Bristows

Competition and Markets Authority (CMA) consultation

Draft revised guidance on the appropriate amount of a penalty

Response of Bristows LLP

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1. Introduction

1.1 Bristows LLP welcomes the opportunity to respond to the CMA's consultation document *Draft CMA's guidance on the appropriate amount of a penalty*[1] (**Consultation Document**) and the accompanying draft revised guidance (**Revised Guidance**). The comments set out below are those of Bristows LLP and should not be taken to represent the views of any of our individual clients.

1.2 We support the CMA's initiative to update the current guidance on penalties (**Current Guidance**) in the light of experience from past cases and in anticipation of the CMA's increased post-Brexit caseload. In particular, we welcome the following aspects of the Revised Guidance:

(i) the changes that are necessary to reflect the UK's withdrawal from the EU;

(ii) the removal of the duplicative material on the CMA's leniency programme;[2]

(iii) the replacement of the current Step 4 with two separate steps (adjustment for specific deterrence and proportionality). We agree that this will help to promote greater transparency and consistency in the CMA's application of these aspects of the framework;

(iv) the recognition of the possibility that a penalty may be reduced where an undertaking has made appropriate redress for an infringement other than under an approved statutory voluntary redress scheme;[3]

(v) the further guidance on the circumstances in which a penalty may be reduced on the basis of an undertaking's financial hardship; and the clarification that the CMA may enter into 'time to pay' agreements where appropriate.[4]

1.3 We do, however, have concerns about certain aspects of the Revised Guidance, as explained in section 2 below.

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[1] CMA73CON, 2 July 2021.

[2] Chapter 3 of the Current Guidance.

[3] Paragraph 2.30 of the Revised Guidance.

[4] Paragraph 2.34 of the Revised Guidance.

2. Areas of concern

The general tenor of the changes

2.1 We are concerned by the general tenor of the changes, which seem intended to push fines upwards. This intention is apparent from certain sections of the Consultation Document and is also reflected in the specific changes discussed below.

2.2 The CMA states in paragraph 1.6 of the Consultation Document that it has sought to ensure that the Revised Guidance achieves the twin statutory objectives of (i) imposing penalties that reflect the seriousness of the infringement and (ii) ensuring effective deterrence.[5] In paragraph 1.7, however, the focus is very much on deterrence and increasing the level of penalties:

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

2.3 Similarly, in its letter to the Secretary of State for Business, Energy and Industrial Strategy of 21 February 2019 outlining proposals for reform of the competition and consumer protection regimes[6], the CMA stated that:

> "*[…] competition law fines in the UK are well short of the statutory maximum, and are markedly lower than those imposed by the CMA's national counterparts in France, Germany, Spain and Italy […]. This weakens deterrence. The UK is not only one of the best jurisdictions for companies to defend a competition case; it is one of the best jurisdictions to lose one*."[7]
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> *"Both the guidance [on penalties] and the CAT's scrutiny of the CMA's decisions taken with reference to that guidance, need to be examined together, if an increase in fines – and the improvement in deterrence that can come with it – is to be secured*."[8]

[5] The statutory objectives are set out in section 36(7A) of the Competition Act 1998.

[6] Available at https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy.

[7] Page 39 of the letter. We note that the CMA's existing framework already enables it to issue very high fines in some cases. In the recent *Hydrocortisone* case, for example, the CMA imposed fines totalling over £260 million. See https://www.gov.uk/government/news/cma-finds-drug-companies-overcharged-nhs.

[8] Page 40 of the letter. As an aside, it is unclear what is the basis for the CMA's assumption that the current level of fines is not having a sufficient deterrent effect. The CMA's caseload does not suggest that specific deterrence (i.e. deterring the company under investigation from engaging in future anti-competitive activity) is an issue: we are not aware of any repeat infringers within the UK (at least where the time periods do not overlap – cf. Advanz Pharma).

2.4 We appreciate that the CMA may need to issue higher fines in some cases following the UK's withdrawal from the EU, and particularly in certain cases involving large, multinational companies. However, we urge the CMA to reconsider whether the Revised Guidance as a whole, and the specific changes discussed below, strike the right balance between the need to ensure effective deterrence and the need to ensure that penalties reflect the seriousness of the infringement. The Competition Appeal Tribunal (**CAT**) held in *Kier Group plc and others v Office of Fair Trading*:

> "*It is a cardinal principle that the ultimate penalty imposed must satisfy the requirements of proportionality. Whilst deterrence is a relevant consideration when assessing proportionality in this context, so equally is the culpability of the offender/seriousness of the offence. If these two considerations pull in different directions, a fair balance should be sought. Where a provisional penalty at Step 1 is deemed insufficient for the purpose of deterrence (or for that matter does not properly reflect the seriousness of the offence) it is proper to increase it. But the culpability consideration must not be lost to view, and it may well impose some limit on the extent of any increase based purely on deterrence. Ultimately the question will be: is the final penalty reasonable and proportionate having regard to the twin objectives set out in paragraph 1.4 of the Guidance? […]*"[9]

2.5 The above paragraph from the *Kier* judgment makes clear that deterrence and seriousness can sometimes pull in opposite directions, and that in such cases it is important to strike a fair balance. In view of this, we suggest that the CMA considers making the changes relating to deterrence more clearly applicable only to larger companies.

Step 3 - Changes to the adjustment for mitigating factors

Genuine uncertainty as to whether the agreement or conduct constituted an infringement / novelty of an infringement

2.6 We do not object to the removal from the list of mitigating factors "*genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement*". The CMA's decisional practice shows that reductions for genuine uncertainty are rare, and it is appropriate that the Revised Guidance reflects this. It is also helpful that footnote 43 of the Revised Guidance clarifies that the 'novelty of the infringement' factor may also be relevant to the assessment at Step 4 (specific deterrence) or Step 5 (proportionality). However, we make the following observations on paragraph 2.18 of the Revised Guidance:

(i) We are unconvinced by the distinction that the CMA seeks to draw in the last sentence of paragraph 2.18. It is difficult to think of many situations where the legal characterisation of the infringement is "truly novel". It may be preferable to replace the last sentence with something like: "*A reduction may also be merited in situations where the type of infringement in question is novel in the sense of having not*

[9] *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, paragraph 175. See also *Eden Brown Limited v Office of Fair Trading* [2011] CAT 8, paragraph 94: "*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*."

previously been found to constitute an infringement by a competition authority or court".[10] If the CMA nevertheless decides to retain the last sentence of paragraph 2.18, it would be helpful to include examples of situations where the legal characterisation of the infringement has been "truly novel".

(ii) It could be clarified in paragraph 2.18 that the question of whether an infringement is novel is assessed in relation to the time when the infringement was committed, not the time of the decision.

(iii) The reference in footnote 42 to the CMA's decision in the estate and lettings agents case is not particularly helpful, as the relevant paragraph of that decision (6.40) does not shed any light on the specific circumstances that created genuine uncertainty in that case. A more useful reference would be the CMA's decision in the cleanroom laundry services and products case[11]: paragraphs 6.65 - 6.71 of that decision set out in detail the circumstances that gave rise to genuine uncertainty in that case.

Removal of compliance activities as a mitigating factor

2.7 We strongly object to the proposal to remove compliance activities as a mitigating factor, for the following reasons.

(i) The CMA suggests in paragraph 4.13 of the Consultation Document that the competition rules are "*nowadays very well embedded and should be widely understood*". This ignores the reality that competition law remains poorly understood by the majority of UK businesses. A recent report published by the CMA[12], 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.[13] Against this background, 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.

[10] This approach would be more consistent with the European Commission's recent decisional practice. For example, whilst the full decision is not yet available, the Commission's press release relating to the recent decision against Daimler, BMW and Volkswagen makes clear that an "*additional reduction [to the level of fines] was applied for all parties given that this is the first cartel prohibition decision based solely on a restriction of technical development and not on price fixing, market sharing or customer allocation*". See https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3581.

[11] Case 50283 *Cleanroom laundry services and products*, CMA decision of 14 December 2017.

[12] IFF Research, Competition Law Quantitative Research Report, published 14 July 2021. Available at https://www.gov.uk/government/publications/competition-law-quantitative-research?utm_medium=email&utm_campaign=govuk-notifications&utm_source=f8cfc828-b472-4028-a317-7016857fc743&utm_content=immediately.

[13] The report also found that: (i) senior management tend to focus compliance on health and safety and employment law; and (ii) relative to other topics, senior-level discussions about competition law remain relatively uncommon, with only a fifth having discussed their compliance with legal requirements in the last year.

(ii) The CAT has recognised that the availability of a reduction for introducing a post-infringement compliance programme can have a positive impact. For example, it held in *Kier Group plc and others v Office of Fair Trading* that "*[t]he reasons for a discount are obvious: it serves as an inducement to infringers to take appropriate steps to avoid infringing in the future, and reflects the mitigating circumstance that the infringer intends not to do so*".[14]

Step 4 – Specific deterrence

2.8 We have reservations about the CMA's proposal that, in order to achieve effective deterrence, a penalty should normally materially exceed the level of any financial benefit derived from the infringement.[15] This has the potential to raise the same kinds of factual and evidential issues that typically need to be assessed in a damages enquiry. It also overlooks the fact that a penalty is not meant to be compensatory. Moreover, as a practical matter, it will be very difficult, if not impossible, to calculate the financial benefit derived from the infringement in many cases. The CMA's assessment of the financial benefit is likely to be contentious in a large number of cases, increasing the prospect of penalty decisions being appealed.

2.9 Footnote 46 of the Revised Guidance states: "*If the penalty imposed on an undertaking which infringes competition law only neutralises the gains made (i.e. puts the undertaking in the same position as it would have been absent the infringement) there is little economic incentive for the undertaking not to infringe competition law as it has the potential to gain without the risk of any material losses, even if the undertaking is caught and sanctioned*." This ignores the other significant implications of infringing competition law, including reputational harm (and associated effects such as reduced ability to participate in tenders, increased insurance premiums, etc), the risk of follow-on damages actions and the risk of director disqualification.

3. Other aspects of the Guidance that could usefully be clarified

Step 1 – percentage starting point

3.1 Paragraph 2.5 of the Revised Guidance continues to draw a distinction between: (i) "*non-cartel object infringements which are inherently likely to cause harm to competition*" (which would generally attract a starting point of 21-30%); and (ii) "*certain, less serious object infringements*" (which would generally attract a starting point of 10-20%). It would be helpful if the Revised Guidance provided further detail on the distinction between these two categories, together with examples of infringements that might fall within each category, based on the CMA's recent decisional practice.

3.2 In particular, it would be useful if the Revised Guidance clarified where resale price maintenance (**RPM**) fits within the CMA's categorisation. Footnote 26 of the Revised

[14] *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, paragraph 217. See also *Eden Brown Limited v Office of Fair Trading* [2011] CAT 8, paragraph 127: "*The availability of a modest reduction for introducing a compliance programme is sufficient to encourage an undertaking to take prompt steps to do so […]*".

[15] Paragraph 4.18 of the Consultation Document; paragraph 2.22 of the Revised Guidance.

Guidance refers to the definition of 'cartel activities' in paragraph 2.2 of the CMA's guidance *Applications for leniency and no-action in cartel cases* (OFT1495). That definition covers arrangements involving "*price-fixing (including resale price maintenance)*". This implies that the CMA considers RPM to be one of "*the most serious types of infringement*"[16], which generally attract a starting point of 21-30%.

3.3 However, this is at odds with the CMA's recent decisional practice. In its Roland musical instruments decision, for example, the CMA stated that RPM is "*generally less serious than horizontal price-fixing, market-sharing and other cartel activities*" and applied a 19% starting point.[17] Similarly, in its RPM decisions in *Light Fittings*, *Bathroom Fittings*, and *Commercial Refrigeration*, the CMA applied starting points of 18-19%.[18] We see no basis for putting RPM in the same category as horizontal price-fixing and therefore consider that the Revised Guidance should make clear that RPM will typically attract a lower starting point than 21-30%.

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[16] Paragraph 2.5 (first bullet point) of the Revised Guidance.

[17] Case 50565-5 *Online resale price maintenance in the electronic drum sector*, CMA decision of 22 July 2020, paragraphs 5.26 and 5.28. See also Case 50565-3 *Online resale price maintenance in the guitar sector*, CMA decision of 22 January 2020, paragraphs 5.27 and 5.29.

[18] Case 50343 *Online resale price maintenance in the light fittings sector*, CMA decision of 3 May 2017, paragraphs 5.24-5.27; Case CE/9857-14 *Online resale price maintenance in the bathroom fittings sector*, CMA decision of 10 May 2016, paragraphs 7.27-7.30; and Case CE/9856-14 *Online resale price maintenance in the commercial refrigeration sector*, CMA decision of 24 May 2016, paragraphs 7.30-7.33.