

CMA issues updated penalty guidance

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Overview

On 18 April 2018, the Competition and Markets Authority issued updated guidance on the appropriate amount of penalties to be imposed for infringements of competition law in the UK. This replaces the previous guidance issued by the Office of Fair Trading (which the CMA replaced in 2014) and takes immediate effect; all pending and future cases investigated by the CMA will be subject to the guidance. The guidance does not substantively alter the mechanism for calculating penalties but is intended to reflect the CMA's recent decisional practice.

Penalty calculation

The steps for calculating penalties remain unchanged, but the updated guidance does provide additional information on the CMA's approach to some of these steps:

Step 1 – Calculation of the starting point

The starting point is calculated by multiplying the undertaking's annual turnover in the relevant market by a 'gravity factor' of up to 30%. The updated guidance provides some additional information on how the CMA will determine the appropriate gravity factor. In particular, the CMA has indicated that it will use a figure of 21%–30% for the most serious types of infringement. In line with its recent focus on this type of conduct, the CMA identifies excessive pricing as being particularly serious, together with predatory pricing and cartel activities.

It is notable that the CMA has previously imposed a 30% gravity factor in both cartel and abuse of dominance cases. Indeed, the CMA has regularly imposed gravity factors in excess of 20%, in contrast to the European Commission, which has tended toward gravity factors of 15–20% for cartels, and lower for abuses of dominance. The updated guidance confirms that the CMA will look to impose proportionally higher fines for what it considers to be the most harmful conduct.

Step 2 – Adjustment for duration

As under the previous guidance, under this step, the starting amount is multiplied by the number of years for which the infringement lasted.

Step 3 – Adjustment for aggravating and mitigating factors

The list of potential aggravating factors (which is not exclusive) has been expanded to include a failure to comply with a warning or advisory letter sent by the CMA. Warning and advisory letters have been used regularly by the CMA where it considers that potentially anticompetitive practices are present in certain industries. The specification of a failure to comply with such letters as an aggravating factor for penalty calculation reinforces the role of these letters in the CMA's enforcement armoury.

Step 4 –Adjustment for specific deterrence and proportionality

The updated guidance provides some additional information on factors the CMA will consider when determining whether an increase for specific deterrence is justified and in line with its approach in recent cases. In general such uplifts have been applied where the fine would otherwise represent a very small proportion of, for example, turnover, profit, dividends or net assets, and these elements are now expressly recognised.

Step 5 –Maximum penalty and avoiding double jeopardy

As before, the maximum amount of any fine is 10% of the relevant undertaking's worldwide turnover, and the CMA will continue to be required to take account of any fine imposed by the European Commission or competition authority of another EU Member State for the same conduct (this provision may of course cease to apply after the UK leaves the European Union).

Step 6 – Reductions under the leniency programme, for settlement or voluntary redress schemes

The key change under this final step is the availability of a fine reduction where the relevant undertaking gains approval for a voluntary redress scheme (whereby those harmed by the anticompetitive conduct may obtain compensation under the scheme rather than through litigation). Voluntary redress schemes were introduced by the Consumer Rights Act 2015, though to date none have been set up (this provision is not reflected in the European Commission's fining guidelines. The Commission has now proposed a new Directive on Collective Redress, and if adopted, it will be interesting to see if the Commission's fining practice changes in line with the CMA approach.).

Comment

Though the updated guidance results in no real change to the framework of the CMA's penalty calculations, it does confirm the CMA's willingness to impose fines at the upper end of the scale. The CMA has demonstrated in recent decisions that it is prepared to impose the maximum gravity factor and apply significant uplifts for specific deterrence where it considers the infringements to be very serious. In addition, the CMA has shown that it will use non-financial penalties more regularly; it recently disqualified two company directors following its investigation into anticompetitive practices by estate agents—the second time it has used that power (the first was in December 2016). All indications are that the CMA intends to take an active approach to competition enforcement in the coming years, and to make use of the full suite of its powers (including its criminal powers).

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