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## **Global Forum on Competition**

### **SANCTIONS IN ANTITRUST CASES**

#### **Contribution by United Kingdom**

-- Session IV --

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**SANCTIONS IN ANTITRUST CASES:  
CONSEQUENCES FOR ANTI-COMPETITIVE ACTIVITY AND CRIMINAL CARTELS:  
THE UK REGIME**

**-- United Kingdom --**

1. In the UK, there are a number of potential consequences for businesses and/or individuals who have been involved in or are responsible for cartels or other anti-competitive activity.
2. The UK Competition Act 1998 (CA98) gives the Competition and Markets Authority (the CMA) powers to apply, investigate and enforce the Chapter I and Chapter II prohibitions of CA98 as well as Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU).<sup>1</sup> Subject to certain exceptions, the CMA can impose financial penalties on undertakings that intentionally or negligently infringe any of these prohibitions. The CMA's enforcement powers vested on 1 April 2014. Prior to that date, the Office of Fair Trading (OFT) exercised these powers.
3. The CMA, along with the UK's Serious Fraud Office (SFO) is also responsible for bringing criminal proceedings against individuals who commit the cartel offence. A conviction can result in an individual being imprisoned for up to five years and/or a fine.
4. In certain circumstances, the CMA has the power to apply to the court for a Competition Disqualification Order (CDO) against a director of a company that has infringed competition law. CDOs are part of the wider director disqualification regime, whose primary purpose is to protect the public from unfit directors.<sup>2</sup>

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<sup>1</sup> In relation to regulated sectors in the UK these provisions can also be applied and enforced, concurrently with the CMA, by the respective regulators for communications and postal matters, healthcare in England, gas, electricity, water and sewerage, railway and air traffic services (under section 54 and schedule 10 of the Competition Act 1998) (the Regulators). The Regulators are

- the Office of Communications (Ofcom)
- NHS Improvement
- the Gas and Electricity Markets Authority (Ofgem)
- the Utility Regulator (Northern Ireland)
- the Water Services Regulation Authority (Ofwat)
- the Office of Road and Rail (ORR), and
- the Civil Aviation Authority (CAA).

<sup>2</sup> See for example [The Secretary of State for Business, Innovation and Skills v Weston and Anor](#) [2014] EWHC 2933 (Ch), at paragraphs 41 and 57.

5. In addition, anyone who has suffered harm caused by an infringement of the Chapter I or Chapter II prohibitions of the CA98 or Articles 101 or 102 of the TFEU can seek compensation for that harm by bringing an action in the civil courts. As such, private actions will not lead to penal sanctions for infringing undertakings, but an infringing business might be liable to pay civil damages.

6. Each of these consequences is considered below.

## 1. Financial penalties under the CA98

### 1.1 Introduction

7. In the UK, anti-competitive agreements are prohibited under Chapter I of CA98. Businesses with a dominant position in a market are prohibited from abusing that dominant position under the Chapter II prohibition of CA98. Articles 101 and 102 of the TFEU are the EU law equivalents of these UK prohibitions and apply where the anticompetitive agreement or conduct may have an effect on trade between EU Member States.

8. The CMA may, subject to certain exceptions, impose a financial penalty on an undertaking which has intentionally or negligently infringed Article 101 or Article 102 TFEU or the Chapter I and/or Chapter II prohibitions.<sup>3</sup> Sections 39 and 40 of CA98 provide limited immunity from financial penalties for small agreements in relation to the Chapter I prohibition and for conduct of minor significance in relation to infringements of the Chapter II prohibition.<sup>4</sup> This immunity does not apply to any infringements of Article 101 or 102 TFEU or to infringements of the Chapter I prohibition which are price-fixing agreements. Such immunity may be withdrawn by the CMA in certain circumstances. In practice, whether to impose a penalty and the amount thereof, will generally be decided on behalf of the CMA by a Case Decision Group (CDG) appointed to a CA98 investigation.<sup>5</sup>

9. CA98 provides that when fixing the amount of the financial penalty for a CA98 infringement, the CMA must have regard to both the seriousness of the infringement concerned and the desirability of deterring both the penalised undertaking and others from infringing in the future.<sup>6</sup>

10. It is a statutory requirement for the CMA to prepare and publish guidance as to the appropriate amount of the penalty.<sup>7</sup> The CMA cannot publish such guidance without the approval of the relevant Secretary of State.<sup>8</sup> The CMA must have regard to the guidance for the time being in force when setting the financial penalty for any infringements in respect of which such penalties can be imposed.<sup>9</sup> This does not

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<sup>3</sup> See section 36(1)–(3) CA98. The CMA can also impose directions on an infringing undertaking requiring the infringement to be brought to an end: see sections 32 and 33 CA98.

<sup>4</sup> See paragraph 1.14 of the OFT423, *Guidance as to the Appropriate Amount of the Penalty*. See also The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262).

<sup>5</sup> See Rule 3(2) of the Competition and Markets Authority's Competition Act 1998 Rules, set out in the Schedule to The Competition Act (Competition and Markets Authority's Rules) Order 2014 (SI 2014/458).

<sup>6</sup> Section 36(7A) CA98.

<sup>7</sup> See section 38(1) CA98.

<sup>8</sup> Section 38(4) CA98.

<sup>9</sup> Section 38(8) CA98. The same section requires that the Competition Appeal Tribunal must also have regard to this guidance when setting a penalty on appeal.

mean that the CMA is *bound* by the penalties guidance: by way of exception, the CMA may depart from the penalties guidance where there are good reasons for doing so.<sup>10</sup>

11. The CMA penalties guidance currently in force is OFT423, [\*Guidance as to the Appropriate Amount of the Penalty\*](#), which was published and came into effect on 10 September 2012.<sup>11</sup>

12. OFT423 sets out a six-step process for CA98 penalty calculation, as follows:

1. calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking
2. adjustment for duration
3. adjustment for aggravating or mitigating factors
4. adjustment for specific deterrence and proportionality
5. adjustment if the maximum penalty of 10 per cent of the worldwide turnover of the undertaking is exceeded or to avoid double jeopardy
6. adjustment for leniency and/or settlement discounts.

13. Each of these steps, applied to a hypothetical example, is considered in the Annex.

## **1.2 Draft Penalty Statements**

14. Once the CMA has issued a Statement of Objections in a CA98 case, a three-member CDG is appointed. The CDG will decide on behalf of the CMA

- whether to issue an infringement decision (with or without directions) or a ‘no grounds for action’ decision, and
- the appropriate amount of any penalty.<sup>12</sup>

15. Once any written and oral observations made on the Statement of Objections have been considered, if the CDG is considering reaching an infringement decision and imposing a financial penalty on a party, the CMA will provide that party with a draft penalty statement.<sup>13</sup> This will set out the key aspects relevant to the calculation of the penalty that the CMA proposes to impose on that party, based upon the information available to the CMA at that time.<sup>14</sup> The draft penalty statement will include the

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<sup>10</sup> The Court of Appeal in its judgment in the *Replica Kits* and *Toys* cases (CITATION) made clear, at paragraph 161 of the judgment, that section 38(8) of the Act does not bind the CMA (or the OFT at the time of the judgement) to follow the penalties guidance in all respects in every case but that, in accordance with general principle, the CMA must give reasons for any significant departure from the penalties guidance.

<sup>11</sup> See para. 1.10 of OFT423. The CMA’s CA98 enforcement powers vested on 1 April 2014. The CMA Board adopted OFT423 as being applicable to the CMA. OFT423 replaced earlier OFT guidance, which is discussed in the context of certain cases, below.

<sup>12</sup> CMA8 at para. 11.30.

<sup>13</sup> See Rule 11 of the CMA Rules and para. 12.31 of CMA8.

<sup>14</sup> Para. 12.31 of CMA8.

proposed starting point percentage, the relevant turnover figures to be used, the duration of the infringement, any aggravating/mitigating factors, any uplift for specific deterrence as well as any adjustment proposed for proportionality.<sup>15</sup> Parties will be offered the opportunity to comment on the draft penalty statement in writing and to attend an oral hearing (in person or by telephone) with the CDG.<sup>16</sup>

## 2. CA98 financial penalties: appeals and the role of the courts

16. The CMA's CA98 enforcement powers vested in April 2014 and since then, the CMA has adopted six infringement decisions in which financial penalties have been imposed. One of these decisions is presently subject to appeal.<sup>17</sup>

17. Five of these were settlement cases in which financial penalties totalling £4.3m have been imposed.<sup>18</sup>

18. Decisions by the CMA as to the imposition of a financial penalty as well as the amount of any such penalty can be appealed to the CAT by a party to the decision.<sup>19</sup> The CAT may impose or revoke, or vary the amount of, a penalty.<sup>20</sup> An appeal against the imposition or amount of financial penalty suspends the effect of the penalty decision, meaning that the penalty does not have to be paid during the appeal.<sup>21</sup> If the CAT wishes to impose a penalty on an appealing party, then as noted above it, like the CMA, must have regard to the CMA's penalties guidance for the time being in force, which is currently OFT423.<sup>22</sup> Decisions of the CAT as to the amount of a penalty can in turn be appealed to the Court of Appeal.<sup>23</sup>

19. The CAT has reduced the financial penalty imposed by the OFT (the predecessor of the CMA with responsibility for CA98 enforcement) in a number of cases.<sup>24</sup> However, the CAT can also increase the amount of the financial penalty in an appeal and to date has done so on one occasion.<sup>25</sup>

20. In some appeals, the CAT has reduced the amount of financial penalty imposed by a significant amount. For example, in the OFT's *Construction* decision<sup>26</sup> the OFT had imposed penalties on various undertakings totalling £129.2m. A number of parties successfully appealed the imposition of penalties, with the result that the total amount of penalties was reduced to £63.9m. In its judgment in *Kier Group plc*

<sup>15</sup> Ibid.

<sup>16</sup> Rule 6 of the CMA Rules.

<sup>17</sup> See, for example, <http://www.catribunal.org.uk/237-9158/1252-1-12-16-GlaxoSmithKline-PLC.html>

<sup>18</sup> See [https://www.gov.uk/cma-cases?keywords=&case\\_type%5B%5D=ca98-and-civil-cartels&case\\_state%5B%5D=open&case\\_state%5B%5D=closed&closed\\_date%5Bfrom%5D=&closed\\_date%5Bto%5D=](https://www.gov.uk/cma-cases?keywords=&case_type%5B%5D=ca98-and-civil-cartels&case_state%5B%5D=open&case_state%5B%5D=closed&closed_date%5Bfrom%5D=&closed_date%5Bto%5D=)

<sup>19</sup> Section 46(3)(i) CA98. Such a decision may also be appealed by a person the CAT considers has a sufficient interest, or that he represents persons who have such an interest (section 47 CA98).

<sup>20</sup> Para. 3(2)(b) of Part I of Schedule 8 of CA98.

<sup>21</sup> See sections 37 and 46(4) CA98. Under its rules of procedure, the CAT may add interest to the

<sup>22</sup> Section 38(8) CA98.

<sup>23</sup> Section 49(1)(a) CA98.

<sup>24</sup> See for example, *Napp Pharmaceuticals Holdings Ltd v DGFT* [2002] CAT 1; *JJB Sports Plc & Others v OFT* [2005] CAT 22, where the CAT reduced the penalties for three of the four appellants.

<sup>25</sup> See *JJB Sports Plc & Others v OFT* [2005] CAT 22, where the CAT increased the penalty for the fourth appellant, Allsports Limited.

<sup>26</sup> See *Bid rigging in the construction industry in England*, decision of 21 September 2009.

*and others v Office of Fair Trading*<sup>27</sup> the CAT among other things concluded that the final penalties imposed by the OFT on each of the appellants for the infringement<sup>28</sup> were excessive, given the nature of the infringement, the harm it was likely to cause, and bearing in mind certain mitigating factors, including the fact that the practice was long-standing in the industry and widely regarded as legitimate. Moreover, the CAT considered that for such infringements, the OFT's starting point of 5 per cent of relevant turnover was too high.<sup>29</sup> While the CAT recognised that the OFT has a margin of discretion in applying the penalties guidance in force at the time, the CAT also considered the OFT's view at the time that "last business year" for Step 1 relevant turnover meant the year ending prior to the OFT's infringement decision, was incorrect.<sup>30</sup> The CAT took the view that "last business year" should instead be interpreted as referring to the year preceding the date when the infringement came to an end. Moreover, the CAT considered that the approach the OFT took to adjustments for specific deterrence and proportionality – which was assessed under Step 3 of the previous version of the penalties guidance then in force – was by its nature and application such as to give rise to penalties which were excessive and disproportionate.<sup>31</sup>

21. The findings of the CAT in such rulings have provided practical assistance to the OFT and to the CMA on its approach to penalty setting. For example, in *Kier*<sup>32</sup> the CAT noted that the OFT's penalties guidance then in force at Step 1 set a maximum starting point of 10 per cent of relevant turnover: it suggested that the OFT should consider moving to 30 per cent maximum at Step 1.<sup>33</sup> The CAT observed that a more generous range at the Step 1 starting point would provide "more headroom" at the outset of the penalty calculation, and greater scope for reflecting the circumstances of individual cases, with the result that there would be less call for substantial subsequent adjustments for specific deterrence as had occurred in the decision giving rise to the *Construction* appeals.<sup>34</sup>

22. In view of this guidance, among other considerations, OFT423, the current penalties guidance, provides that a Step 1 starting point can be a maximum of 30 per cent of relevant turnover. Moreover, OFT423 now makes it clear, following judgments such as *Kier*<sup>35</sup> and *Eden Brown*<sup>36</sup> that the "last business year" of relevant turnover for the purposes of setting the starting point at Step 1 should be the business year ending the year before the infringement ended.

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<sup>27</sup> [2011] CAT 3.

<sup>28</sup> Which involved what the CAT called "simple" cover pricing.

<sup>29</sup> This guidance was the predecessor to the current version of OFT423 and involved a five-step penalty setting process, with a maximum starting point at Step 1 of 10% of relevant turnover.

<sup>30</sup> This was the approach taken under the penalties guidance then in force.

<sup>31</sup> The OFT had sought to apply a "Minimum Deterrence Threshold" or MDT. The MDT calculation represented the OFT's view of the minimum figure needed to deter the undertakings concerned and other similar sized undertakings from engaging in unlawful behaviour of the kind found in the Decision. The CAT took a similar view to the application of MDT in *Eden Brown Ltd v OFT* [2011] CAT 8.

<sup>32</sup> See footnote 56 above.

<sup>33</sup> *Kier*, footnote 56 above, at para. 109.

<sup>34</sup> *Ibid.*

<sup>35</sup> Footnote 56, above.

<sup>36</sup> See footnote 59, above.

### 3. The criminal cartel offence

23. Under section 188 of the Enterprise Act 2002 (EA02) it is a criminal offence for individuals to agree to make or implement, or to cause to be made or implemented, arrangements which constitute certain types of cartel activity, namely price-fixing, limiting or preventing supply or production, market-sharing and bid-rigging. Individuals convicted of the cartel offence may be sentenced to up to five years imprisonment and/or an unlimited fine. Where an individual convicted of the criminal cartel offence is a company director and has committed that offence in connection with the management of company, the convicting court may disqualify them from being a company director as an ancillary sentencing order.<sup>37</sup> Moreover, benefits that might have accrued to an individual from having committed the cartel offence may be subject to a confiscation order imposed by a court.<sup>38</sup>

24. Whereas cases under CA98 are brought against undertakings, prosecutions for the criminal cartel offence can only be brought against individuals.

25. In England and Wales, and in Northern Ireland, prosecutions may only be brought by the CMA or the SFO, or with the consent of the CMA. Prosecutions will generally be undertaken by the CMA. In Scotland, prosecutions will be brought by the Crown Office and Procurator Fiscal Service.

26. The cartel offence as originally enacted required the individual to have acted dishonestly. Dishonesty as an element of the offence was removed under amendment made in 2014 by the Enterprise and Regulatory Reform Act 2013 (ERRA13). Certain statutory exclusions and defences were also added under the ERRA13.

27. It is possible to obtain immunity from prosecution for the criminal cartel offence: the CMA will not prosecute any individual who has received a written notice under subsection 190(4) of the EA02 except in the circumstances specified in that notice (so called “no action letters”). The grant of criminal immunity in the form of a no-action letter can be linked to the grant of immunity or leniency to a business.<sup>39</sup>

28. To date, there have been four convictions for the criminal cartel offence in the UK. Sentences imposed have ranged in one case from six months’ imprisonment, suspended for 12 months (and an order to do 120 hours of community service within 12 months)<sup>40</sup> to two and a half years’ imprisonment in another case.<sup>41</sup> Director disqualification orders of varying lengths were imposed on the defendants in one of these cases.<sup>42</sup>

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<sup>37</sup> Section 2 of the Company Directors Disqualification Act 1986. Note that this is not a CDO, which is discussed below. The maximum term of disqualification is either 5 or 15 years, depending upon the convicting court.

<sup>38</sup> Under the Proceeds of Crime Act 2002.

<sup>39</sup> See footnotes 37, 38 and 39 above.

<sup>40</sup> <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage>

<sup>41</sup> <https://www.gov.uk/cma-cases/marine-hose-criminal-cartel-investigation>

<sup>42</sup> Ibid.

#### 4. Private actions

29. In addition to the above considerations, anyone – whether a business or individual – who has suffered harm caused by an infringement of Chapter I or Chapter II of the CA98 or Articles 101 or 102 of the TFEU can bring a private action to seek compensation for that harm. Claims for redress can be brought in the following UK courts which have jurisdiction to hear competition cases:

- the High Court of England and Wales;
- the Court of Session and Sheriff Court in Scotland;
- the High Court of Northern Ireland, and
- the CAT.

30. Any damages that might be awarded in private actions are not ‘sanctions’, since they are intended to compensate those harmed by the anti-competitive activity rather than to penalise the infringers. Nevertheless, they are a potential consequence for businesses that have engaged in anti-competitive activity [and may add to the deterrence of public enforcement by increasing the overall ‘cost’ of breaking competition law]. The imposition of a financial penalty on a business that has infringed competition law does not exempt that business from potentially being found liable to pay damages for harm caused by its anti-competitive activity.

31. In certain circumstances the UK framework provides for approved voluntary redress schemes as an alternative to court proceedings in respect of harm caused by a competition law infringement. A person (which may include more than one undertaking applying jointly) who has infringed competition law may apply to the CMA or a concurrent regulator for approval of a voluntary redress scheme. An application can be submitted to the CMA either during the course of an ongoing investigation or where an infringement decision has already been made by the CMA or the European Commission. Where an application relates to a proposed CMA infringement decision, the CMA may consider an application before it adopts the decision but may only approve the scheme at the time it makes the infringement decision. Evidently, if a scheme relates to a pre-existing CMA infringement decision or an infringement decision of another UK competition authority or the European Commission, the CMA can only approve a scheme after the infringement decision has been made.

32. Where a business offers such a redress scheme, those affected by the infringement are able to claim compensation through the scheme without the need to pursue litigation in the courts.

33. A potential advantage of a CMA-approved voluntary redress scheme is that it provides a statutory process through which:

- consumers and businesses can gain access to compensation more quickly, easily and without the costs of litigation; and
- businesses that have infringed the competition rules may voluntarily offer and administer redress to those affected by the breach, thereby avoiding lengthy and costly court proceedings. This may also have reputational benefits for such businesses.

34. Moreover, businesses may in certain circumstances receive a discount on any penalty imposed by the CMA in respect of the infringement to which the redress scheme relates. Therefore, voluntary redress schemes offer both businesses and individuals a chance of early compromise and avoiding costly litigation altogether.

35. Voluntary redress schemes are discussed in the CMA's guidance CMA40, [Guidance on the approval of voluntary redress schemes for infringements of competition law](#).<sup>43</sup>

## 5. Competition disqualification orders

36. The CMA also has the power to apply to the court for a CDO against a person. Under the Company Directors Disqualification Act 1986 (CDDA), a court must make a CDO against a person if the court considers that the following two conditions are satisfied in relation to that person:

1. an undertaking which is a company of which that person is a director commits a breach of competition law, and
2. the court considers that person's conduct as a director makes him or her unfit to be concerned in the management of a company.<sup>44</sup>

37. A CDO can only be made against a director of a company. The CMA considers that 'director' for these purposes includes a de facto director. 'Company' includes unregistered companies.<sup>45</sup>

38. "Breach of competition law" for the purposes of section 9A CDDA means an infringement of any of the following:

- the Chapter I prohibition of CA98;
- the Chapter II prohibition of CA98;
- Article 101 of the TFEU, or
- Article 102 of the TFEU.<sup>46</sup>

39. The maximum period of disqualification under a CDO is 15 years.<sup>47</sup> During the period in which a person is subject to a CDO it is a criminal offence<sup>48</sup> for that person to:

- be a director of a company;
- act as a receiver of a company's property;

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<sup>43</sup> Certain concurrent regulators have also published guidance on their use of the redress power – see concurrent regulators' web pages for further details.

<sup>44</sup> See section 9A of the CDDA.

<sup>45</sup> See paragraph 2.3 of OFT510 *Director Disqualification Orders in Competition Cases*.

<sup>46</sup> See section 9A(4) of the CDDA.

<sup>47</sup> Section 9A(9) CDDA.

<sup>48</sup> Section 13 CDDA – thought that person may seek the permission of the court to act in certain roles otherwise prohibited to them: section 1(1)(a) CDDA.

- in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, or
- act as an insolvency practitioner.<sup>49</sup>

40. In addition, any person involved in the management of a company in contravention of a CDO is personally liable for all of the relevant debts of the company.<sup>50</sup> Furthermore, details of a CDO will be entered into a public register maintained by the Secretary of State.<sup>51</sup> The Secretary of State or CMA may also issue a press release.

41. The CMA may accept a Competition Disqualification Undertaking (CDU) from a person instead of applying for a CDO or, where a CDO has been applied for, instead of continuing with the application for a CDO.<sup>52</sup>

42. It should be noted that CDOs, as with other director disqualification orders under CDDA, are not form or sanction or penalty. They are intended primarily to protect the public from persons who are unfit to be concerned in the management of a company.<sup>53</sup> Nevertheless, they are an important complement to CA98 and other forms of enforcement and may contribute to compliance incentives and deterring anti-competitive activity.

## 6. Conclusion

43. As can be seen, there are a number of potential consequences in the UK for businesses and individuals who have been involved in cartels and other anti-competitive activity.

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<sup>49</sup> Section 1(1) of the CDDA.

<sup>50</sup> Section 15(1)(a) CDDA.

<sup>51</sup> Section 18 CDDA.

<sup>52</sup> Section 9B(2) CDDA.

<sup>53</sup> See footnote 2 above.

## ANNEX – THE CMA’S SIX STEP FINANCIAL PENALTY SETTING PROCESS AND HYPOTHETICAL EXAMPLE

### Step 1 – Starting point

44. The starting point of a penalty calculation will be expressed as a percentage of up to 30 per cent of the relevant turnover of the undertaking.<sup>54</sup> The starting point will depend in particular upon the nature of the infringement: the more serious and widespread the infringement, the higher the starting point is likely to be.<sup>55</sup> The CMA will ordinarily use a starting point towards the upper end of the 30 per cent range for the most serious infringements of competition law, including hard-core cartel activity<sup>56</sup> and the most serious abuses of a dominant position, such as predatory pricing.<sup>57</sup> When assessing seriousness of the infringement for the purposes of the starting point percentage, the CMA will consider a number of factors. These include the nature of the product, the structure of the market, the markets share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect of the infringement on competitors and third parties. This assessment will take into account the need to deter other undertakings from engaging in such infringements in future (general deterrence).<sup>58</sup> Each assessment of the starting point will be conducted on a case-by-case basis for all types of infringement, taking into account all the circumstances of the case.<sup>59</sup>

45. The “relevant turnover” to which the percentage starting point is applied is the turnover of the undertaking in the relevant product and geographic markets affected by the infringement in the undertaking’s last business year.<sup>60</sup> “Last business year” for these purposes is the undertaking’s financial year preceding the year in which the infringement ended.<sup>61</sup>

46. In cases involving Article 101 and/or Article 102 of the TFEU, when determining the starting point at Step 1, the CMA may take into account effects in another Member State of the agreement or conduct concerned. This will be done through an assessment of the relevant turnover of the undertaking in question. The CMA may consider turnover generated in another Member State if the relevant geographic market is wider than the UK and the CMA has obtained the express consent of the relevant Member State or National Competition Authority, as appropriate.<sup>62</sup>

Applying these points above to a hypothetical example, the CMA might determine that an undertaking has been involved in a price-fixing cartel and that its relevant turnover in the last business year was £20m. The CMA might in such a case, having regard to the facts in question, consider that a **27 per cent** starting point was appropriate and apply this to the relevant turnover to yield a Step 1 amount of £5.7m.

<sup>54</sup> See for example para. 2.4—2.5 of OFT423.

<sup>55</sup> Para. 2.4 of OFT423.

<sup>56</sup> Such as price-fixing, market sharing and bid-rigging.

<sup>57</sup> Para. 2.5 of OFT423.

<sup>58</sup> Para. 2.6 of OFT423.

<sup>59</sup> Ibid.

<sup>60</sup> Para. 2.7 of the OFT423.

<sup>61</sup> Ibid.

<sup>62</sup> Para. 2.10 of OFT423.

## Step 2 – Adjustment for duration

47. Having obtained the starting point in the manner described above, the CMA at Step 2 of the penalty calculation process may increase – or in exceptional circumstances decrease – the starting point amount to take into account the duration of the infringement. Where an infringement has lasted for more than a year, it may be multiplied by not more than the number of years of the infringement.<sup>63</sup> Where the infringement has lasted for less than a year, the CMA will ordinarily consider the duration to have been a full year for the purposes of Step 2.<sup>64</sup> In exceptional cases, the CMA might reduce the Step 1 amount, where the duration of the infringement has been less than a year.<sup>65</sup> Where the infringement has lasted for more than a year, then the CMA will round up any part years to the nearest quarter year, though in exceptional cases, the CMA might decide to round up the part year to a full year.

Applying these principles to the hypothetical example above, suppose that in its decision the CMA had found that the infringement had lasted for two and a half years. The CMA would therefore at Step 2 ordinarily expect to increase the financial penalty on the undertaking by a multiplier of 2.5, yielding an amount of £15m.

## Step 3 – Adjustment for aggravating and mitigating factors

48. At Step 3 of the process, the CMA may increase or decrease the amount of the financial penalty yielded following Step 2. The penalty might be increased where there are aggravating factors, or decreased where there are mitigating factors.<sup>66</sup>

49. Aggravating factors will include the following:

- persistent and repeated unreasonable behaviour that delays the CMA’s enforcement action;
- the undertaking having had a role as a leader in, or an instigator of, the infringement;
- involvement of directors or senior management;
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuing the infringement after the start of the investigation;
- repeated infringements by the same undertaking or other undertakings in the same group (recidivism), and
- infringements committed intentionally rather than negligently.<sup>67</sup>

50. Mitigating factors will include the following:

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<sup>63</sup> Para. 2.12 of OFT423.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Para. 2.13 of OFT423.

<sup>67</sup> Para. 2.14 of OFT423.

- where the undertaking was acting under severe duress or pressure;
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- adequate steps having been taken with to ensuring compliance with Article 101 and Article 102 of the TFEU and the Chapter I and Chapter II prohibitions;
- termination of the infringement as soon as the CMA intervenes;
- co-operation which enables the enforcement process to be concluded more effectively and/or speedily.<sup>68</sup>

51. The form of adjustment will usually be a percentage increase or decrease to the amount yielded at Step 2.

52. With respect to compliance activities potentially being taken into account as a mitigating factor, the starting position is that the CMA will be neutral but it will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount from the penalty of up to 10 per cent. Thus, the mere existence of compliance activities will not be treated as a mitigating factor. However, in an individual case, evidence of adequate steps having been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation (from the top down) – together with appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities – will likely be treated as a mitigating factor. The business will need to demonstrate that the steps taken were appropriate to the size of the business concerned and its overall level of competition risk. It will also need to present evidence on the steps it took to review its compliance activities, and change them as appropriate, in light of the events that led to the investigation at hand.<sup>69</sup>

53. Save for exceptional cases, the CMA will not treat the existence of compliance activities as an aggravating factor justifying an increase in the financial penalty. Such exceptional circumstances could include situations where, for example, compliance activities are used to conceal or facilitate an infringement, or to mislead the CMA during its investigation. It should be noted that the CMA has published guidance to assist businesses to achieve competition law compliance: see, for example, <https://www.gov.uk/government/collections/competition-and-consumer-law-compliance-guidance-for-businesses>

Therefore continuing with the hypothetical example above, suppose that in its decision, the CMA found the existence of the following aggravating and mitigating factors with respect to the undertaking:

- instigator of the infringement (aggravating): 10 per cent increase
- involvement of directors or senior management (aggravating): 10 per cent increase
- adequate steps having been taken to ensuring compliance (mitigating): 5 per cent

This would result in a net increase to the financial penalty of 15 per cent, increasing by £2.25m to £17.25m.

<sup>68</sup> Para. 2.15 of OFT423.

<sup>69</sup> See footnote 26 of OFT423.

#### **Step 4 – Adjustment for specific deterrence and proportionality**

54. At Step 4 of the penalty setting process set out in OFT423, the CMA will consider whether the penalty yielded at the end of Step 3 should be increased for specific deterrence or reduced for proportionality. This assessment will be made having regard to the appropriate indicators of the size and financial position of the undertaking. When making this determination, the CMA will consider a range of financial indicators, including where they are available, the following:

- total turnover
- profits
- cash flow, and
- industry margins.

55. The CMA will use such financial indicators as at the time the penalty is being imposed, though it may also consider indicators of size and financial position from the time of the infringement.<sup>70</sup>

56. “Specific deterrence” refers to an assessment of whether the financial penalty should be increased in order to ensure that the penalty imposed will deter that specific infringing undertaking from infringing competition law in the future. The CMA takes the view that increases to the financial penalty on this ground will be generally be limited to the following circumstances:

- the undertaking has a significant proportion of its turnover outside the relevant market;
- the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that exceeds the level of penalty yielded at the end of Step 3 of the penalty setting process, or
- the infringing undertaking’s relevant turnover is very low or zero, with the result that the penalty figure at the end of Step 3 would also be a very low or zero, or the relevant turnover did not accurately reflect the scale of an undertaking’s involvement in the infringement or the likely harm to competition.<sup>71</sup>

57. The CMA will ensure that any increase that might be made for specific deterrence will not result in a penalty that is disproportionate or excessive, having regard to the undertaking’s size, financial position and the nature of the infringement.<sup>72</sup>

58. The CMA will also consider whether, in its view, the overall amount of a penalty yielded by the process is proportionate “in the round”, having regard to the undertaking’s size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking’s infringing activity on competition. Where the CMA considers that the penalty yielded at the end of Step 3 is excessive or disproportionate, it can decrease the penalty to an appropriate level.

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<sup>70</sup> Para. 2.16 of OFT423.

<sup>71</sup> Para. 2.18 of OFT423.

<sup>72</sup> Para. 2.19 of OFT423.

Continuing with the hypothetical example discussed above, Step 3 has yielded a figure of £17.25m. Suppose that the undertaking had worldwide turnover in the financial year before the infringement ended of £500m and profits after tax of £200m, as well as net assets of £900m. It derives 70 per cent of its turnover from outside the relevant market. This means that the Step 3 financial penalty would constitute the following:

- 3.45 per cent of last years' worldwide turnover.
- 8.625 per cent of last year's profits after tax.
- 1.91 per cent of net assets.

The CMA might consider that the fact the undertaking earns 70 per cent of its turnover outside the relevant markets suggests that it does earn "a significant proportion of its turnover outside the relevant market." However, on the facts, let us assume that the CMA considers in the round that the £17.25m figure yielded following Step 3 is sufficient for specific deterrence: this is an amount which, in this case, the CMA considers is likely to drive home the message that the undertaking must avoid infringing competition law in the future.

Furthermore, having regard to the circumstances in the round as well as to financial indicators such as those above, let us assume that the CMA in this case takes the view that the penalty yielded by Step 3 is not excessive or disproportionate.

In that event, on this theoretical example, the CMA would not at Step 4 of the penalty calculation process adjust the Step 3 figure.

### **Step 5 – Adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy**

59. As noted above, the CMA cannot impose a financial penalty that exceeds 10 per cent of the undertaking's worldwide turnover in the last business year.<sup>73</sup> This will be the business year preceding the date on which the CMA's decision is taken.<sup>74</sup> The penalty yielded by Step 4 will be adjusted if necessary to ensure that it does not exceed this maximum.

60. Where a financial penalty or fine has been imposed by the European Commission, or by a court or other body in another Member State in respect of an agreement or conduct, the CMA must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct.<sup>75</sup> This is to ensure that any agreement or conduct that has been subject to financial sanction elsewhere in the EU is not subject to being penalised again in the UK for the same anti-competitive effects.<sup>76</sup>

Continuing with our hypothetical example, the penalty figure at the end of Step 4 for the undertaking is £17.25m considered against worldwide turnover in the last financial year of £500m. As noted above, the penalty constituted 3.45 per cent of the undertaking's last years' worldwide turnover, which is well below the statutory cap. Accordingly, there is no need for the CMA to adjust the penalty at Step 5.

<sup>73</sup> And see section 36(8) CA98 as well as the Competition Act 1998 (Determination of Turnover for Penalties Order 2000 (SI 2000/309), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

<sup>74</sup> Or if figures for that year are unavailable, the one immediately preceding it.

<sup>75</sup> Section 38(9) CA98.

<sup>76</sup> See para. 2.24 of OFT423.

## Step 6 – Application of reductions under the OFT’s leniency programme and for settlement agreements

61. The CMA operates a leniency programme under which undertakings who provide the CMA with information about cartel activity<sup>77</sup> can receive immunity from, or a reduction in financial penalty.<sup>78</sup> In order to encourage undertakings to participating in cartel activities to come forward, the CMA will grant total immunity from financial penalties for an infringement of Article 101 and/or the Chapter I prohibition to a participant in cartel activity who is the **first** to come forward before the CMA has commenced an investigation and who satisfies certain other requirements.<sup>79</sup> Alternatively, the CMA may offer total immunity from financial penalty or a reduction of up to 100 per cent from financial penalties to a cartel participant who is the first to come forward **after** the CMA has commenced an investigation into the cartel and who meets certain requirements.<sup>80</sup> Moreover, an undertaking that is not the first to come forward, or does not satisfy the necessary requirement for immunity, may benefit from reduction of up to 50 per cent in the amount of the financial penalty imposed if it satisfies certain requirements.<sup>81</sup> the undertaking must come forward before the CMA has issued a statement of objections<sup>82</sup> in the relevant investigation and the information, documents and evidence they provide must, as a minimum, add significant value to the CMA’s investigation, which is to say, they must genuinely advance the investigation<sup>83</sup>

62. In addition to operating the leniency programme described above, the CMA may enter into settlement agreements with parties who admit that they have infringed competition law and accept that a streamlined administrative procedure will govern the remainder of the CMA’s investigation of that business’ conduct.<sup>84</sup> The CMA will impose a reduced financial penalty on such an undertaking.<sup>85</sup> The leniency programme described above and the use of settlements are not mutually exclusive. It is possible

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<sup>77</sup> “Cartel activity” for these purposes means agreements and/or concerted practices which infringe Article 101 of the TFEU and/or the Chapter I prohibition and involve price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market-sharing or market-dividing.

<sup>78</sup> See, for example, para. 3.1 and following of OFT423.

<sup>79</sup> See, for example, para. 3.4 of OFT423. In this situation, the undertaking will also receive “blanket” immunity from prosecution for the criminal cartel offence for all co-operating current and former employees and directors of the undertaking (see below for a discussion of the criminal cartel offence). Furthermore, all directors of the undertaking will receive protection from CDOs.

<sup>80</sup> Ibid. In this situation, there will be discretionary criminal immunity for co-operating current and former employees of the undertaking, which could be granted on a “blanket” basis, or for specific individuals or for all employees other than named individuals. There will be protection for CDOs for all directors of the undertaking.

<sup>81</sup> An undertaking benefitting from such discretionary leniency will also be eligible for discretionary specific criminal immunity for specific individuals and protection from CDOs for all directors of the undertaking.

<sup>82</sup> A statement of objections is the CMA’s proposed infringement decision, on which the addressee can make written and oral representations. See for example Rule 5 in the Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014 (the CMA Rules).

<sup>83</sup> See, for example, para. 3.19 of OFT423.

<sup>84</sup> See para. 14.1 of CMA8 *Competition Act 1998: Guidance on the CMA’s investigation procedures in Competition Act 1998 cases*.

<sup>85</sup> Ibid.

for a leniency applicant to settle a case under CA98 and to benefit from both leniency and settlement discounts.<sup>86</sup>

63. The CMA has capped settlement discounts at a level of 20 per cent. The actual discount awarded will take account of the resource savings achieved in settling that particular case at that particular stage in the investigation. The discount available prior to the issue of Statement of Objections<sup>87</sup> will be up to 20 per cent. The discount available for settlement after the Statement of Objections is issued will be up to 10 per cent. It should be noted that these are the maximum levels of discount available in each situation. The CMA in each case will determine the appropriate level of discount having regard to the circumstances of the case.<sup>88</sup>

64. Bearing in mind the points above, the CMA will at Step 6 of the penalty calculation reduce an undertaking's penalty where that undertaking has a leniency agreement with the CMA, provided always that the undertaking meets the conditions of the leniency agreement.<sup>89</sup> Similarly, the CMA will at this stage apply any settlement discounts stipulated in a settlement agreement.<sup>90</sup> As noted above, settlement and leniency discounts are not mutually exclusive and the penalty may be adjusted to reflect both in appropriate cases.

In our hypothetical example, the undertaking has not entered in a leniency or settlement agreement with the CMA, so there will be no downwards adjustment to the financial penalty of £17.25m yielded following the first five steps of the process.

### **Financial hardship**

65. The CMA may in exceptional circumstances reduce a penalty where, owing to its financial position, an undertaking is unable to pay a financial penalty calculated on the basis of the six steps above.<sup>91</sup> The CMA's view is that there should never be any expectation that a penalty will be reduced on this basis.<sup>92</sup>

In our hypothetical example, having regard to the financial indicators mentioned above, there is no question of the undertaking being in any financial hardship such that it could not pay the penalty imposed.

Therefore in our hypothetical example, the financial penalty imposed on the undertaking, applying the six-step process set out in OFT423, will be £17.25m.

<sup>86</sup> See para. 14.3 of CMA8.

<sup>87</sup> See footnote 36 above.

<sup>88</sup> See para. 14.27 and footnote 189 of CMA8.

<sup>89</sup> See para. 2.26 of OFT423.

<sup>90</sup> Ibid.

<sup>91</sup> Para. 2.27 of OFT423.

<sup>92</sup> See *Sepia Logistics Limited (formerly known as Double Quick Supplyline Limited) v Precision Concepts Ltd* [2007] CAT 13 at para. 94. See also *GF Tomlinson Group Limited and Others v Office of Fair Trading* [2011] CAT 7 at para. 262.