

**COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF  
ANTITRUST LAW AND INTERNATIONAL LAW REGARDING THE  
PROPOSED REVISIONS TO THE UK GUIDANCE AS TO THE APPROPRIATE  
AMOUNT OF A PENALTY**

September 27, 2017

*The views stated in these Comments are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.*

**I. Introduction**

The Sections of Antitrust Law and International Law of the American Bar Association (the Sections) respectfully submit these comments to the Competition & Markets Authority (the CMA) to assist in further refining the draft of the CMA’s Guidance as to the Appropriate Amount of a Penalty (the Guidance), published for public consultation on August 2, 2017. These comments reflect the expertise and experience of the Sections’ members with respect to both antitrust and unfair competition laws around the world. The Sections are available to provide additional comments, or to participate in consultations with the CMA, as it deems appropriate.

**II. Executive Summary**

The Sections believe that the draft Guidance contains useful material that will aid businesses, legal practitioners, and others in understanding the CMA’s policies and practices with respect to penalties. The Sections commend the CMA for the advances in the draft Guidance, and believe that the Guidance will further the CMA’s twin objectives “to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anticompetitive activities from engaging in them.”<sup>1</sup> The draft Guidance makes progress towards achieving the transparency that is one of the key objectives of guidance documents of this kind.

The Sections respectfully make certain proposals that they believe will provide further guidance and certainty to the legal community regarding the CMA’s policies concerning penalties. In particular:

- (1) with respect to establishing the starting point of the six-step process used to determine the amount of the penalty, the Sections recommend that the draft Guidance be clarified to more fully explain what is meant by the seriousness of the infringement and how this—along with the need for general deterrence—may be reflected as a specific percentage of the undertaking’s turnover;

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<sup>1</sup> COMPETITION & MARKETS AUTHORITY, CMA’S GUIDANCE AS TO THE APPROPRIATE AMOUNT OF A PENALTY, DRAFT FOR CONSULTATION ¶ 1.3 (Aug. 2, 2017) [hereinafter DRAFT GUIDANCE].

- (2) with respect to violations meriting a penalty within the range of 21–30 percent of relevant turnover, the Sections recommend that the Guidance provide more clarity on the types of “other, non-cartel object infringements which are inherently likely to cause significant harm to competition” that would be considered as the most serious types of infringement;
- (3) in calculating the penalties, the Sections suggest that additional information be provided regarding the circumstances in which—and to what extent—the CMA will adjust the penalty for duration based on the number of years of the infringement;
- (4) the Sections recommend that the Guidance provide additional explanation with respect to when part years will be treated as full years for the purpose of calculating the duration of the infringement; and
- (5) the Sections recommend that the Guidance avoid redundancy with respect to the discussion of aggravating factors when determining the level of penalty.

Please note that the Sections do not address the substantive treatment of certain activities such as resale price maintenance and excessive pricing in UK competition law,<sup>2</sup> on the understanding that such issues are beyond the intended scope of the CMA’s consultation.<sup>3</sup> However, the Sections note that the lack of international consensus on the legality of these activities under the antitrust laws is a relevant factor in considering whether it is appropriate to treat them as object infringements that would be subject to the most significant penalties.

### III. Specific Suggestions on Steps for Determining the Level of a Penalty

*Seriousness.* Step one of the six-step calculation to determine the amount of the penalty considers the seriousness of the infringement, the need for general deterrence, and the relevant turnover of the undertaking. The Sections respectfully suggest that the draft Guidance could be clarified to better explain what is meant by the seriousness of the infringement and how this is reflected as a specific percentage of the undertaking’s turnover.

The draft Guidance states that “[t]he CMA will apply a starting point of up to 30% to an undertaking’s relevant turnover in order to reflect adequately the seriousness of the particular infringement (and ultimately the extent and likelihood of actual or potential harm to competition and consumers.)” In referring to competitive harm as well as the seriousness of the infringement, the draft Guidance suggests that these may be distinct or overlapping considerations, but does not explain how.

In particular, the Guidance states that “[t]he CMA will generally use a starting point between 21 and 30% of relevant turnover for the most serious types of infringement,” including “cartel activities . . . and other, non-cartel object infringements which are inherently likely to cause significant harm to competition.” While “cartel activities” are specifically defined in

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<sup>2</sup> *Id.* ¶ 2.6.

<sup>3</sup> *Cf.* *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) (U.S. view of resale price maintenance); *Verizon Commc’ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407-08 (2004) (U.S. view of excessive pricing); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (same).

Paragraph 3.1 of the guidance, the guidance lacks clarity as to types of “other, non-cartel object infringements” that are inherently likely to harm competition. Absent further clarification, firms and counsel may find it difficult to anticipate what types of conduct may result in the highest fines because there is no widely recognized definition of “serious” for conduct that falls outside the scope of cartel activities. The Sections respectfully suggest that more examples of specific types of violations be provided, which would add clarity in this area.

Moreover, once the CMA determines a general range for a penalty’s starting point—e.g., 21–30 percent for the most serious types of infringement, or 10–20 percent for less serious object infringements—more guidance could be provided as to the factors that the CMA will consider in determining the ultimate starting point. For example, the draft Guidance could provide more explanation regarding:

- How seriousness is measured and translated into a downward deviation from the maximum 30 percent starting point;
- How much of a downward deviation from the maximum 30 percent starting point can be established because of an infringement’s seriousness (or lack thereof);
- How optimal general deterrence is measured and translated into an appropriate starting point; and
- In the case where seriousness and the need for general deterrence suggest different starting points for a penalty, whether seriousness or deterrence considerations will carry greater weight in establishing the starting point for calculating a penalty.

*Adjustment for Duration.* In discussing adjustments for duration in Paragraph 2.16, the Guidance states that “[p]enalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement.” While this paragraph establishes the maximum number of years by which a penalty may be multiplied, there appears not to be guidance as to when, and by how much, the CMA will adjust for the duration of the infringement in practice. This ambiguity is compounded by uncertainty regarding whether and when part years are treated as full years in the calculation of duration of the infringement. Paragraph 2.16 states that “[p]art years may be treated as full years for the purpose of calculating the number of years of the infringement,” and “where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional cases decide to round up the part year to a full year.”<sup>4</sup> The Sections suggest that the draft Guidance can provide more clarity regarding the circumstances under which a part year will be rounded up to the next quarter year, or the next full year. Finally, the Sections suggest that if the various additional adjustments in Steps 3 through 5 of the draft Guidance can also influence the CMA’s determination of the duration of an infringement, it would be helpful if this were made explicit in Paragraph 2.16.

*Aggravating Factors.* In discussing aggravating factors in Paragraph 2.18, the draft Guidance adds a new factor that states, “depending on the circumstances of the case, failure to

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<sup>4</sup> DRAFT GUIDANCE, *supra* note 1, ¶ 2.16.

comply with competition law following receipt of a warning or advisory letter in respect of the same or similar conduct.” The Sections agree that failure to comply with warnings and advisories may appropriately be considered as an aggravating factor for penalty purposes, but would suggest removal of the clause “depending on the circumstances of the case.” The Sections note that this language may be redundant,<sup>5</sup> and perhaps inconsistent with the language of the other factors outlined in Paragraph 2.18 (none of which are qualified by similar language).

#### **IV. Conclusion**

The Sections very much appreciate the opportunity to comment on the draft of the CMA’s Guidance as to the Appropriate Amount of a Penalty and hope that the CMA finds these comments useful in further refining the Guidance. The Sections would be pleased to respond to any questions that the CMA may have and to provide any further assistance that may be appropriate.

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<sup>5</sup> *Id.* ¶¶ 2.17 (“The basic amount . . . may be increased where there are aggravating factors”), 2.18 n.37 (“The CMA will take into account the circumstances of the failure”).