CMA's guidance on the appropriate amount of a penalty

Summary of responses to the consultation

16 December 2021
CMA73RESP

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1. Introduction and summary

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 the abuse of a dominant position contained in the Competition Act 1998 (the CA98).

1.2 Under section 38 of the CA98, the CMA is obliged to prepare and publish guidance as to the appropriate amount of any such penalty, which the CMA may alter at any time. No such guidance may be published without the approval of the Secretary of State. When setting the amount of a penalty the CMA, concurrent regulators and the Competition Appeal Tribunal (CAT) must all have regard to the guidance in force at the time.

1.3 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).

1.4 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.

1.5 On 2 July 2021, further to a review of the Current Guidance in the 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), the CMA consulted on proposed revisions to the Current Guidance. The CMA published a consultation document which considered the proposed changes (the Consultation Document) and included a draft revised version of the Current Guidance showing the proposed changes (the Draft Revised Guidance).[2]

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

[2] These documents are available on the consultation page.

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

- Do you agree with the proposed changes set out in chapter 5 of the Consultation Document? 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.

1.7 We received nine written responses to the consultation. The list of respondents is at **Annex A**, and non-confidential versions of all submissions are available on the consultation page.

1.8 The CMA has considered respondents' views on these questions carefully. This document summarises the key issues raised by the responses and the CMA's views on these issues. This document is not intended to be a comprehensive record of all views expressed, nor to be a comprehensive response to all individual views.

1.9 The CMA has made amendments to the Draft Revised Guidance in line with the decisions on the consultation proposals that are described below. On 22 November 2021, the CMA submitted the final draft guidance to the Secretary of State for approval. Following approval by the Secretary of State on 9 December 2021, the new penalties guidance was published and came into force on 16 December 2021.

2. Issues raised by the consultation and our response

2.1 Respondents' views on the proposed changes set out in the Consultation Document, and on whether there were any other areas that could usefully be clarified, addressed several of the penalty-setting steps. In view of overlaps in responses to the consultation questions, these have been grouped together by reference to the relevant step of the Draft Revised Guidance.

General comments

Summary of responses

2.2 In general, the majority of the respondents welcomed the CMA's initiative to update the Current Guidance on penalties in the light of experience from past cases and in anticipation of the CMA's increased caseload following EU Exit. Some respondents also welcomed the CMA's stated goal of ensuring the guidance leads to appropriate penalties being set in a fair, consistent, predictable, and transparent manner.

2.3 Two respondents expressed concerns as to the overall intent of the changes, encouraging the CMA to consider (a) making the changes relating to deterrence more clearly applicable only to larger companies; and (b) the potential cumulative impact of the proposed changes, which in their view could lead to excessive fines being imposed on individual undertakings, at a time when companies are facing financial exposure in the private enforcement sphere.

The CMA's views

2.4 The CMA welcomes the respondents' view on the timing of its initiative to update the Current Guidance and the support of its goal to ensure that the guidance should lead to appropriate penalties being set in a fair, consistent, predictable and transparent manner.

2.5 The CMA also notes concerns raised by some respondents about the changes, but considers that the Draft Revised Guidance does not require any clarification. As stated in the Consultation Document, the CMA wishes to ensure that the level of the penalties it imposes ensures effective deterrence, especially in cases involving large undertakings.[3] That is because it is important to ensure that large companies active in the UK are properly incentivised not to infringe competition law. The Draft Revised Guidance

[3] Consultation Document, paragraph 1.7.

indicates that it may be necessary to impose higher penalties on larger undertakings in order to achieve effective deterrence.[4] At step 5 the CMA will still check that a fine is not excessive, ensuring that the overall penalty figure arrived at is appropriate 'in the round', taking into account all the circumstances of the particular case at hand.

Step 1 – starting point

Clarification in the determination of the relevant turnover

2.6 The Consultation Document noted that the CMA proposes to clarify in Step 1 that in circumstances where the product or geographic market affected by the infringement is wider than the relevant product market in the UK 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.

Summary of responses

2.7 A number of respondents expressed concerns with the CMA's proposed clarification. Many respondents were concerned that this proposal would lead to the CMA taking account of turnover achieved outside of the UK and in turn lead to excessively high and disproportionate fines where an undertaking has minimal activity and turnover in the UK.

2.8 Respondents suggested that:

(a) any consideration of turnover achieved outside of the UK should be limited to the regulators in the relevant overseas jurisdictions investigating competition law infringements, rather than the CMA, in order to protect undertakings against 'double jeopardy' / the imposition of multiple competition fines in respect of the same effects of the same conduct;

(b) given that the CMA has the ability to uplift fines at Step 4, if the level of the UK fine is not considered enough of a deterrent it is appropriate that the relevant turnover should be UK turnover in Step 1, and any adjustments can be made at Step 4; and

(c) the CMA should base its calculations on quantitative and objective criteria at this stage, otherwise the CMA's proposal risks inflation of the fine at

[4] Draft Revised Guidance, paragraph 2.20.

various stages of the process on the basis of the same or similar assessments, leading to unpredictability for businesses.

2.9 One respondent also noted that if the CMA seeks to maintain this ability, it needs to clarify how exactly it intends to take into account each undertaking's share of turnover in the wider affected product or geographic market(s) when determining the relevant turnover. They also encourage the CMA to cooperate with other competition authorities when determining fines for conduct that spans multiple jurisdictions and is the subject of parallel investigations.

2.10 Another respondent, noted that, while they understood the logic for the proposed amendment, it would be helpful to clarify that this approach is intended to apply only exceptionally.

The CMA's views

2.11 The CMA has carefully considered the respondents' comments and notes the respondents' concerns. The CMA wishes to clarify that the intention of the footnote is to explain the CMA's approach in circumstances where the relevant market affected by the infringement is wider than the UK and where the CMA considers that the turnover generated by an undertaking in the UK does not adequately reflect its role in the infringement.

2.12 In such circumstances, it is explained that the CMA can take into account each undertaking's *share* of turnover in the wider affected market when determining the relevant turnover for each undertaking for the purposes of Step 1. The CMA did not intend to suggest that turnover achieved outside of the UK would be included in the calculation of relevant turnover at Step 1.

2.13 Being able to take into account an undertaking's share of turnover in the wider affected market would be particularly relevant in a case where (i) the geographic market affected by the infringement was wider than the UK, (ii) the infringement involved the market being shared on the basis of territory, and (iii) the UK turnover of some participants was very low or even zero (because of the market-sharing agreement). An illustrative example is set out in the box below.

For example:

- Undertaking X and Undertaking Y enter into a market sharing agreement in respect of product A.
- Under the market sharing agreement, X is allocated the UK market and Y is allocated the market in Ruritania. The relevant geographic market is wider than the UK and includes Ruritania. The UK and Ruritanian markets are both affected by the infringement.

- X's turnover in the affected market in the UK is £160 million and Y's turnover in the affected market in Ruritania is £240 million (with Y having no turnover in the affected market in the UK because of the market sharing agreement).
- Despite Y having been involved in serious cartel activity affecting the UK market, its relevant turnover in the UK (and the basis for the starting point of the penalty) would be zero. This would not adequately reflect Y's involvement in the infringement or the impact of its conduct on the UK market.
- In order for the penalty properly to reflect the involvement of Y in the infringement, the CMA may instead use Y's share of the parties' aggregate turnover in the markets affected by the infringement, namely the parties' combined turnover in the UK and Ruritania for the supply of product A, as a basis for calculating the starting point.
- In this example, the aggregate turnover in the affected markets would be £400 million (X's turnover of £160 million plus Y's turnover of £240 million). X's share of the turnover in the market affected by the infringement would therefore be 40% and Y's share would be 60%.
- In order to reflect the size of the relevant sales in the UK and the relative weight of each of X and Y's involvement in the infringement, the CMA may decide take into account each party's respective share of the turnover in the wider market affected by the infringement to determine its relevant turnover for the purpose of the starting point. It would do this by applying the parties' respective shares of turnover in the wider market (40% for X; 60% for Y) to the parties' aggregate turnover in the UK (ie £160 million).
- Accordingly, at Step 1, the relevant turnover for X would be £64 million (£160 million x 40%) and the relevant turnover for Y would be £96 million (£160 million x 60%).

2.14 The CMA considers that its approach means there is no risk of 'double jeopardy' or double counting of competition fines in respect of the same effects from the same conduct. The calculation of the starting point of the fine at Step 1 would only be based on the actual turnover of the parties in the affected market in the UK (not on overseas turnover). The CMA agrees that it has the discretion to make an adjustment at Step 4 to reflect the situation where an undertaking has a significant proportion of its turnover outside the relevant market. However, it considers that there may be cases where it is more appropriate to take into account at Step 1 the relative weight of the parties' role in the infringement where one (or more) of the parties has very low or zero turnover in the affected market in the UK .

2.15 The CMA will also aim to achieve effective cooperation with overseas competition authorities,[5] including when determining fines for conduct that spans multiple jurisdictions and is the subject of parallel investigations.

Further comments on Step 1

Summary of responses

2.16 One respondent suggested that the CMA should elaborate on how relevant turnover is determined in its guidance, given the primary role this may play in setting fines. In its view, a fuller explanation of the role of market definition would better inform businesses, and their advisers, as to the size of potential fines and reduce the room for controversy about fines imposed by the CMA.

2.17 In particular, the respondent noted that, since the inclusion of supply side substitutes in determining the extent of the relevant market is well-established, the CMA's guidance could be clearer in setting out the role of market definition (as well as the process for defining the relevant market) in the determination of the relevant turnover for the purpose of setting fines in CA98 infringements.

2.18 In respect of the section of the Draft Revised Guidance relating to starting point percentages:

(a) One respondent disagreed with the amendments in the wording of paragraph 2.5, in particular the deletion of 'significant' which might lead to the loss of the use of starting points of between 21-30% for only the most serious infringements.

(b) Another respondent suggested that further clarifications and examples of infringements which might attract starting points within the 21-30% or 10-20% ranges, including resale price maintenance cases, would be useful.

(c) A further respondent raised concerns that the approach in the Current Guidance leads to 'de facto minimum starting points' for certain infringement types from which the CMA will not readily depart. The respondent considered that the guidance should allow for the possibility of the CMA adopting, where appropriate, differing starting points for different

[5] See the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC) signed in September 2020 and the UK's commitment in Article 361 of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [April 2021] ('[…] *the Parties recognise the importance of cooperation between their respective competition authorities with regard to developments in competition policy and enforcement activities*').

undertakings involved in the same conduct in order to take account of each undertaking's particular circumstances.

The CMA's views

2.19 The CMA notes the comments in respect of how relevant turnover is determined and, while it agrees that this has a key role in the penalty-setting process, is of the view that these considerations are more relevant for the CMA's *Guidance on Market Definition* (OFT403)[6], which is outside of the scope of this consultation.

2.20 The CMA does not propose to make any clarifications in respect of paragraphs 2.3 to 2.9. The CMA notes that these paragraphs were subject to consultation in 2017, following which the Current Guidance was published in 2018. The CMA does not consider that there have been any changes to decisional practice or case law which have raised uncertainty as to the considerations around starting points. In respect of the minor amendments to the text of paragraph 2.5, these do not indicate any change in decisional practice by the CMA and are intended to be clarificatory. As per the Draft Revised Guidance, and the Current Guidance, the appropriate starting point will be set with regard to the conduct in question, with the most serious types of infringement attracting a higher starter point than less serious types of infringement. As regards any differences in the particular circumstances of the undertakings involved, these will be taken into account at the later stages of the penalty calculation.

Step 3 – adjustment for aggravating and mitigating factors

2.21 In relation to Step 3, the Consultation Document proposed to remove some of the mitigating factors included in the Current Guidance and add an explanation as to when an adjustment might be made for truly novel situations.

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

Summary of responses

2.22 The majority of respondents commented on the CMA's proposal to remove genuine uncertainty as to whether the conduct constituted an infringement

[6] Market definition: OFT403 - GOV.UK (www.gov.uk).

from the list of mitigating factors. Some disagreed with this approach, while others understood the CMA's reasoning but expressed some concerns.

2.23 The respondents that disagreed with the CMA's approach submitted that there are many arrangements and practices that could potentially infringe competition law, but which may be considered less clear cut. The examples provided included certain terms in joint ventures, features in joint purchasing alliances, and non-compete clauses. The suggestion was that, while these types of agreement could raise potential competition law concerns, they may arise from well-intentioned and legitimate cooperation between businesses. It was also suggested that it may be that someone who is not a competition law expert may genuinely not be aware of the risk of infringement in relation this type of conduct.

2.24 Respondents considered a distinction could be drawn between: (i) scenarios where an undertaking negligently commits an infringement because of a lack of knowledge of essential competition law principles that it clearly ought to have known, and (ii) scenarios where the CMA ultimately concludes that the undertaking ought to have known that its conduct would result in a restriction or distortion of competition, but there was genuine uncertainty on its part as to the lawfulness and/or effects of its conduct. As such, respondents considered the CMA should not rule out the possibility of discounts from fines on the basis that the facts are novel, or indeed, uncertain.

2.25 Other comments and suggestions included:

(a) clarifying that the question of whether an infringement is novel should be assessed in relation to the time when the infringement was committed, not the time of the CMA's decision;

(b) retaining genuine uncertainty as a listed mitigating factor on the basis that, as past CMA decisions have recognised, such situations do occur – albeit it is only likely to arise in exceptional circumstances; and

(c) amending the guidance to include reference to novelty alongside genuine uncertainty as a mitigating factor at Step 3.

The CMA's views

2.26 The CMA welcomes the fact that several respondents acknowledged that an adjustment based on 'genuine uncertainty' should only apply in limited circumstances. While the CMA notes respondents' concerns, it remains of the view that the point is adequately reflected in the guidance if this factor is removed from the non-exhaustive list of mitigating factors and is explained separately. Similarly, as the CMA considers that 'novelty' is also only likely to

arise very occasionally, it does not consider it necessary to include in the guidance a detailed description of how the CMA might make its assessment about whether an infringement is truly novel or include novelty within the list of mitigating factors at Step 3. Instead, as indicated in the Consultation Document, the CMA has explained the position regarding novelty at paragraph 2.18 of the Draft Revised Guidance.

2.27 Where, in exceptional circumstances, questions of genuine uncertainty or novelty arise, the CMA will consider the extent to which any reduction in the fine is warranted on the facts of the case at hand.

Adequate steps having been taken with a view to ensuring compliance

Summary of responses

2.28 Nearly all of the respondents disagreed with the CMA's proposal to remove compliance programmes from the list of mitigating factors. Comments included suggestions that:

(a) the removal of this factor disincentivises undertakings and senior executives to invest in and maintain an adequate and effective compliance programme and it is a 'backward step' in motivating compliance;

(b) ruling out discounts for compliance programmes would limit the CMA's ability to ensure that a fine properly reflects an undertaking's role and culpability;

(c) the proposal is out of line with measures taken by competition regulators in other countries (such as Australia, Brazil, Canada, Germany, Italy, the Netherlands, Singapore, Spain, and the USA), as well as with the approaches of other UK regulators, such as the Financial Conduct Authority and the Serious Fraud Office;

(d) the proposal appears out of step with recent evidence which shows that competition law remains poorly understood by the majority of UK businesses;[7] and

[7] The respondent noted that a recent report published by the CMA, which was based on a survey of 1,200 UK businesses, found that just 24% of respondents claimed to know competition law well, while roughly three in five respondents said they did not know the law very well or not at all. Against this background, the respondent suggested that removing the additional incentive to put effective compliance measures in place seems inconsistent with the CMA's objective of fostering high levels of awareness of the competition rules.

(e) the proposal ignores the fact that the CAT has noted that the availability of a reduction for introducing a post-infringement compliance programme can have a positive impact.[8]

2.29 The majority of respondents encouraged the CMA to reconsider the compliance proposal and retain the wording from the Current Guidance. Alternatively, one respondent suggested that the CMA could consider keeping this factor, but instead provide guidance as to the types of compliance programmes that would not satisfy the relevant standard for mitigation. The respondent suggested that this could incentivise further investment in compliance, reducing breaches of competition law.

2.30 Another respondent suggested that a better change would be for the CMA to drop the 10% limit on the reduction available for compliance programmes, so that the CMA has the discretion to offer a greater discount.

The CMA's views

2.31 The CMA recognises the concerns that respondents have raised in relation to this proposed change to the Current Guidance. In that regard, the CMA wishes to make it very clear that it supports and promotes competition law compliance in the UK and works to raise the profile of the need for competition law compliance with businesses, for example through its post-enforcement and communications work.[9] Indeed, the CMA is committed to continuing to raise awareness and highlight the importance of competing fairly. The proposed change in the Draft Revised Guidance does not affect this commitment.

2.32 In the CMA's view, incentivising senior executives, and businesses generally, to have and maintain proper compliance programmes is not something that should rest on the availability of a mitigating factor leading to a reduction in penalty for an infringement. It is a legal obligation of all businesses (even small ones) to respect competition rules and those businesses that establish compliance programmes are much more likely to avoid infringing competition law. Moreover, the directors of a company that infringes competition law risk disqualification.

2.33 Further, if a business spots a possible breach through the operation of its compliance programme (for example an internal whistleblowing policy) then it will be able to apply for leniency, potentially receiving immunity from any fine.

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[8] In that regard, the respondent referred to *Kier v Office of Fair Trading* [2011] CAT 3, paragraph 217.

[9] For example, the CMA promotes competition compliance through its webpages: Competition law compliance - Competition and Markets Authority (blog.gov.uk).

While we note the points raised by respondents, the CMA considers that the risks of being subject to an investigation, the potential for significant penalties to be imposed, reputational damage, director disqualification, and the prospect of damages actions mean there are sufficient incentives for businesses (and their senior executives) to adopt compliance programmes, without this also being a mitigating factor warranting a reduction in penalty in the event of a finding of infringement.

2.34 The CMA acknowledges that the approach of some overseas competition authorities is to give credit to undertakings having put in place compliance programmes. However, practice varies between authorities, with no single view on this with, for example, neither the European Commission nor France giving credit for compliance programmes as part of penalty calculations.

Additional mitigating factors

Summary of responses

2.35 One respondent advocated the addition of some factors at Step 3 further to the European Commission's fining guidance.

The CMA's views

2.36 The CMA notes the comments made but is not minded to expand the non-exhaustive factors included at Step 3 at this time.

Step 4 – Adjustment for specific deterrence

2.37 The Consultation Document proposed replacing 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).

2.38 Changes were also proposed to further clarify that the worldwide turnover is the main factor that the CMA 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. In addition, proposed language was suggested to emphasise that an 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 the infringement.

Summary of responses

2.39 Respondents generally welcomed the CMA's proposal to replace Step 4 in the Current Guidance with two separate steps, first to consider the need for any adjustment for specific deterrence (Step 4) and second to assess whether the overall penalty proposed is proportionate (Step 5).

2.40 Several respondents requested further guidance on the factors that the CMA would consider as part of Step 4 when assessing whether an uplift is appropriate. In particular, it was suggested that:

(a) greater detail as to how the CMA will approach the assessment of an undertaking's size and financial position would be welcome;

(b) there should be more clarity as to the circumstances in which the CMA may uplift at Step 4 where a potential fine is 'too low to achieve the object of deterrence in view of the undertaking's size and financial position' and what factors will be taken into account when considering this; and

(c) the guidance should provide a list of relevant factors which may lead the CMA to consider an uplift to be necessary in the circumstances of a particular case, given that any uplift must be related to the infringement and not only the size of the undertaking.

2.41 In relation to the proposed use of worldwide turnover as the 'primary indicator' that the CMA takes into account at Step 4, respondents noted that:

(a) this may lead to double counting, including where undertakings face fines for the same conduct in other markets, leading to a form of 'double jeopardy';

(b) there is a potential overlap in the turnover the CMA considers at Step 1 and 4, which may lead to undue increases on the basis of similar factors; and

(c) the focus on worldwide turnover could lead the CMA to treat this as the only consideration for an uplift, narrowing the focus of penalty setting onto the deterrence objective, without also taking into account the seriousness of the infringement.

2.42 Four respondents commented on the language added by the CMA in the Draft Revised Guidance which explained that, in order to achieve effective deterrence, a penalty should normally materially exceed the level of any financial benefit derived from the infringement. Some expressed the concern that this has the potential to raise the same kinds of factual and evidential

issues that typically need to be assessed in calculating damages in a private action; while others highlighted that there was no discussion in the Draft Revised Guidance about how such likely gains would be assessed, noting that such calculations would be complex.

The CMA's views

2.43 The CMA welcomes the comments of respondents and general support for the splitting of specific deterrence and proportionality assessments into separate steps.

2.44 In relation to the use, at Step 4, of worldwide turnover as the primary indicator of the size and economic power of the undertaking, as explained in the Consultation Document, the Draft Revised Guidance clarifies the position already outlined in the Current Guidance. In that regard, the Current Guidance explains (at paragraph 2.21) that uplifts are likely where an undertaking has a significant proportion of turnover outside of the relevant market. The Draft Revised Guidance develops this existing position by making it clear that worldwide turnover is the main factor the CMA will take into account when assessing the financial position of an undertaking for the purposes of specific deterrence, but does not rule out the need to consider other appropriate indicators of size and financial position on a case-by-case basis. The CMA considers that the position set out in the Draft Revised Guidance provides sufficient flexibility to ensure that the CMA can take into account appropriate metrics, while making it clear that it considers worldwide turnover is likely to be the primary indicator.

2.45 The CMA will also take account of any other relevant circumstances of the case in relation to specific deterrence at Step 4. Therefore, matters such as the seriousness of the infringement or an undertaking's particular circumstances in relation to the infringement can be taken into account in determining whether, and to what extent, a fine needs to be uplifted for specific deterrence. The CMA considers that it is not appropriate to provide a detailed list of additional factors, given that cases tend to be fact-specific and the need, as recognised at Step 5 of the Draft Revised Guidance, to ensure that penalty overall is proportionate.

2.46 In relation to the comments from respondents about the CMA increasing fines at Step 4 where it has evidence that an undertaking has made or is likely to make an economic or financial benefit, the CMA notes that the Draft Revised Guidance seeks only to provide further explanation about a position already in the Current Guidance. The Draft Revised Guidance explains that in order to be an effective deterrent, a penalty should materially exceed an undertaking's likely gains from the infringement, not merely neutralise them. As recognised

in both the Current Guidance and the Draft Revised Guidance, an increase on this basis is likely to be appropriate where the CMA has evidence of an economic or financial benefit above the penalty at the end of Step 3. It may be that in some cases the CMA does not have evidence of such a gain, despite otherwise having sufficient evidence to prove the infringement.

2.47 The CMA has taken into account the points raised by respondents about the risks of potential double counting and overlap with Step 1. As set out above, the CMA has provided a clearer explanation at Step 1 about its approach to calculating relevant turnover in circumstances where the relevant market affected by the infringement is wider than the UK and where the CMA considers that the turnover generated by an undertaking in the UK does not adequately reflect its role in the infringement.

Step 5 – Proportionality assessment and statutory cap

2.48 The Consultation Document explained that in order to check whether the penalty is appropriate 'in the round' the CMA considers that proportionality is better assessed in a separate 'standing back' step after having carried out all the previous steps set out in the guidance. Accordingly, in the Draft Revised Guidance, the CMA proposed that Step 5 would 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.

Summary of responses

2.49 As noted above, many respondents welcomed the CMA's proposal to replace the current Step 4 with two separate steps, the first to consider the need for any adjustment for specific deterrence (Step 4) and the second to assess whether the overall penalty proposed is proportionate (Step 5).

2.50 Three respondents requested that further clarification about how proportionality will be assessed at the new Step 5 should be contained in the guidance, including:

(a) setting out clearly the factors the CMA will take into account in making its proportionality assessment, with specific reference to the nature of the infringement, the size of the affected market and the undertaking's market share and role in it, any mitigating factors, as well as the undertaking's size and financial position; and

(b) providing explicit recognition that there may be circumstances in which the penalty should be decreased at this stage.

The CMA's views

2.51 The CMA considers that the Draft Revised Guidance provides sufficient explanation about how the CMA will approach the 'in the round' assessment of a fine, making it clear that Step 5 involves a sense check to ensure the fine is proportionate. This includes reference to a non-exhaustive list of factors to which the CMA will have regard. We also note that the Draft Revised Guidance is clear that the CMA has discretion at Step 5 to adjust the penalty to ensure that it is appropriate and proportionate in all the relevant circumstances.

2.52 As explained in the Consultation Document, the purpose of Step 5 is to check the appropriateness of the penalty *after* the previous steps. Those previous steps specifically address many of the factors that some respondents suggested would also usefully be added into the check at Step 5. Given that proportionality considerations are inherently present in all steps, the CMA does not consider that it is appropriate for these to be 'reassessed' again at Step 5.

2.53 Rather the CMA will, at Step 5, check that the fine is appropriate and proportionate in the circumstances of the case, taking into account the need to ensure it is set at a level that meets the statutory objectives, namely that it reflects the seriousness of the infringement and the need sufficiently to deter both the infringing undertaking and other undertakings from engaging in anti-competitive activity. The Draft Revised Guidance makes it clear (in the same way as the Current Guidance) that the penalty may be decreased at this stage to ensure that the level of penalty is not disproportionate.

Step 6 – adjustment for leniency, settlement discounts, approval of voluntary redress scheme

2.54 The CMA added clarificatory 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.

Summary of responses

2.55 Around half of the respondents explicitly welcomed the clarification. One respondent suggested that it would be helpful to give an example in the guidance, noting the previous cases where a discount had been granted. Another respondent noted it would be useful for the guidance to contain further detail as to how the CMA will approach possible reduction outside of

the framework of the statutory voluntary redress scheme, including the level of any discount.

The CMA's views

2.56 As set out in the Draft Revised Guidance, the CMA has updated this aspect of the Current Guidance to explain the circumstances in which the CMA may reduce an undertaking's penalty where it has made appropriate redress in order to reflect recent decisional practice. As noted in the Consultation Document the likely level of any discount will be assessed by reference to factors similar to those discussed in the CMA's guidance on the approval of voluntary redress schemes (CMA40). The CMA does not therefore propose to add any further guidance at this stage; however, it agrees with the suggestion of adding a reference to the relevant recent CMA decisional practice.

Financial hardship

2.57 The CMA added text to the Draft Revised Guidance clarifying the circumstances under which such a reduction may be considered and also reflecting its practice of considering requests for 'time to pay' agreements, whereby the undertaking agrees to pay the penalty via instalments.

Summary of responses

2.58 Three respondents welcomed the CMA's proposed clarifications on financial hardship, with other respondents not commenting on the changes.

Other consultation proposals

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

Summary of responses

2.59 Four respondents welcomed the CMA's 'tidying up' proposal to remove Chapter 3 from the Penalties Guidance. There were no other responses.

EU Exit Changes

Summary of responses

2.60 Several respondents welcomed the amendments throughout the document since these are tidying up changes that remove references to statutory obligations and powers that have fallen away following the UK's withdrawal from the EU. One respondent commented on the removal of the text in the

Current Guidance explaining that the CMA must take into account a penalty or fine imposed by the European Commission or by a court or other body in an EU member state in respect of an agreement or conduct. They suggested that for infringements involving cross-border conduct, it would still be proportionate and appropriate for the CMA to consider penalties imposed by competition authorities within the European Union (and indeed globally) given the increasingly close cooperation of competition authorities when investigating such cases.

The CMA's views

2.61 The CMA notes the point made regarding the removal of the text about the CMA being required to take into account penalties imposed within the EU in relation to the same infringing agreement or conduct. However, given that the inclusion of this text in the Current Guidance was intended to reflect section 38(9) of the CA98, which has been repealed following EU Exit, and the fact the CMA can no longer apply Article 101 or Article 102 of the Treaty on the Functioning of the EU, the CMA does not consider it is necessary to retain it.

ANNEX A – List of respondents to the Consultation

- Ashurst
- Baker McKenzie
- Bristows
- Freshfields Bruckhaus Deringer
- Hugh Mullan
- ICLA UK
- Joint Working Party of the Bars and Law Societies of the UK on Competition Law
- Society of Corporate Compliance and Ethics
- Van Bael & Bellis