conduct. The Competition SI maintains this requirement for cases over which the European Commission retains continued competence under the terms of the Withdrawal Act.[36] However, this obligation will only ever relate to conduct pre-dating the end of the Transition Period, and the CMA is therefore under no obligation to take into account any fine/penalty imposed by the Commission in respect of conduct post-dating the end of the Transition Period. The Competition SI removes this requirement for such conduct from the CA98 and reference to this is therefore removed in the Draft Revised Guidance. The change is reflected in the deletion of paragraph 2.28 of the Current Guidance.

4.33 The CA98 (section 38(9)) and the Current Guidance require the CMA, in setting the amount of a penalty in respect of an agreement or conduct, to take into account any penalty or fine imposed by the European Commission, or by a court or other body in another Member State, in respect of that agreement or conduct. The Competition SI removes this requirement from the CA98 and reference to this is therefore removed in the Draft Revised Guidance. The change is reflected in the deletion of paragraph 2.28 of the Current Guidance.

4.34 The Competition SI provides that '*the CMA, the Tribunal or the appropriate court must take* [a penalty or fine imposed in a continued competence case] *into account when setting the amount of penalty under Part 1 of the 1998 Act in relation to that agreement or conduct*.'[37] The CMA notes that this obligation only relates to pre-EU Exit facts, and the CMA is under no obligation to take into account any penalty imposed by the Commission in respect of conduct post-dating the end of the Transition Period.

[36] Withdrawal Agreement, Article 92.
[37] Competition (Amendment etc.) (EU Exit) Regulations 2020, Regulation 36(4).

5. Questions for consideration

Do you agree with the proposed changes set out in chapter 4? Please give reasons for your views.

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