CMA Consultation on draft Competition Act 1998 Penalties Guidance

Revised CMA's guidance as to the appropriate amount of a penalty, 2 July 2021

Response by Freshfields Bruckhaus Deringer LLP

30 July 2021

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RESPONSE TO THE CMA'S CONSULTATION ON REVISED GUIDANCE AS TO THE APPROPRIATE AMOUNT OF A PENALTY

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP (***Freshfields***) welcomes the opportunity to comment on the Competition and Markets Authority (***CMA***)'s consultation dated 2 July 2021 (the ***Consultation***) on revisions to the CMA's guidance as to the appropriate amount of a penalty (the ***Guidance***).

1.2 Our comments are based on our substantial experience of representing clients in investigations by the CMA and the sector regulators under the Competition Act 1998 (***CA98***) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (***TFEU***), as well as competition and regulatory investigations by authorities across Europe, the US and Asia.

1.3 This response is submitted on behalf of Freshfields and does not represent the views of any of the Freshfields' clients. Likewise, this response does not necessarily in all respects represent the personal views of every partner at Freshfields.

1.4 The terms defined in the Consultation have the same meaning in this response.

1.5 We note that since the Consultation was published by the CMA, two separate and wide-ranging consultations were published on 20 July 2021: (i) by BEIS on reforming competition and consumer policy;[1] and (ii) by BEIS/DCMS on a new pro-competition regime for digital markets.[2] Some of the proposals in those two consultations are likely to affect the balance of incentives in the UK competition regime and, as such, have a bearing on the application and effectiveness of the Guidance. Our comments in this response are without prejudice to any further comments Freshfields may have in respect of the interaction between the Guidance and those separate proposed reforms.

1.6 Finally we note that the 20 July 2021 BEIS/DCMS consultation states that: "*We intend to require the Digital Markets Unit to publish general guidelines setting out how it will determine the level of penalties it may be minded to impose*"[3] in respect of the new code of conduct proposed for undertakings with strategic market status in certain activities. We respectfully request that the Digital Markets Unit takes heed of the responses to the Consultation on the CMA's current Guidance.

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[1] Department for Business, Energy and Industrial Strategy, *Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for* consumers, 20 July 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004015/CCS001_CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_E-Laying.pdf.

[2] Department for Business, Energy and Industrial Strategy and Department for Digital, Culture, Media & Sport, *A new pro-competition regime for digital markets*, 20 July 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf.

[3] Ibid, para. 127.

2. **Question for consideration: "Do you agree with the proposed changes set out in chapter 4? Please give reasons for your views."**

2.1 We welcome greater transparency from the CMA on how it determines financial penalties and are supportive of the CMA's objective to ensure that application of the Guidance continues to lead to appropriate penalties set in a "*fair, consistent, predictable and transparent manner*".[4] We do, however, have a number of specific concerns relating to the CMA's proposals with regard to determination of the relevant turnover and removal of certain of the mitigating factors contained in Step 3 of the Guidance, and the potentially detrimental impact of those changes on the CMA's ability to achieve its stated objectives.

Step 1*: *Clarification in the determination of relevant turnover

2.2 We have some practical concerns with the CMA's proposed clarification to the determination of 'relevant turnover' in the Guidance. The proposed clarification allows the CMA to consider the turnover an undertaking generates outside the UK, where: (i) the 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.[5] We have two concerns with this approach.

2.3 *First*, the CMA's determination of whether an undertaking's relevant turnover within the UK fully reflects its role in the infringement is likely to follow a qualitative assessment, and it is not clear from the Guidance in what circumstances the CMA will consider this to be the case (other than in some geographic market sharing agreements). We consider that the CMA should instead base its calculation of relevant turnover in Step 1 of the Guidance on *quantitative* and *objective* criteria, in particular, since the CMA already has ample scope to increase the level of fine in other steps of its calculation based on qualitative factors. For example, the CMA has scope to make adjustments for:

(a) aggravating factors (of which the Guidance sets out a non-exhaustive list at paragraph 2.16). The Guidance includes factors which relate to the role of an undertaking in the infringement, in particular any role as a leader in, or an instigator of, the infringement; and

(b) specific deterrence (to ensure the penalty imposed on an undertaking is sufficient to deter the undertaking from breaching competition law in the future).

2.4 If qualitative factors are introduced in Step 1 of the calculation, there is scope for the CMA to unduly increase the fine at various stages of the fine calculation on the basis of the same or similar assessments. Without objective criteria, this approach could lead

[4] *Draft CMA's guidance on the appropriate amount of penalty,* Consultation document, 2 July 2021 (***Consultation Document***), para. 1.6. Available at: 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.

[5] *Draft CMA's guidance on the appropriate amount of penalty,* 2 July 2021 (***Draft Guidance***), footnote 21. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/998277/CMAs_guidance_as_to_the_appropriate_amount_of_a_penalty__clean.pdf.

to inconsistency in the application of the Guidance and therefore runs counter to the CMA's objectives in terms of transparency and predictability.

2.5 *Second*, any fine imposed by the CMA must relate to conduct that has infringed the Chapter I and Chapter II prohibitions.[6] For the Chapter I prohibition to apply to an agreement, it must have been, or intended to have been, implemented in the UK.[7] Similarly, the Chapter II prohibition only applies where the business carrying out the anticompetitive conduct has a dominant position in the UK (or any part of it)[8].[9] This means that any fines imposed by the CMA should relate to the seriousness of the infringement of the CA98 – i.e. fines should relate to the effects of the anticompetitive conduct that occurred within the UK and thus be based on businesses' UK-generated turnover (and not turnover generated on the wider product and geographic market).

2.6 A separate, but related point is that the CMA's proposed change to take into account non-UK turnover risks double-counting where multiple competition authorities calculate their respective fines based on the same or overlapping turnover data. As a result, the CMA's proposal to take into account turnover generated in product and geographic markets outside the UK may result in undertakings being unfairly penalised with fines that are disproportionate to the effects of the anticompetitive conduct within the UK.

2.7 Whilst our preference is for the removal of this clarification in Step 1 of the Guidance, if the CMA seeks to maintain this ability, we encourage the CMA 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*."[10] For example, the Commission's guidelines for calculating fines contains a similar provision, but sets out more clearly how the Commission will account for an undertaking's turnover where the relevant market is wider than the EEA – i.e. it will "*determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned*."[11] In addition, the CMA should ensure that it does not increase fines at various stages of the calculation on the basis of the same or similar factors. The CMA should also be mindful that any fine it imposes should relate to conduct that the CMA has investigated under the CA98, meaning that it should only issue fines in relation to anticompetitive agreements that have been implemented (or were intended to be implemented) in the UK or anticompetitive conduct where a business has a dominant position in the UK. As a general principle, we encourage the CMA to cooperate with other competition authorities when determining fines for conduct which spans multiple jurisdictions and is the subject of parallel investigations.

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[6] Section 36(1) and (2) CA98.
[7] Section 2(3) CA98.
[8] Section 18(3) CA98.
[9] This response represents the current position under the CA98. We note BEIS' proposals in its consultation of 20 July 2021 to expand the territorial scope of the jurisdictional tests for the application of the Chapter I and Chapter II prohibitions under the CA98 (see paragraphs 1.147 to 1.150 of BEIS' consultation: *Reforming Competition and Consumer Policy* of 20 July 2021). We will respond separately to the questions raised in that consultation.
[10] Draft Guidance, footnote 21.
[11] Commission Guidelines, para. 18.

Step 3: Changes to the adjustment for mitigation factors

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

2.8 We are concerned by the removal of "genuine uncertainty" as a listed mitigating factor in the Guidance. We acknowledge that the new paragraph 2.18 of the Guidance indicates that the CMA retains some discretion to take into account genuine uncertainty "*in limited circumstances*" and that footnote 42 also recognises the relevance of the novelty of the infringement to the need for any uplift for deterrence at Step 4 and the proportionality assessment at Step 5 – these aspects are therefore welcome. However, we consider that the new paragraph 2.18 of the Guidance takes too narrow a view of the circumstances in which genuine uncertainty may arise.

2.9 We recognise that the consequence of: (i) the efforts of the CMA and its predecessors in raising awareness amongst businesses of the Chapter I and Chapter II prohibitions; and (ii) the increasing body of case law as to their meaning, is that the circumstances where infringements can be considered truly "novel" or where companies may have genuine uncertainty as to the lawfulness of their conduct is diminishing. However, it is widely acknowledged that authorities around the world, including in the UK, are testing new frontiers of competition law in order to address unique challenges – particularly with respect to digital markets, innovation and sustainability. For potential infringements outside the cartel context – in particular vertical conduct and abuse of dominance – we consider there to be substantial scope for genuine uncertainty on the part of an undertaking as to whether its behaviour infringes competition law. In our broad experience of advising clients on questions of competition compliance, we have encountered a range of issues where there is significant uncertainty that is not down to a misqualification of conduct as a matter of law. For certain types of vertical agreement, such as most-favoured nation clauses and exclusive distribution, there is substantial scope for efficiencies justifications and investigations will require a close look at the effects of the agreement. However, it is very challenging for companies to self-assess these agreements on a product-by-product basis. Indeed, developments in the dynamics of the online retail market have been highly relevant to both the Commission and the CMA's review of the (retained) Vertical Block Exemption Regulation. Similarly, in the case of abuse of dominance, in fast moving and multi-sided markets it can be very difficult for an undertaking to self-assess whether it is dominant in a market, let alone whether its particular conduct in that market could be considered to be abusive given that it is well established that the list of acts that may be considered abusive in section 18(2) CA98 is non-exhaustive.

2.10 We do see a distinction between 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 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.

Adequate steps having been taken with a view to ensuring compliance

2.11 We welcome the CMA's firm commitment to promoting improved levels of compliance with competition law among UK businesses.[12] However, we have concerns with the CMA's proposal to remove consideration of whether a business has taken adequate steps to ensure compliance with competition law as a mitigating factor when determining the appropriate level of fine for an infringement. As a general principle, we believe that there should be recognition of, and advantages for, those businesses who are invested in and commit to genuine competition law compliance, as opposed to those who are not.

2.12 The CMA's proposed change significantly diverges from the US Department of Justice's approach to "*recognize the efforts of companies that invest significantly in robust compliance programs*"[13] which is now widely regarded as international best practice. In our experience, many businesses that operate internationally model their compliance policies based on the US Department of Justice's guidance and more generally, welcome the recognition that many other antitrust authorities give to robust compliance programmes.

2.13 Relatedly, we are aware of many businesses that continue to invest considerably in comprehensive competition compliance programmes, in terms of time, effort and money, and such effort should not be underestimated by the CMA. These competition compliance programmes are often complex and operate by identifying and quantifying risks of breaching competition laws, followed by implementing practical controls to minimise the identified risk. Compliance programmes of this kind are dynamic – they are continuously monitored and evolve, accounting for events that are both internal and/or external to the business (e.g. new case law developments). In our experience most businesses want to conduct their businesses ethically and in compliance with competition law. In this respect, compliance is not solely about avoiding infringements, but is also aimed at creating a culture of doing business ethically and in compliance with all applicable laws, not just competition law. The impact of active and positive compliance is wider than just the company that initiates the compliance programme and permeates its trading relations with third parties, for example, suppliers, customers and other commercial partners, thereby promoting compliance beyond the business itself. There is a risk that failure to take into account these significant efforts made by businesses, essentially by removing the 'carrot' but maintaining the 'stick', will prove counter-productive for the CMA and have a potentially dampening effect on the effectiveness of such programmes: removing the incentive for business to go above and beyond or dedicate the necessary resource to implementing – and maintaining – effective and forward-looking compliance programmes. This may result in businesses doing the 'bare minimum' in terms of compliance, which in the long-term will be detrimental to both UK competition law and consumers. Conversely, recognising and rewarding good compliance will encourage further investment, increased dedicated resources, and continued efforts to enhance future compliance.

[12] Consultation Document, para. 4.12.
[13] Speech by Makan Delrahim, *Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs*, 11 July 2019. Available at: https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahimdelivers-remarks-new-york-university-school-l-0.

2.14 While removing any consideration of compliance policies as a mitigating factor in calculating fines aligns with the Commission's approach, it diverges from the more recent approach taken by the US Department of Justice as noted above. Domestically, this proposed change diverges from the approach taken by other UK regulators when calculating fines or determining sentences for breaches of other UK laws, who *do* consider that compliance programmes should carry some weight. For example:

(a) When the Financial Conduct Authority calculates fines for breaches of UK financial regulation, it may consider steps taken by a business "*to ensure that similar problems cannot arise in the future*"[14] as a mitigating factor. 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 "*the past, the present, and in some cases, even the future*" compliance programmes as *"a relevant factor for sentencing considerations*."[15] 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.[16]

(b) Ofcom's guidance on penalties for regulatory breaches includes as a relevant factor: "*Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention.*"[17]

(c) Ofgem's guidance on penalties for regulatory breaches includes as mitigating factors both: "*the extent to which the regulated person had taken steps to secure compliance either specifically or by maintaining an appropriate compliance policy, with effective management supervision*" and "*evidence that the regulated person has taken steps to review its compliance activities and change them as appropriate in the light of the events that led to the investigation at hand.*"[18]

2.15 In addition, introducing or improving existing competition law compliance programmes is often part of settlement discussions between a business and the CMA. As set out in Step 6 of the Guidance, settlement is indeed a factor that merits a reduction in an undertaking's penalty. We consider that even where a company has not admitted participation in an infringement by settling, evidence of an existing, robust compliance programme and an unequivocal commitment by a business to improve its competition law compliance programme should be considered as a relevant factor when calculating the business' fine.

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[14] FCA Handbook, *The Decision Procedure and Penalties manual*, para. 6.5A.3(2)(d). Available at: https://www.handbook.fca.org.uk/handbook/DEPP.pdf.

[15] Serious Fraud Office, *Evaluating a Compliance Programme*, January 2020. Available at: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/evaluating-a-compliance-programme/#_ftn4.

[16] Serious Fraud Office, *Deferred Prosecution Agreements*. Available at: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/.

[17] Ofcom, *Penalty guidelines*, 14 September 2017, para. 1.12. Available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf.

[18] Ofgem, *Statement of Policy with respect to Financial Penalties and Consumer Redress under the Gas Act 1986 and the Electricity Act 1989*, 6 November 2014, para. 5.17. Available at: https://www.ofgem.gov.uk/publications/statement-policy-respect-financial-penalties-and-consumer-redress.

2.16 We encourage the CMA to align with the US Department of Justice's and other UK regulators' approaches and give recognition to businesses that invest significantly in competition law compliance policies. Going further, we would encourage the CMA to issue further guidance, similar to the US Department of Justice's guidance around how it evaluates competition law compliance policies.[19] We see no benefit in the CMA's proposed change to remove competition law compliance policies as a mitigating factor in the guidance: we believe that the 2018 'CMA's guidance as to the appropriate amount of a penalty' (the ***2018 Guidance***)[20] already appropriately incentivises businesses to adopt (and continuously improve) competition compliance policies that are adequate and effective in preventing future breaches, and at the same time deters 'sham' compliance programmes and avoids rewarding failed compliance policies.

Step 4: Separate step for specific deterrence

2.17 We recognise that an uplift to a potential fine may be required to achieve the important objectives of specific and general deterrence and note the guidance given by the Competition Appeal Tribunal (*CAT*) in *Kier* that "*it is perfectly rational for a bigger undertaking to receive a more severe penalty than a smaller company, not just because its turnover in the market affected by the infringement is likely to be bigger, but also because the OFT is entitled to form the view that, 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*."[21] We also note that the CAT went on to say in its judgment in *Kier*: "*this does not mean that penalties should be precisely proportionate to the relative sizes of the undertakings on which they are imposed…it will not necessarily be fair or proportionate to impose on a bigger company a penalty which reflects the same proportion of its total worldwide turnover as a penalty imposed on a smaller company represents in relation to the latter's turnover*."[22]

2.18 We do, however, have some practical concerns around the CMA's proposals on specific deterrence.

2.19 *First* we are concerned that the CMA's proposed clarification at paragraph 2.20 gives rise to a risk of 'double counting', which may lead to unduly high fines being imposed on undertakings. The CMA's proposed clarification seeks to address a perceived need to "*impose a higher penalty on a larger undertaking than a smaller undertaking involved in the same infringement to achieve the required deterrent effect.*"[23] The proposed clarification focuses primarily on the relevant undertaking's "*specific size and financial position*".[24] While we agree an undertaking's size and financial position are relevant to the assessment of an appropriate potential fine, we note that the CMA's proposed clarification states that the CMA "*will generally take into account the*

[19] *U.S. Department of Justice Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust investigations*, July 2019. Available at: https://www.justice.gov/atr/page/file/1182001/download.
[20] *CMA's guidance on the appropriate amount of penalty,* 18 April 2018. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf.
[21] *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, para. 177.
[22] Ibid.
[23] Draft Guidance, para. 2.20.
[24] Ibid, para. 2.19.

undertaking's total worldwide turnover as the primary indicator of the size of the undertaking and its economic power".[25]

2.20 In our view, the CMA should not consider the same factor twice in the calculation of a potential fine. Given that the current draft Guidance allows the CMA to consider at Step 1 the turnover an undertaking generates outside the UK, where: (i) the 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, there is potential overlap between the turnover the CMA considers at Step 1, and the turnover the CMA considers at Step 4. The proposed clarification therefore gives rise to a risk that undertakings may face fines which are unduly increased at more than one step on the basis of the same or similar factors.

2.21 We note that the Commission's approach does recognise and address the need for sufficient deterrence, but its approach is framed much more narrowly than the CMA's proposals, focusing on: (i) "*undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates*";[26] and (ii) "*the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.*"[27]

2.22 *Second*, we are concerned that the CMA's proposal may lead to a narrow focus on specific and general deterrence independently of the other objective of the CMA's policy on financial penalties, namely to impose penalties on infringing undertakings "*which reflect the seriousness of the infringement*".[28] Paragraph 2.19 of the Guidance states: "*The CMA may increase the penalty reached after step 3 where this is appropriate in order to ensure that the penalty achieves deterrence given the undertaking's specific size and financial position, and any other relevant circumstances of the case*". In our view, there is a risk that this clarification could lead to the CMA imposing an uplift for deterrence which is based on an undertaking's total worldwide turnover as the exclusive consideration. The CMA should consider the twin objectives together, and ensure that any uplift for specific and general deterrence is linked to culpability, rather than displacing the assessment of culpability before Step 4 with an assessment of what is needed for specific and general deterrence primarily (or even exclusively) based on worldwide turnover. As the CAT noted in its judgment in *Eden Brown*: "*The objectives set out in para [1.4] of the Guidance are twin objectives and it is important that the one is not lost sight of in pursuit of the other*"[29] and "*Furthermore, in having regard to the need for deterrence, it is important not to lose sight of the need for the penalty properly to reflect also the culpability of the undertaking in terms of the seriousness, and hence the scale and effect of the infringement*."[30] The CMA should also have regard to the principle of proportionality as well as the important principle of equal treatment when calculating any fine, as recognised in proposed new footnote 20 of the Guidance. We are concerned that an excessive and independent focus on deterrence, assessed as currently proposed, may give rise to a breach of those principles.

[25] Draft Guidance, para. 2.20.
[26] Commission Guidelines, para. 30.
[27] Ibid, para. 31.
[28] Draft Guidance, para. 1.2.
[29] *Eden Brown v OFT*, para. 94.
[30] Ibid, para. 99.

2.23 *Third*, we note that in its judgment in *Kier*, the CAT said: "*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… For most companies profit and cash flow rather than turnover are the key issues, and companies are primarily valued by financial markets, and their directors remunerated, by reference to profit, cash flow and dividend, with turnover being a secondary consideration.*"[31]

2.24 The CMA's proposal to take into account "*the undertaking's total worldwide turnover as the primary indicator of the size of the undertaking and its economic power*"[32] (emphasis added) is not consistent with the CAT's guidance in *Kier*. The CMA proposes to remove from the Guidance indicators other than turnover as to an undertaking's size and financial position. The current wording states "*including, where they are available, total turnover, profitability (including profits after tax), net assets and dividends, liquidity and industry margins* (emphasis added) – *as well as any other relevant circumstances of the case.*"[33]

2.25 In this respect, we note the CAT's guidance in its judgment in *Eden Brown*: "*We do not suggest that worldwide turnover, as a measure of the total size of the undertaking, is irrelevant, or indeed that gross turnover should be disregarded altogether… However, other aspects of the undertaking's financial position, where reliable information is made available, should also be considered. We do not consider that it is appropriate to be prescriptive about this since the circumstances will vary from case to case, and even for individual undertakings in the same case. But such matters as the profit margin (both in the UK and world-wide) for the undertaking individually and the industry generally, and any unusual features of the year in question, may be relevant considerations.*"[34]

2.26 Given the potential significance of the assessment of size and financial position under the CMA's proposals, greater detail as to how the CMA will approach the assessment of an undertaking's size and financial position would be welcome. We do not understand why the factors to which the CMA has previously said it will have regard have been removed, particularly in light of the CAT's guidance in *Kier* and *Eden Brown*. We would encourage the CMA to provide greater clarity and transparency here.

2.27 *Fourth*, in relation to the CMA's proposed clarification at paragraph 2.21, we note the CMA's view that there may be circumstances where a potential fine is "*too low to achieve the object of deterrence in view of the undertaking's size and financial position*" (subject to our comments above). However, it is not clear from the Guidance in what circumstances the CMA will consider this to be the case, or what factors the CMA will take into account to determine (i) whether a fine is too low to achieve the desired objective of deterrence; and (ii) where the CMA considers a potential fine is too low, the appropriate quantum of an uplift for specific deterrence.

2.28 *Finally*, in relation to the CMA's proposed clarification at paragraph 2.22, we note the CMA's view that in principle "*any penalty imposed should also exceed an undertaking's likely gains from an infringement*". We are concerned that this could

[31] *Kier v OFT*, para. 171.
[32] Draft Guidance, para. 2.20.
[33] 2018 Guidance, para. 2.20.
[34] *Eden Brown v OFT*, para. 98.

have complex consequences for private enforcement (i.e. follow-on damages litigation) in terms of the status of any analysis of financial gains undertaken by the CMA for the purposes of fining. It would be helpful for the CMA to provide further guidance and clarification as to what it means by "*a material amount*",[35] and how it proposes to assess any economic or financial benefit an undertaking may have derived from an infringement. Quantifying an undertaking's gains from any infringement (whether for example avoided costs or overcharges to customers) can be very challenging and requires extensive economic modelling. As such, this could lead to undertakings on whom a fine is imposed facing a considerable additional evidential burden, in addition to the substantial burden on the CMA's resources to analyse this.

Step 5: Proportionality assessment and statutory cap

2.29 We agree that proportionality of a potential fine should be assessed "*in the round.*"[36] As a general point, while we consider that it is appropriate for the CMA to assess proportionality of a potential fine in the round after considering specific deterrence, we are mindful that proportionality should be a central consideration at every step of the CMA's decision-making in respect of fines. At the end of the process, the CMA should be asking, having considered all relevant individual circumstances of the infringing conduct and undertaking, whether the penalty is proportionate and achieves the CMA's policy objectives of general and specific deterrence and punishment. The CMA's proposed clarification states that the proportionality assessment is "*one of evaluation and judgment*".[37] We therefore welcome some clarity around the factors the CMA will take into account in carrying out the proportionality assessment. We note the Guidance focuses again on the undertaking's "*size and financial position*",[38] and refer to our comments above at paragraphs 2.23 to 2.26.

Step 6: Penalty discounts for redress payments

2.30 We appreciate that the CMA's clarification at paragraph 2.30 of the Guidance may incentivise businesses to make appropriate redress for an infringement, either within or outside the framework of the statutory voluntary redress scheme.

2.31 It would be useful for the CMA to provide further information as to how the CMA will approach and apply any reduction for redress for an infringement *outside* the framework of the statutory voluntary redress scheme: for example, what types of redress would be considered to merit a reduction and why, and how great would any reduction likely be?

Financial hardship

2.32 We welcome the CMA's clarifications regarding the circumstances in which the CMA will grant a reduction to a proposed penalty and/or enter into a 'time to pay' agreement. We also welcome the CMA's additional guidance regarding the evidence required for an undertaking to demonstrate that it merits such a reduction and/or any time to pay agreement.

[35] Draft Guidance, para. 2.22.
[36] Ibid.
[37] Ibid.
[38] Ibid, para. 2.19.

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

2.33 We have no comments on this tidying up proposal to avoid duplication.

EU Exit changes

2.34 We have no comments on the tidying up changes to remove references to statutory obligations and powers that have fallen away following the UK's withdrawal from the EU, subject to our comments above with respect to the additional changes in Step 1 and Step 4 and the likelihood of double jeopardy.

3. **Question for consideration: "Are there any other areas of the Current Guidance which you consider could be usefully clarified? Please explain which areas and why."**

3.1 As a general remark, the CMA's proposed changes to the Guidance are likely to allow the CMA to impose higher fines on undertakings (and in some cases to a very significant degree). As well as our comments above regarding individual steps in the calculation of a fine, we would encourage the CMA to consider the potential cumulative impact of the proposed changes, which in our view could lead to excessive fines being imposed on individual undertakings. At a time when companies are facing huge financial exposure in the private enforcement sphere (including individual follow-on damages actions and opt-out collective actions, and – often many times greater than regulatory fines) we are concerned that the CMA's proposed changes may risk in some cases over-enforcement of competition rules against individual companies.

Freshfields Bruckhaus Deringer LLP

30 July 2021