Response to CMA consultation on draft revised guidance on the appropriate amount of a penalty – July 2021

1. INTRODUCTION

1.1 Van Bael & Bellis ("**VBB**") welcomes the opportunity to comment on the Competition and Markets Authority's (the "**CMA**") public consultation on its draft revised guidance on the appropriate amount of a penalty (the "**Draft Revised Guidance**"), which is intended to update the version of this guidance that the CMA published in April 2018 (the "**Current Guidance**"). We comment in our capacity as an international law firm, on behalf of the firm and no individual client.

1.2 As a preliminary point, we welcome the fact that the CMA is updating this guidance document in order to take account of recent developments. Clear and relevant guidance regarding the CMA's approach to these matters is essential, for undertakings and legal advisors alike. In particular, it is in our view also important to ensure that the CMA's guidance on penalties is consistent with its goal of deterring clearly harmful conduct and promoting effective competition law compliance (but without creating a disincentive for undertakings to engage in conduct that generates efficiencies, and therefore benefits consumers).

1.3 Generally speaking, we consider that the amendments proposed by the CMA in its Draft Revised Guidance are both sensible and appropriate.

1.4 However, in our view two particular proposals in the Draft Revised Guidance may benefit from further consideration (and/or amendment) prior to final publication – in order to ensure that such guidance is of maximum value to undertakings, legal advisors and indeed the CMA itself. These are as follows:

(i) The CMA's proposal to (a) remove, from the non-exhaustive list of potential mitigating factors identified at Step 3 of the Current Guidance, genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement; and (b) clarify, in the Draft Revised Guidance, that there are only very limited circumstances in which a discount could be merited on such a basis by an undertaking that was found to have committed an infringement intentionally or negligently (whilst still allowing for the possibility that such discount may be merited in circumstances where the legal characterisation of the infringement is truly novel) (the "**Genuine Uncertainty Proposal**");[1] and

(ii) The CMA's proposed removal, from the non-exhaustive list of potential mitigating factors identified at Step 3 of the Current Guidance, of adequate steps having been taken with a view to ensuring compliance (the "**Compliance Proposal**").[2]

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[1] As explained in more detail at paragraphs 4.9 to 4.11 of the consultation document accompanying the Draft Revised Guidance (the "**Consultation Document**").

[2] As explained in more detail at paragraphs 4.12 to 4.14 of the Consultation Document.

1.5 The remainder of this consultation response outlines in further detail our initial observations in relation to each of these specific proposals.

2. THE GENUINE UNCERTAINTY PROPOSAL

2.1 Under the Current Guidance, the non-exhaustive list of potential mitigating factors includes the concept of genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement.

2.2 At paragraph 4.9 of the Consultation Document, the CMA notes that it considers that there are only very limited circumstances in which there might be genuine uncertainty (as contemplated in the Current Guidance) deserving a discount on the part of an undertaking that was found to have committed an infringement intentionally or negligently – for example, the CMA considers that such a discount would not be applied to an undertaking simply because it (or its professional advisors) mischaracterised the infringing conduct in law. The CMA further considers that its position is supported by its decisional practice (in which such reductions are rare, and generally relate to very specific factual circumstances).

2.3 Thus, the CMA is concerned that the Current Guidance fails to convey the fact that this mitigating factor will apply only in very limited circumstances – and, on this basis, the CMA has formulated the Genuine Uncertainty Proposal.

2.4 Against that background, we do not in principle disagree with the Genuine Uncertainty Proposal (and we welcome that the CMA still intends to view allow for the possibility that a discount may be merited in circumstances where the legal characterisation of the infringement is truly novel).

2.5 However, and in order to assist the CMA, we would note the following points:

(i) It is well-established that the CMA – consistent with other influential competition authorities such as the European Commission – generally promotes an effects-based approach in competition law cases (i.e., an analytical framework that relies on key economic concepts such as market power, consumer welfare, and efficiencies). In our view, such approach must not be limited to the substantive analysis of a case; in other words, to be optimally effective the same principles must also inform the CMA's approach to penalties.

(ii) However, it is important to recognise that the application of such approach should differ as between hard-core cartel cases (which is highly unlikely to necessitate the balancing of plausible efficiency claims against *prima facie* restrictions of competition) on the one hand, and single-firm conduct cases on the other (as well as, for example, vertical agreements and horizontal cooperation agreements). More specifically, as hard-core cartels are widely understood to be the most serious type of competition law infringements (not least because they almost invariably cause harmful effects, without giving rise to any appreciable countervailing benefits), it follows that (a) competition authorities should impose high fines on undertakings engaged in such conduct (including to ensure effective deterrence); and (b) the relevant undertaking(s) should be well aware that such conduct is very likely to be categorised as an infringement (i.e., there should be no uncertainty/novelty). Conversely, in single-firm conduct cases (for example) the analysis is far less straightforward (for undertakings, experienced legal advisors and sophisticated competition authorities alike), in particular because many potentially exclusionary practices have inter-temporal effects that are very difficult to assess (and, in many cases, it is not at all obvious that an undertaking enjoys single-firm "dominance"). For example, practices such as tying, predation and loyalty rebates may initially benefit consumers, and may only become harmful if they ultimately lead to anticompetitive foreclosure (i.e., if they eventually cause competitors to exit the market or reduce capacity, thereby enabling the dominant firm to restrict output and increase price, to the long-term detriment of consumers), which is generally much less certain when the

undertakings are engaging in the relevant conduct (and even during a competition authority's investigation). This trade-off between concrete and appreciable efficiencies and more speculative possible harm is particularly characteristic of cases in the digital space (as well as for pharmaceuticals, and other scalable industries), where all undertakings – including those that arguably hold a dominant position – regularly develop innovative (and sometimes experimental) products and services practices to attract consumers. In this sector, the pace of innovation can also radically alter the market structure – meaning that the alleged anticompetitive effects of the conduct at issue might never materialise. As such, in single-firm conduct cases it is entirely possible that an undertaking may genuinely not know – at the time that it implements a particular practice – that such practice may in the future be found to violate competition law (and, indeed, the undertaking's intentions may well be benign and focused on the efficiencies its conduct is likely to create). .

(iii) Moreover, penalties are not – and should not be seen as – a "trophy" for competition authorities. Rather, penalties are a tool that should, if properly designed, deter future anticompetitive conduct (whilst remaining mindful of our relatively more limited understanding of certain types of markets). In particular, poorly developed and/or wrongly applied principles in the penalties phase of a single-firm conduct case risk undermining some of the (many) benefits that the effects-based approach is intended to bring about – and the same point would in our view apply equally to distribution networks, and the necessity of collaboration in order to tackle. For example, the imposition of inappropriate fines and/or the application of insufficient weight to potential mitigating factors such as genuine novelty/uncertainty in such cases (especially where the categorisation of the relevant conduct requires a highly complex and often uncertain legal and/or economic assessment) may well deter (a) experimentation/innovation; (b) the establishment of new business models; and even (c) the development of new products and services (each of which can result in enormous benefits to consumers).

(iv) In this context, as a general point we consider that the Draft Revised Guidance should more rigorously reflect the effects-based approach outlined above, which – combined with a more explicit acknowledgment of the relatively limited ability (even of experienced legal advisors and sophisticated competition authorities such as the CMA) to understand future market developments and the potential for mistakes – would, over time, likely lead to a more proportionate and nuanced penalties regime (particularly in single-firm conduct cases) that does not disincentivise undertakings from engaging in efficiency-enhancing conduct in the future.

(v) Specifically in relation to the CMA's suggested clarificatory wording regarding the Genuine Uncertainty Proposal, and in single-firm conduct cases in particular, we would encourage the CMA to include within such assessment a (detailed) consideration of the following three points: (a) whether the CMA has a reasonable explanation as to why a particular example of conduct has led to (substantial) consumer harm; (b) whether the relevant competition law rules were sufficiently clear when the alleged conduct was planned and implemented, such that the undertaking in question (and/or its legal advisors) could reasonably foresee a possible violation – or whether the categorisation of such conduct as a competition law infringement should more appropriately be considered to be novel (and therefore potentially worthy of inclusion as a mitigating factor); and (c) whether the CMA's decision can describe the infringing conduct with sufficient precision – in order to amplify the potential deterrent effect of the decision, such that other undertakings will, in the future, be discouraged from engaging in similarly inefficient conduct and are not deterred from participating vigorously in practices that are not deemed harmful to the market (not least because the level of effective deterrence may ultimately depend on the ability of undertakings to clearly and

unambiguously anticipate the (potential) unlawfulness of their conduct). Indeed, it may be even more beneficial if the CMA were to explicitly recognise these considerations in the Draft Revised Guidance.

2.6 On a related note, and whilst not the specific focus of this response, CMA may wish to consider whether the considerations outlined above should also be reflected in other parts of the Draft Revised Guidance. For example, in circumstances where (a) there is genuine uncertainty on the part of the undertaking(s) engaged in the relevant conduct as to whether it constitutes an infringement; and (b) the CMA considers that, on average, the scale of harm caused by the type of conduct under investigation is typically very low (and may perhaps even be outweighed by the pro-competitive efficiencies generated by such conduct, for example in certain types of single-firm conduct cases), in order to avoid creating a real risk of deterring actions which may (at worst) be benign it may well be appropriate for the CMA to apply – at Step 1 of the financial penalty calculation method outlined in the Draft Revised Guidance – a lower percentage of turnover (or even zero) as a starting point.

3. THE COMPLIANCE PROPOSAL

3.1 Under the Current Guidance, the CMA may apply a discount of up to 10% of the penalty imposed on an undertaking where (i) evidence is presented of that undertaking's compliance activities; and (ii) in the CMA's view, the steps taken by the undertaking merit a reduction in the penalty.

3.2 At paragraphs 4.13 to 4.14 of the Consultation Document, the CMA (i) considers that the mere existence of a compliance policy should not be deemed a mitigating factor which may justify a lower penalty than would otherwise be applied; and (ii) accordingly puts forward the Compliance Proposal.

3.2 In support of the Compliance Proposal, the CMA further notes that (i) it is a legal obligation of businesses (even small ones) to respect competition rules which are now very well embedded and should be widely understood; (ii) it expects that businesses should, as a matter of course, take steps to ensure they comply with competition law; and (iii) in any event, the specific deterrent effect of an infringement finding and any related penalty (provided that the penalty is sufficient to achieve deterrence) should incentivise an undertaking to take appropriate compliance steps for the future.[3]

3.3 Against that background, and in order to assist the CMA, we would note the following points:

(i) It is crucial that the CMA continues to (explicitly) recognise the value and benefit of appropriate encouragement of genuine compliance activities, since a failure to do so may result in an appreciable "chilling" of incentives for undertakings to engage in such activities. In other words, in circumstances where a properly implemented and maintained compliance policy will (continue to) potentially result in an appreciable discount from a CMA penalty, in-house compliance departments will find it extremely difficult to justify (especially to the Board of Directors, or other relevant supervisory function(s)) the absence of such comprehensive policy.

(ii) More specifically, we agree with the CMA that the primary goal (and reward) of effective competition law compliance should be the prevention or avoidance of a competition law infringement occurring in the first place, since this results in both (a) no harm to consumers; and (b) no enforcement costs for competition authorities. Thus, although compliance efforts may not always entirely succeed, if encouraging these efforts ultimately results in even one fewer competition law infringement (for example, one fewer cartel being formed) then it should in overall economic terms be viewed as a success. Moreover, the implementation or enhancement of robust compliance activities by just one or two

[3] Consultation Document, at paragraph 4.13.

undertakings in a particular industry can often encourage a number of other undertakings in the same industry to undertake similar compliance efforts – thus potentially resulting in a "cascade" effect, which can significantly amplify the overall compliance benefit to that industry (and ultimately consumers). Indeed, even one truly compliant player can effectively "police" its peers (i.e., competitors, suppliers and customers) by intervening early and highlighting that certain practices may attract competition law scrutiny – thereby creating a "virtuous" business environment where a number of potentially anticompetitive practices are reconsidered at a very early stage, resulting in a significant overall compliance benefit. In this context, there is in our view a very clear and compelling incentive for influential competition authorities such as the CMA to (continue) to encourage – and in appropriate circumstances reward – genuine and robust compliance activities.

(iii) In addition, as currently drafted the Compliance Proposal may also ultimately have the (presumably unintended) effect of essentially "penalising" undertakings that engage in genuine and robust compliance activities in good faith – and potentially disincentivising such undertakings from renewing those efforts in the future. By way of example, under the Compliance Proposal it appears that – regardless of the circumstances – there would be no obvious distinction between (a) a scenario where, although an undertaking has fostered and maintained a genuine and robust compliance culture, a "rogue" employee of such undertaking (acting alone, and in breach of clear internal compliance guidelines) has committed a competition law infringement – where, in our view, it would likely be appropriate to (continue to) offer that undertaking a discount to its fine; and (b) a starkly contrasting scenario where, for example, the undertaking may have a less robust (and less well-maintained) compliance culture and/or the conduct contributing to the infringement is more widespread amongst such undertaking's employees – and where it is therefore far less likely that a discount on the basis of compliance activities would be appropriate. Indeed, a more extreme (albeit entirely plausible and foreseeable) consequence of the Compliance Proposal as currently drafted would be where – despite being penalised for a competition law infringement – an undertaking either (a) does not subsequently introduce a competition compliance policy (and in fact begins to actively take steps to avoid further detection); or (b) introduces such policy, but only really pays (external) lip-service to it (i.e., whilst such undertaking's senior management highlights the importance of not being detected, rather than focusing instead on fostering a genuine and robust competition compliance culture).

(iv) We do not disagree that undertakings should, as a matter of course, take steps to ensure that they comply with competition law, and nor do we consider that the mere existence of compliance activities should – in and of itself – be recognised as a potential mitigating factor. However, we nevertheless consider that – since there is no "one size fits all" approach to compliance – for smaller undertakings even modest compliance activities may represent a substantial commitment (of time, cost and resources) towards achieving a robust compliance culture. In this context, and further to our overall view (as outlined below) that the CMA should reconsider the Compliance Proposal and reinstate the wording from the Current Guidance in this regard, we also consider that the "appropriateness" of compliance activities should continue to be assessed relative to the size of the undertaking in question (as already contemplated by the Current Guidance).

3.4 In light of the above, and notwithstanding that the Draft Revised Guidance acknowledges that the list of potential mitigating factors is non-exhaustive, we would encourage the CMA to (a) reconsider the Compliance Proposal; and in particular (b) reinstate, in its entirety, the wording from the Current Guidance in this regard – such that the taking of adequate steps by an undertaking with a view to ensuring compliance continues to be (explicitly) recognised as a potential mitigating factor.

Continuing to adopt this approach – and, in particular, continuing to (explicitly) recognise the value and benefit of genuine and robust compliance activities in this specific context – would also be consistent with the current practice and policy of other leading competition authorities, including for example the US Department of Justice.[4] To that end, and in order to assist undertakings in ensuring that the design and implementation of their competition compliance policies is as effective as possible, we consider that it would be especially helpful if the CMA were to provide more detailed guidance to undertakings as regards the CMA's view of the requirements of a truly effective competition compliance policy. To the extent that the CMA is minded to take forward this proposal, we would be delighted to participate and share our experiences and views in this regard.

3.5 Moreover, and whilst we do not in principle disagree with the CMA's view that competition law rules are generally now well embedded (and should therefore be widely understood by undertakings), there may be circumstances where the legal characterisation of particular conduct as an infringement of competition law is truly novel (such that there is genuine uncertainty on the part of the undertaking in question as to whether the conduct in fact constituted an infringement).[5] In such circumstances, the Draft Revised Guidance should in our view take into account – within the overall compliance-related potential mitigating factor (if reinstated to reflect the wording of the Current Guidance, per our above suggestion) – actions taken by undertakings to review their (potentially already very comprehensive) compliance activities in light of the CMA's investigation (e.g., ensuring that compliance materials are updated to reflect that the (genuinely novel) conduct constitutes an infringement, and that all relevant staff receive appropriate compliance training to that effect). For the reasons outlined above, doing otherwise may ultimately have the (highly undesirable) effect of disincentivising competition law compliance – not only in relation to the particular undertaking(s) in question, but potentially also other undertakings in the same or similar industries.

4. CONCLUDING REMARKS

4.1 We appreciate the opportunity to respond to this consultation. Should it be helpful, we would be happy to explore further with the CMA any of the matters discussed in this response.

VAN BAEL & BELLIS

28 JULY 2021

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[4] See, for example, the US Department of Justice Antitrust Division's July 2019 guidance document entitled *"Evaluation of Compliance Programs in Criminal Antitrust Investigations"*.

[5] For further details, please refer to our comments on the Genuine Uncertainty Proposal.