COMMENTS SUBMITTED AS INPUT FOR CMA'S PROPOSED REVISIONS TO ITS POLICY ON PENALTIES

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The Society of Corporate Compliance and Ethics (the "SCCE")[1] is a non-profit organization comprised of more than 6000 individual members, dedicated to improving the quality of corporate governance, compliance and ethics. The SCCE champions ethical practice and compliance standards in all organizations and seeks to provide the necessary resources for compliance professionals and others who share these principles.

SCCE supports the mission of the Competition and Markets Authority ("CMA") in seeking to prevent anticompetitive conduct in violation of competition law, and believes that corporate and other organizations' effective compliance and ethics programs, including programs to promote competition law, are essential to the success of this mission. We also believe that governments play an indispensable role in promoting the types of programs that can truly prevent and detect anticompetitive practices.

The CMA has proposed revisions to its policy on penalties, and has posted these for public comment. Among the proposed changes is to reverse its policy of recognizing the value of compliance programs in its determination of penalties for illegal conduct.

We believe this proposed step backwards is a serious mistake that will weaken compliance and ethics program efforts and lead to more violations – both those done in error and those done in willful violation of the law. It will send a stark message that competition law compliance programs are now less important. This, in turn, can lead to more cartel behavior as companies reduce or eliminate competition law compliance programs and redirect their resources to other uses such as increasing sales or pursuing compliance where it is recognized by enforcement authorities, such as in the fight against

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corruption. CMA's mission should be to increase competition and reduce anti-competitive practices. Undercutting competition law compliance programs undermines those essential goals.

What are the concerns about this policy reversal?

1. **One size fits all policy.** Ignoring compliance programs treats all companies identically, whether they deliberately set out to break the law and did nothing to promote compliance, or whether there were truly rogue employees and the company fundamentally worked hard to prevent violations. This will strike companies as unfair and undermine the legitimacy of the law.
2. **A wrong direction.** What CMA is doing is counter to the increasingly common practices of other countries in recognizing and encouraging competition law compliance programs. Spain reversed its prior course and now considers compliance programs. Germany changed this by law. Austria and Italy consider programs. Brazil fully considers them. Canada also. The United States Department of Justice changed in 2019. In the anti-corruption area compliance programs are typically considered, including in the UK.
3. **Following France's mistake.** The one country that has reversed course is France, which had previously made the mistake of only recognizing programs where companies had delayed implementing them until they were caught in a violation. There was no credit for prior compliance efforts. The French Authority closed out its after-the-fact program.
4. **No incentive to improve compliance programs.** CMA is following France in the fundamental misconception that having a compliance program is a simple "yes" or "no" decision. In fact, how strong a compliance program may be is the result of many decisions made on an ongoing basis throughout a company. For example, decisions are made regularly on such important questions as whether and how to discipline top people who violate the rules, what incentives to have, how good should the training be, what compliance stories to publish, and what type of resources go into the program. When government signals it doesn't care, it sends a powerful message to companies that there is no point in making more than a minimal investment.
5. **Back to paper programs.** Before governments started giving credit for compliance programs, and making clear the programs had to use tough and effective management steps to get credit, compliance programs typically were nothing more than a) legalistic policy statements, b) unread compliance manuals, and c) boring lectures by lawyers. Only the government's use of leverage (offering possible benefits) got companies to take the tougher steps, like conducting audits, evaluating whether the compliance steps actually worked and using incentives as part of the program. How will society benefit by telling companies it is acceptable to go back to doing things that were easy and did not work?
6. **What gets rewarded gets done.** In the US, antitrust enforcers discovered that when corruption enforcers consider compliance programs and antitrust enforcers do not, the anti-corruption programs are far superior to the antitrust ones.

In the American Bar Association Antitrust Section's "Cartel & Criminal Practice Committee Newsletter" Fall 2017 issue there was an article by Mark Rosman and Marvin Price entitled "Antitrust Division Views on Compliance: Past, Present, Future." Mr. Price was the Antitrust Division's Acting Deputy Assistant Attorney General for Criminal Enforcement. Comments he made on page 4 are particularly revealing. After repeating the Division's then (and subsequently abandoned) policy of giving no credit for any company's preventive efforts, but rewarding only those who implemented or improved programs after they were caught, he observed:

> "While criminal antitrust fines and prison terms are significant, and the Division has a well-established record for prosecuting both companies and individuals, *antitrust crimes often do not appear to garner the same compliance dollars as other types of white-collar crimes.* [emphasis added]
>
> In our investigations we often see evidence of compliance training programs that contain just a brief mention of antitrust issues after a lengthy discussion of corruption and bribery."

What gets rewarded is what gets done – that is basic management.

7. **CMA has better policy options.** A better change for CMA would be to drop the arbitrary 10% limit on recognizing compliance programs so CMA has discretion to give as much credit as is warranted in each case. It should be no surprise to anyone that an arbitrarily small limit of 10% is not as effective as a broader approach would be. Note, for example, that no country imposes such an arbitrarily small limit on granting benefits under their leniency programs. Competition authorities already know such limits do not work for leniency; why assume they work for dealing with compliance programs? Moreover, there is no reason to limit the recognition of compliance programs to determinations of penalty amounts. CMA should also state that compliance programs will be taken into consideration in all aspects of the enforcement decision making and remedial steps, rather than limiting consideration only to the amount of the fine. If a company has shown true diligence in doing whatever it could to prevent a violation, what policy benefit comes from nevertheless punishing the company? If someone tries their best, what more can be expected?

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