30 July 2021

ICLA UK

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

1. Introduction

1.1. The In-House Competition Lawyers' Association UK ("**ICLA UK**") is an informal association of in-house competition lawyers in the UK comprising around 100 members. ICLA UK meets usually twice a year to discuss matters of common interest, as well as to share competition law knowledge. ICLA UK does not represent companies but rather is made up of individuals who are experts in competition law. As such this paper represents the views of the ICLA UK members and not the companies who employ them, and it does not necessarily represent the views of all its members.

1.2. ICLA UK is part of the wider In-house Competition Lawyers' Association of in-house competition lawyers across Europe and in South East Asia which currently numbers more than 450 members based in different countries around the globe.

1.3. Because of their role, in-house competition lawyers have a clear interest in a simple and straightforward competition law regime that prioritises legal certainty, minimises costs, and does not represent a disproportionate demand on businesses' time and resources.

1.4. ICLA UK is grateful for the opportunity to feedback on the CMA's consultation on "*Draft CMA's guidance on the appropriate amount of a penalty*" (the "**Consultation**").[1] ICLA UK has particular concerns regarding the proposed removal of mitigation for compliance programmes noting the clear benefit they play in achieving deterrence and absent any identified negative impact for their continued inclusion in the overall assessment framework.

1.5. ICLA UK's response to the CMA's consultation is set out below. ICLA UK has not sought to respond on every aspect, but rather on the issues most relevant to its members.

2. Step One - Clarification in the determination of relevant turnover[2]

2.1 The proposed clarification under consideration for Step 1 would allow the CMA to consider an undertaking's turnover generated outside the UK when calculating fines, where: (i) the

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/998311/Consultation_document_Draft_revised_CMAs_guidance_on_the_appropriate_amount_of_a_penalty.pdf

[2] See para 4.6 onwards, of the Consultation.

product or geographic market affected by the infringement is wider than the UK, and (ii) the undertaking's UK turnover does not fully reflect its role in the infringement. ICLA UK is concerned that this clarification may result in businesses being unfairly and disproportionately penalised where multiple regulators calculate their own fines based on the same or overlapping turnover data. *For example*, if an undertaking carries out the same anti-competitive conduct in a European geographic market with respect to the same product, both the CMA and the European Commission ("**EC**") may seek to fine the undertaking for the conduct in the UK and in the EEA respectively. If the CMA considered that the undertaking's UK turnover did not reflect its role in the infringement, it could account for the undertaking's share of turnover in the wider European market when determining the appropriate fine. At the same time, as a starting point for calculating its own fine, the EC would consider the undertaking's turnover in the EEA. This may result in the undertaking receiving two separate fines based on the same or overlapping turnover (rather than one fine based on UK turnover and another based on EEA turnover), and thus receiving fines that are together, disproportionate to the undertaking's turnover generated in the product and geographic market affected by the infringement.

2.2 Furthermore, ICLA UK is concerned by the introduction at Step 1 of an assessment of whether the infringing undertaking's turnover reflects its role in the infringement. The CMA already has levers within the five-step process to assess the nature or seriousness of the conduct as well as the scale of markets affected; in particular, within 'Step 1 – seriousness', 'Step 3 - aggravating factors' or 'New step 4 - specific deterrence'. The CMA's existing aggregating factors already enable the CMA to take into account factors relating to the undertakings' role in the infringement, and is non-exhaustive. Furthermore, the CMA's proposed changes to the 'specific deterrence' step will, if implemented, enable the CMA to consider uplifts "*including where an undertaking has a significant proportion of its turnover outside the relevant market*".[3]

2.3 Moreover, calculating relevant turnover acts as an objective baseline for the calculation. Subsequent calculations are derived from the starting point. ICLA UK considers that the CMA should base its calculations on quantitative and objective criteria at this stage, otherwise the

[3] Para 4.17, Consultation.

CMA's proposal risks inflation of the fine at various stages of the process on the basis of the same or similar assessments, leading to unpredictability for businesses.

3. Step Three – Changes to the adjustment for mitigating factors

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

The CMA has drawn the mitigation for uncertainty too narrowly

3.1 The CMA is entitled to impose a penalty where an undertaking "*ought to have known*" that its conduct would result in a restriction of competition (under Chapter 1 or Chapter 2 of the Competition Act 1998). The current penalties guidance states that a reduction to the fine may be available where there is genuine uncertainty as to whether conduct constitutes an infringement. The slightly paradoxical question is whether there are situations where an undertaking ought to have known it was committing an infringement but there was nonetheless some type of uncertainty about whether it was committing an infringement that should lead to a reduction in the fine. If the threshold for a reduction on grounds of uncertainty is set too high, then it may never apply, as the undertaking could argue against the proposition that it "*ought to have known*" it was committing an infringement, as the level of uncertainty was so high.

3.2 The CMA states that it wishes to convey that this mitigating factor will apply only in very limited circumstances.[4] The draft guidance states that the CMA will generally not make reductions to the penalty on the grounds of novelty of the infringement, or uncertainty as to whether the agreement constituted an infringement.[5] No reductions are to be made simply because an undertaking has mis-characterised the infringing conduct in law.

3.3 Apart from uncertainties that arise during the CMA investigative process, the only circumstances the draft guidelines identify in which a reduction may be merited are situations where the legal characterisation of the infringement is truly novel, although such situations are *"to be distinguished from the application of established competition law principles to a novel pattern of facts*".[6] This seems a difficult distinction to draw. If there is genuine uncertainty around whether the law applies to a given type of conduct (*for example*,

[4] See para 4.10 of the Consultation.
[5] See para 2.18.
[6] See para 4.11 of the Consultation

where there is no applicable case law), then it is hard to say that an undertaking ought to have known that this type of conduct would (not might) result in an infringement. Indeed there have been cases where the EC has found an infringement but elected not to impose fines on the basis that there was significant uncertainty around whether the conduct in fact amounted to an infringement – in such circumstances it would be hard to assert that the undertaking "*ought to have known*".[7] ICLA UK submit that mitigations to fines for uncertainty should have a lower threshold than this.

3.4 The CMA refers to the recent Competition Appeal Tribunal ("**CAT**") *pay for delay* judgment,[8] in which the CAT substantially reduced the fine imposed by the CMA on GSK and others, in part on the basis that there was genuine uncertainty at the time the agreements were entered into around whether and in what circumstances a pay for delay agreement would infringe competition law. Nonetheless, the CAT still found that the undertakings ought to have known they were committing an infringement. In this case, the CMA no doubt argued that it was obvious (or at least more likely than not), applying standard competition law principles to the (novel) facts, that there was an infringement, and that the undertaking ought to have known this. It is not clear from the *pay for delay* case whether it was novel law or novel facts that led the CAT to apply a discount.

3.5 As such, the CMA should not rule out the possibility of discounts from fines on the basis that the facts are novel, or indeed, ICLA UK would submit, uncertain. The EC very recently applied a 20% discount on the basis of novel facts when it fined car manufacturers for collusion on technical development in the area of nitrogen oxide cleaning.[9] There was no question of novel legal concepts in this case, but the fines were reduced as this was the first time the EC had found a cartel in relation to discussions around technical developments.

<u>The experience of ICLA UK members</u>

3.6 ICLA UK's members regularly have to give advice in conditions of uncertainty, where there is limited or no legal guidance (from authorities or case law) as to whether a proposed action is an infringement of competition law, and the facts are not all readily available, or have not yet transpired. Business cannot engage external lawyers and consultants to conduct a

[7] See, *for example*, the 2014 decision in *Case AT.39985* - Motorola - enforcement of GPRS standard essential patents.
[8] *Generics (UK) Limited, GlaxoSmithKline PLC and others v CMA* [2021] CAT 9, see *for example* para 181.
[9] https://ec.europa.eu/commission/presscorner/detail/it/ip_21_3581

detailed, lengthy and expensive legal and economic assessment every time it wishes to engage in activity that generates competition law questions.

3.7 ICLA UK's members will often satisfy themselves that a proposed agreement does not comprise or resemble an obvious restriction of competition; that its underlying purpose is pro-competitive (or at least not anti-competitive), and that there is no obvious anti-competitive effect. However, uncertainty around both facts and law often remains. *For example*, uncertainty can arise around the counterfactual (one party to an agreement cannot determine what its counterparty would do in the absence of an agreement), potential efficiencies (often only apparent *ex post*), or the extent to which a certain type of collaboration is necessary to achieve a pro-competitive objective. Some generic examples where uncertainty can arise, in respect of both facts and law, include:

3.7.1 B2B markets where undertakings engage in joint bids to provide services to customers. The undertakings may include products or services in their bids that sit on a spectrum between being complements and substitutes for one another. Existing case law (*e.g.* Norwegian taxis) and guidance (see Danish competition authority) is significantly lacking in this challenging area.

3.7.2 Collaborations between competitors to develop new products or services (that require coordination between competitors to be brought to market), where it is not clear *ex ante* whether or not it is necessary for the parties to agree on common commercial terms, such as categories of pricing (not price levels).

3.7.3 Agency agreements that involve control over resale prices – what is the risk threshold past which an agent ceases to be an agent and the agreement becomes a hard-core RPM restriction.

3.8 As illustrated by the above, ICLA UK believes there is a place in the revised guidelines for reductions for uncertainty where the facts are either novel or not known in full, in addition to situations where the application of the law itself is unclear. This is even more so in light

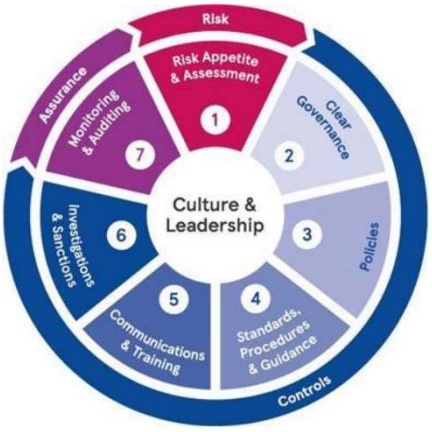
of the fact that the CMA expects undertakings to self-assess whether or not their actions comply with competition law.

Adequate steps having been taken with a view to ensuring compliance

3.1 Compliance programmes are highly effective tools for ensuring compliance. An effective compliance programme delivers multiple benefits, including avoiding infringements by educating employees on what is permitted and what constitutes (clearly or less clearly) problematic behaviour, allowing a business to implement procedures to detect potential antitrust concerns and take appropriate steps to mitigate risks before they emerge or at an early stage. They are not merely paper, tick box or even one-off exercises involving little engagement of colleagues (or if they are then they would not qualify as an effective programme in the first place).

3.2 Instead, they are continuous processes, tailored and proportionate to the risk that a business may face, and supported by the business' leadership. An example of the competition compliance programme of one ICLA member is set out in Box 1 below for illustration.

Box 1



The compliance programme is based around the company's enterprise risk model (left, see also paragraph 3.17 below) and a thorough understanding of where competition risk may exist within the organisation (for example, buying and sales departments, property, HR teams), captured within a competition risk register. Risks are scored for their likelihood and impact with greater focus given to the highest risks. A range of controls is implemented to mitigate the risks identified. In addition to "classic" controls such as policies and training, other controls are likely to include regular risk reporting to senior management, guidance and protocols such as a "pushback process" and year-round communications and reminders. Investigation protocols are used to ensure swift identification and review of any policy breaches and regular testing takes place to ensure that controls are effective and requirements such as training continue to be met. Strong and visible leadership from business leaders is a fundamental requirement of any effective compliance programme: to ensure that senior management understand the risks and lead their teams to behave in a way that supports legal compliance and the

organisation's values. The compliance programme is under continuous review: external CMA or court cases, assurance findings, internal investigations and changes in the operations of the business may all give rise to changes to the risk assessment and the controls that are implemented to mitigate these risks. An annual review of the programme is designed to ensure that it is always kept up-to-date.

3.3 Indeed, an increasing number of jurisdictions worldwide acknowledge and provide credit to businesses for demonstrating a robust and effective compliance programme, which in current times is also interrelated with the reputational benefit that businesses gain for being good corporate citizens which value and engage in ethical behaviour.[10] A recent policy shift in the US by the Department of Justice ("**DOJ**") has re-iterated the importance and value of compliance programmes in recently issued guidance on best practice for antitrust compliance ("**Guidance**").[11] Some authorities have indeed spoken out in support of compliance programmes and how they can be beneficial for antitrust authorities (in terms of reducing enforcement efforts, uncovering cartels, *etc*.). *For example*, as noted by the International Chamber of Commerce, in Australia, compliance is recognised as an "*important component of the ACCC's integrated suite of compliance tools*", whereas in France, the Autorité de la Concurrence has described compliance as an "*asset*" for antitrust authorities.[12]

3.4 A trend observed within ICLA UK is that in-house competition teams are spending increasing amounts of time on compliance and compliance training as best practice evolves and companies seek to further tailor compliance training to specific teams within the business and smaller training sessions, rather than one size fits all engagement.

3.5 Furthermore, and as clearly demonstrated following the implementation of the UK Bribery Act in 2011, mitigation for compliance programmes enables legal or compliance departments to gain greater traction with their Boards in terms of obtaining the resources as and when required to ensure that compliance programmes are kept up-to-date and fit for purpose. Given the realities of the boardroom – where there are so many demands for investment and use of revenues – this additional incentive can prove determinative in

[10] See, US, Spain and Canada, as examples.
[11] See Evaluation of Corporate Compliance Programs, July 2019.
[12] Promoting Antitrust compliance: the various approaches of national antitrust authorities (europa.eu), see e.g. pages 2 and 5.

securing the necessary support, over and above that flowing from the general obligation to comply with law.

3.6 The presence of an effective compliance programme would appear particularly relevant as a mitigating factor where the employees directly responsible for the breach have taken steps to evade procedures aimed at detecting anticompetitive behaviour (*for example,* by using personal communication channels that cannot be monitored) and conceal their behaviour from their internal compliance function. Given liability for the misconduct continues to attach to the employing undertaking in these circumstances, by ruling out this mitigating factor the CMA would limit its ability to ensure the amount of the penalty properly reflects the undertaking's role in, and culpability for, the infringement.

3.7 Removing such a mitigation appears at odds with other areas of competition law enforcement including directors' disqualification and remedies, where the CMA often recognises and takes into account companies' efforts towards their compliance frameworks when deciding its approach to enforcement.

3.8 Domestically, this proposed change also diverges from the approach taken by other UK regulators in the sphere of compliance when calculating fines or determining sentences for breaches of other UK laws. *For example*, when the Financial Conduct Authority calculates fines for breaches of UK financial regulation, it may consider steps taken by business "*to ensure that similar problems cannot arise in the future*" as a mitigating factor.[13] Similarly, the Serious Fraud Office ("**SFO**") takes into account the state of an organisation's compliance programme when considering sentencing for fraud, bribery and other economic crime, and considers that compliance programmes may "*lessen culpability*".[14] The SFO also places weight on improving and remediating compliance programmes when entering into UK Deferred Prosecution Agreements in connection with fraud, bribery and other economic crime.[15] Indeed, the CMA appears to be recommending aligning more to the position of the

[13] See para. 6.5A.3(d), FCA Handbook, The Decision Procedure and Penalties Manual.
[14] See:https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/evaluating-a-compliance-programme/
[15] See https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/

EU, than to UK policy in other areas of compliance, which appears to be somewhat at odds with the aims of Brexit.

3.9 Additionally, compliance regimes form an integral part of companies' risk management frameworks. Risk management frameworks are premised on the concept of minimising unfortunate events and retaining economic value within a company. It's a well-recognised principle of risk management that risk cannot be eliminated in its entirety, only mitigated. Many industries, like the financial services industry, put in place detailed risk management frameworks, which operate principally by identifying and quantifying potential risks, followed by implementation of practical controls in order to bring the level of those risks down to an acceptable level. Compliance programmes often form part of a company's overall culture toward compliance and ethics. Whilst the primary objective of a competition law compliance programmes is the avoidance of an infringement decision in the first place, it is short-sighted not to also recognize companies for investing substantial time and resource into embedding a culture of competition law compliance aimed at avoiding the risk. It is clear that incentivising genuine compliance efforts results in more investment in compliance, and therefore greater efforts towards compliance. As referenced in a recent submission by the Business at OECD (BIAC) Competition Committee to the OECD Competition Committee Working Party No. 3,[16] in November 2020, the ICLA surveyed the activities of in-house competition lawyers in relation to compliance, and a majority of respondents (69%) did not expect their antitrust compliance budgets to change materially, but 82% of in-house respondents believed that if having an actively implemented formal compliance programme increased the likelihood of a reduced sanction from authorities for non-compliance, higher investments would be made.

3.10 As an alternative, the CMA could consider keeping the mitigation and, instead, provide guidance as to the types of compliance programmes which would not satisfy the relevant standard for mitigation – thus incentivising companies and their Boards to invest further in compliance (and hopefully result in less infringements overall). ICLA UK would urge the CMA to maintain a balance between the carrot and the stick, rather than a leaning towards the stick alone, in order to achieve optimum compliance. As mentioned above, the DOJ is the most recent authority to have indicated that it is willing to consider the existence of a robust compliance programme, joining a long list of jurisdictions that have previously taken that approach, whether formally or informally. In fact, in announcing this shift in the DOJ's policy,

[16] See: https://biac.org/wp-content/uploads/2021/05/WP3_Compliance-Programs-FINAL_2021-05-27-1.pdf

former Assistant Attorney General Makan Delrahim suggested that the DOJ's previous position, where the DOJ was dogmatically refusing to take into account the existence of robust compliance efforts as a mitigating factor, reflected an "*outdated view of the real world*". Obviously, and as made clear in the Guidance, simply having a compliance programme will typically not suffice, in and of itself, for a business to be granted a reduction of any fine even in jurisdictions that give credit for having a programme in place. Instead, authorities look at whether the programme satisfies certain criteria as well as at how it is implemented *etc*., to determine whether or not credit should be given. This reflects an important point: compliance programmes must be effective to be taken into account, and guidance from authorities on the types of programmes that would satisfy the standard for mitigation exists can unlock the full potential of and benefits from compliance programmes for consumer welfare, authorities and businesses.

4. Step Four – Separation step for specific deterrence

4.1 The CMA is proposing 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 5 - to assess whether the overall penalty proposed is proportionate and appropriate 'in the round'.[17]

4.2 It is clear that the CMA is putting much more focus on deterrence, which has now its own step, even though it is already part of the starting point for assessment. 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.[18] How will the CMA assess the likely gains accrued to an infringing company?

[17] See para 4.15, Consultation.
[18] See para 4.18, ibid.