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CMA CONSULTATION ON DRAFT REVISED GUIDANCE ON THE APPROPRIATE AMOUNT OF A PENALTY

RESPONSE OF ASHURST LLP

Introduction

Ashurst LLP welcomes the opportunity to respond to the consultation by the Competition and Markets Authority ("**CMA**") on its draft revised guidance on the appropriate amount of a penalty (2 July 2021) (the "**Draft Revised Guidance**"). This response contains our own views, based on our experience of advising and representing clients involved in CMA competition investigations, and is not made on behalf of any of our clients.

We confirm that nothing in this response is confidential. We also confirm that we would be happy to be contacted by the CMA in relation to our responses.

1. **Do you agree with the proposed changes set out in chapter 4? Please give reasons for your views.**

Introductory comments

1.1 We welcome the CMA's stated goal of ensuring the guidance leads to appropriate penalties being set in a fair, consistent, predictable and transparent manner. We agree with most of the proposed changes set out in chapter 4 of the consultation document. However, as explained further below, we have some concerns and we would also welcome further clarification on a number of sections of the Draft Revised Guidance.

Step 1 – clarification in the determination of relevant turnover

1.2 We are concerned by the proposed amendment to footnote 29 of the Draft Revised Guidance which suggests that the CMA can take into account turnover generated outside the relevant product market in the UK where the affected product or geographic market is wider. This will increase the complexity of investigations and the CMA's analysis of the appropriate geographic market definition, as parties are likely to make additional submissions on this in cases where it would not previously have been a relevant consideration.

1.3 We believe this proposal could also lead to disproportionate penalties being imposed, particularly as the CMA has amended the Draft Revised Guidance to remove the requirement for it to take into account penalties imposed in other jurisdictions for the same conduct, and it would increase the complexity of investigations as geographic market definition will become increasingly important.

1.4 Where an undertaking's UK turnover is artificially low or zero as a result of a market-sharing agreement, an undertaking's turnover on the relevant product market in the UK may not accurately reflect its participation in the infringement. However, turnover generated outside the relevant product market in the UK will not reflect the impact of the infringement and is not an appropriate proxy for the turnover which would have been generated on the relevant product market in the UK but for the infringement. In these limited circumstances, the CMA

could instead consider any value transfer the undertaking allegedly received from the market-sharing agreement.

1.5 In addition, the CMA has the ability under paragraph 2.23 at step 4 to "*make more significant adjustments, both for general and specific deterrence*" where the undertaking's relevant turnover is very low or zero at the end of step 3 therefore there is no need for the CMA to expand the turnover it considers at step 1.

Step 3 – changes to the adjustment for mitigating factors

1.6 In our view, compliance programmes should continue to be recognised as a mitigating factor. Removing the CMA's ability to offer discounts for effective compliance programmes as a mitigating factor is contrary to the approach of an increasing number of competition authorities globally (including, those in Australia, Brazil, Canada, Germany, Italy, the Netherlands, Singapore, Spain and the USA) which are able to recognise the importance of compliance programmes and factor these into their assessment of penalties. Indeed, in 2019 the US Department of Justice amended its guidance to give weight to effective compliance programmes when determining whether to charge an undertaking with an alleged breach of competition law.

1.7 While a desire to comply with the law and the deterrence effect of penalties will incentivise firms to take measures to avoid competition law breaches, compliance programmes are increasingly sophisticated, costly and complex. This coupled with an increasing number of regulations and penalties creates significant competition for limited compliance resources within organisations. Allowing for the possibility of a discount for an effective compliance programme will help in-house legal teams to secure resources to create or maintain competition law compliance programmes. In 2020, the In-house Competition Lawyers Association (the "**ICLA**") carried out a survey of in-house lawyers' compliance activities which is summarised in the Business at OECD (BIAC) note on competition compliance programmes dated 8 June 2021 for Working Party No. 3 on Co-operation and Enforcement B.[1] 82% of respondents to the ICLA's survey believe that offering the possibility of discounts for effective compliance programmes would result in higher investment in compliance programmes.[2]

1.8 No compliance programme however well-designed, maintained and enforced can stop all infringements. The role of compliance programmes is to instil a culture of doing business in compliance with applicable laws which helps facilitate early detection of misconduct and can prevent or bring an early end to any non-compliance with competition laws.

1.9 As compliance programmes facilitate early detection of misconduct, we believe it is worth continuing to incentivise companies to implement and maintain effective competition law compliance programmes.

Step 4 – separate step for specific deterrence

1.10 We welcome the CMA's proposal to replace the current step 4 with two steps to consider the need for any adjustment for specific deterrence and proportionality separately. However, it is vital that the CMA provide further guidance on the factors which the CMA will consider as part of step 4 when considering whether an uplift is appropriate.

1.11 In paragraph 2.19 of the Draft Revised Guidance, the CMA states that it will have regard to an undertaking's size and financial position and "any other relevant circumstances of the case". While it may be reasonable for larger undertakings to receive a more severe penalty if this is necessary to produce the desired deterrent effect,[3] many cases will require a more

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1 Available at: https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)25/en/pdf.

2 Ibid, paragraph 24.

3 Footnote 26 of the CMA's consultation on the Draft Revised Guidance.

nuanced analysis. For example, where the infringing entity is part of (or subsequently acquired by) a larger entity, using the overall undertaking's size to assess whether an uplift is required for specific deterrence may result in a penalty which does not reflect the severity or impact of the infringement in question.

1.12 The uplifted penalty must relate to the infringement[4] and not simply to the size of a parent entity which may not be actively involved in the day-to-day management of the infringing entity or even active on the relevant product market. It would therefore be helpful for the CMA to provide a list of relevant factors which may lead the CMA to consider an uplift to be necessary in the circumstances of the particular case.

1.13 To ensure transparency, we also believe that the CMA should specify in the Draft Revised Guidance that it will provide a reasoned rationale for any uplift applied at step 4.

Step 5 – proportionality assessment and statutory cap

1.14 As set out above in relation to step 4, we agree with the CMA's proposed approach to consider proportionality separately as a final step in the penalty-setting process. While we appreciate that the proportionality assessment is "one of evaluation and judgement" of the particular case, it would be beneficial for the CMA to provide greater insight on the factors and process for this evaluation in order to promote transparency and consistency in the CMA's decisional practice.

1.15 In addition to the factors set out in paragraph 2.23 of the Draft Revised Guidance, we submit that the CMA should have regard to (a) the size of the affected market, (b) the undertaking's market share and role on the affected market and (c) any mitigating factors.

1.16 It is unclear from the Draft Revised Guidance whether the CMA could increase a proposed penalty at step 5. The amendments to paragraph 2.23 in step 5 of the Draft Revised Guidance introduce the concept of general deterrence which has already been factored in to the penalty-setting process at step 1 (paragraph 2.3 of the Draft Revised Guidance), which could suggest the CMA may consider an additional uplift at this stage. As the need for any uplift for deterrence has been considered earlier in the penalty-setting process (general deterrence at step 1 and specific deterrence at step 4), the CMA should make clear that no further uplift will be applied at step 5.

<u>Double jeopardy and penalties for related infringements</u>

1.17 We recognise that the CMA is no longer required to take into account any penalty imposed by the European Commission or national competition authority for the same conduct. However, for infringements involving cross-border conduct, we submit that it would still be proportionate and appropriate for the CMA to consider penalties imposed by competition authorities within the European Union (and indeed globally) given the increasingly close cooperation of competition authorities when investigating such cases. This will be of particular significance given the increasing number of parallel investigations by the CMA and the European Commission or the EU Member States' national competition authorities following the United Kingdom's withdrawal from the European Union.

1.18 Similarly, it would be proportionate and appropriate for the CMA to take account of penalties for related conduct in certain cases: such as cases where the CMA has the choice to pursue related conduct as a single infringement, two infringements within the same decision or two infringements in two separate decisions. This enforcement choice should not affect the overall penalty imposed for the conduct.

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[4] Joined Cases 100-103/80 **Musique Diffusion Française SA & others v Commission** [1983] ECR 1825, paragraph 106; **GF Tomlinson Building Ltd and others v Office of Fair Trading** [2011] CAT 7, paragraph 118.

2. **Are there any other areas of the Current Guidance which you consider could be usefully clarified? Please explain why areas and why.**

Step 1 - turnover calculation

2.1 In paragraph 2.23, the Draft Revised Guidance states that the CMA may increase a penalty if it considers that the undertaking's turnover in the last business year is very low. In our view, the Draft Revised Guidance should also provide for the possibility of a reduction in the penalty in cases where the undertaking's turnover in the last business year was unusually high or overstates the scale of an undertaking's involvement or the likely harm to competition.

Step 1 - assessment of the appropriate starting point

Categorisation of the conduct

2.2 As set out in our response to the CMA's consultation on draft revised guidance on the appropriate amount of a penalty (2 August 2017), we are concerned that the CMA's categorisation approach leads to de facto minimum starting points for certain types of infringement from which the CMA will not readily depart. We believe this approach unnecessarily fetters the CMA's discretion to determine the appropriate starting point on a case-by-case basis, having regard to all relevant circumstances of a particular case.[5] This could lead to inequitable results where the same conduct could be described in different ways and could therefore fall into different categories.

2.3 Should the CMA nonetheless continue with the categorisation approach, we request that the CMA provide explanations or examples of the types of activity which fall within the categories set out in paragraph 2.5 of the Draft Revised Guidance, in particular:

(a) The types of conduct that fall within the category of "*non-cartel object infringements which are inherently likely to cause harm to competition*". We note that the amendment to paragraph 2.5 of the Draft Revised Guidance which replaces the reference to "*significant harm to competition*" with "*harm to competition*" further blurs the distinction between this category and the category of "*less serious object infringements*";

(b) The types of conduct which fall within the category of "*less serious object infringements*";

(c) How cases involving resale price maintenance ("**RPM**") will be categorised. We note that the CMA's recent decisional practice suggests that RPM cases would be treated as "*less serious object infringements*" as the CMA has adopted a starting point of 19% in recent cases, however, the CMA expressly states in the infringement decisions that RPM is a serious by object infringement;[6] and

(d) How the exchange (and unilateral disclosure) of commercially sensitive information would be categorised. This is an area which covers a wide range of conduct of

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5 Although the CMA's guidance is "*not to be construed as if it were a statute*" (**Argos and Littlewoods v Office of Fair Trading** [2005] CAT 13, paragraph 168), "*in accordance with general principle the [CMA] must give reasons for any significant departure from the Guidance*" (**Argos and Littlewoods Ltd and JJB Sports plc v Office of Fair Trading** [2006] EWCA Civ 1138, paragraph 161).

6 Case 50565-6 **Resale price maintenance in the digital piano and digital keyboard, and guitar sectors** (CMA infringement decision dated 17 July 2020); Case 50565-3 **Online resale price maintenance in the guitar sector** (CMA infringement decision dated 22 January 2020); Case 50565-5 **Online resale price maintenance in the electronic drum sector** (CMA infringement decision dated 22 July 2020); Case 50565-4 **Online resale price maintenance in the synthesizer and hi-tech sector** (CMA infringement decision dated 29 June 2020) and Case 50565-2 **Online resale price maintenance in the digital piano and digital keyboard sector** (CMA infringement decision dated 1 August 2019).

differing severity and where categorisation of the conduct would not be appropriate if it results in an inflexible range as a starting point.

2.4 Further clarification on these points would provide greater transparency and consistency in categorising conduct for the purposes of determining the starting point.

Differentiating between undertakings involved in the same infringement

2.5 Whilst the Draft Revised Guidance expressly states at paragraph 2.9 that the starting point is intended to reflect the severity of the infringement and that the parties' particular circumstances are taken into account at later stages, we submit that it would be appropriate to allow for the possibility of differentiating between undertakings at step 1. There are a number of reasons why the severity of the infringement may not be the same for all undertakings involved, for example:

(a) In vertical cases, the conduct of the upstream supplier may be more severe than that of the downstream retailers. This is consistent with the CMA's previous decisions to exercise discretion not to initiate proceedings against downstream retailers while proceeding against the upstream supplier.

(b) One undertaking may have a significantly higher market share than another undertaking involved in the infringement meaning that the impact, and therefore the severity, of its participation in the infringement is likely to be greater. Paragraph 2.7 of the Draft Revised Guidance states that the market share(s) of the undertaking(s) involved in the infringement are a factor in determining whether to adjust the starting point, which suggests that an undertaking with a small market share may benefit from an adjustment downwards to reflect the fact its conduct is less likely to harm competition or consumers. In our view, it would be appropriate to allow for the possibility of different starting points in these circumstances.

Step 3 - additional mitigating factors

2.6 Whilst the list of mitigating factors is noted to be non-exhaustive in the Draft Revised Guidance, we would suggest that the CMA consider including additional mitigating factors in the Draft Revised Guidance. In particular, there are certain mitigating factors included in the European Commission's fining guidelines which are relevant considerations to a penalty calculation and adding these would provide greater clarity:

(a) Where the infringement has been committed as a result of negligence.[7]

(b) Where there is evidence that the undertaking's involvement was substantially limited or it did not apply the agreement.[8]

(c) Where the conduct was authorised or encouraged by public authorities or legislation.[9]

Ashurst LLP

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7 Point 29 of the European Commission's guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

8 Ibid.

9 Ibid.