# The virtue of a proportional response—an assessment of the CMA's new penalty guidance

**Nissim Massarano***

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## Introduction

The fictional United States (US) President Jed Bartlet famously once asked: "What's the virtue of the proportional response?" The response his Admiral provided was "It isn't virtuous, Mr President. It's all there is, sir".[1] The author of this article always found this response disappointing, since President Bartlet answered his own question; the virtue of a proportional response is exactly that—it is proportional.

Unfortunately, this virtue appears to be lacking in the United Kingdom's (UK) Competition and Markets Authority (CMA) revised guidance (the Guidance) as to the appropriate amount of a penalty, published at the end of 2021.[2] The Guidance is of particular importance in antitrust cases, since both the CMA and the UK Competition Appeal Tribunal (CAT) must have regard to such guidance when considering the appropriate level of penalties.[3]

This article describes the key changes made to the six-step penalty-setting process the CMA follows and analyses the appropriateness of the proposed changes.[4] In so doing, this article argues that, although the Guidance contains some helpful updates, particularly those aimed at ensuring the CMA can exercise its functions post-Brexit, the Guidance inappropriately seeks to create a foundation for imposing ever larger penalties. This CMA is not coy about this; in its consultation document for the Guidance, the CMA predicted that "there may be an overall increase in the level of penalties imposed".[5]

## Step 1: The starting point

Step 1 of the penalty-setting process involves, first, ascribing a "seriousness" percentage to the infringement of between 0–30%; second, ascertaining the "relevant turnover" of the business being fined; and third, applying the seriousness percentage to the relevant turnover.[6]

The Guidance introduces two key changes, both relating to "relevant turnover" aspect of this step. For context, "relevant turnover" means the turnover of the undertaking in the relevant product and geographic market affected by the infringement in the financial year of the undertaking preceding the date when the infringement is found to have ended.[7] The two key changes are as follows; the first relates to the calculation of relevant turnover where an undertaking has no or low turnover in the UK, and the second relates to the exceptions to the rule of calculating relevant turnover based on the businesses' audited accounts in the last financial year.

### *Relevant turnover where an undertaking has no or low turnover in the UK*

Prior to the new Guidance, an undertaking's relevant turnover was generally limited to that which it generated in the UK in the product market. The problem the Guidance identifies is that, where the market affected by the infringement is wider than the UK, an undertaking's relevant turnover within the UK may not adequately reflect its role in the infringement. This may occur, for example, where undertakings active in a global or Europe-wide market enter into a market-sharing agreement that affects the UK. In such circumstances, one of the counterparties to market-sharing agreement may have low or no turnover in the UK; they agreed to stay out of the UK market.

The predecessors to the Guidance already accounted for such a possibility by allowing for the CMA to increase any penalty at step 4 where the proposed penalty was very low or zero at the end of step 3. However, the current Guidance takes the view that there may be cases, including the one noted above, where it might be better to take account of this issue at step 1.[8]

The Guidance accounts for this possibility at step 1 as follows. First, the CMA will assess the aggregate turnover of all the relevant undertakings in the wider market affected by the infringement, i.e. to include turnover

* Associate in the London Antitrust Practice of Clifford Chance LLP. The author is grateful for the valuable input provided by Alex Nourry and Dan Harrison. The views, interpretations, and conclusions expressed in this article are the author's personal opinion. They do not reflect the position of Clifford Chance LLP.

[1] The West Wing, Season 1, Episode 3, *A Proportional Response*.

[2] Competition and Markets Authority, "CMA's guidance as to the appropriate amount of a penalty CMA73" (Guidance) (16 December 2021), available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060671/CMA73final_.pdf*.

[3] Section 38(8) of the Competition Act 1998 (CA98).

[4] The changes made to step 6 of Guidance are not examined in this article.

[5] CMA, "Draft CMA's guidance on the appropriate amount of a penalty, Consultation document CMA73CON" (2 July 2021), available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907176/consultation-document-draft-penalty-calculation-guidance.pdf*.

[6] Guidance, para.2.2 et seq.

[7] Guidance, para.2.10.

[8] CMA, "CMA's guidance on the appropriate amount of a penalty, Summary of responses to the consultation CMA73RESP" (16 December 2021), para.2.14, available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041024/CMA73_-_Summary_of_Responses.pdf*.

generated outside the UK.[9] Second, it will identify each relevant undertaking's share of supply of the aggregate turnover on that wider affected market.[10] Third, it will apply those shares of supply to the undertakings' aggregate turnover in the affected market *in the UK*.[11]

This article considers that this move is, overall, welcome. First, this approach closely mirrors the approach of the European Commission (the Commission) in its penalty guidance,[12] which, by implication, provides a material degree of clarity to undertakings. Moreover, by limiting the denominator of the relevant turnover to turnover generated in the UK, risks of double jeopardy are lessened.[13]

Second, there are good grounds to move this assessment to step 1, rather than only being taken account of at step 4. As this article will come on to, the Guidance does not specify the amount by which the CMA may increase the level of a fine at step 4, and the CMA has shown itself willing to impose significant increase (sometimes as by over 1,000%[14]). Accordingly, accounting for the situation described above at step 4 will lead to a material input of the fine being imposed on a largely discretionary basis, which is contrary to the purpose of having guidance.[15]

Third, post-Brexit, the CMA is more likely to deal with cases involving global or Europe-wide markets affecting the UK; these previously would have been dealt with by the Commission. This change may therefore be timely.

This notwithstanding, the instances in which the CMA will elect to take this approach are unclear. So far, the only instance the CMA has suggested by way of example is a market sharing agreement in a global or Europe-wide market affecting the UK. While this seems the most obvious example, businesses will benefit from understanding whether the CMA envisages using this tool in other circumstances.

## *Exceptions to the rule of calculating relevant turnover on the basis of the businesses' audited accounts in the last financial year*

Another general rule the CMA applies when calculating the relevant turnover is that, generally, it will use the businesses' audited accounts in the financial year prior to the end of the infringement period.[16] The predecessor to the Guidance stated that there may be "exceptional" circumstances where it may be appropriate to use a different figure to reflect the true scale of an undertaking's activities in the relevant market.

A good example of this is *Balmoral Tanks Ltd v CMA* (*Balmoral*).[17] In *Balmoral*, the appellant was found to have engaged in an unlawful information exchange on 11 July 2012. Balmoral's financial year ended on 31 March. Therefore, had the general rule been applied, Balmoral's relevant turnover would have been from its audited accounts for the financial year ended 31 March 2012. However, the CMA found that Balmoral was a new entrant in the relevant market, having only delivered product first in February 2012. Accordingly, its turnover in that financial year was very limited such that, in the CMA's view, that turnover did not represent Balmoral's real economic situation at the time of the infringement. Instead, the CMA used the 12-month period immediately preceding the infringement as a basis for determining relevant turnover.[18] The CAT upheld this approach.[19] These facts are "exceptional".

However, the revised Guidance seems to alter and expand this approach. Gone is the word "exceptional", replaced instead with guidance that the CMA may use a different figure "in certain circumstances".[20] The CMA did not explain what it intended with this change. However, it appears probable that this change was intended to allow the CMA more flexibility in departing from the general rule. Yet it is unclear, and unexplained, what other, non-exceptional, circumstances the CMA considers warrants a departure from the general position. Accordingly, this change appears to leave scope for the CMA to employ creative and flexible accounting tools to calculate, and potentially increase, the relevant turnover.

[9] For example, Undertaking A generates £150m in the UK, and Undertaking B generates the equivalent of £50m in a third county that forms part of the wider market affected by the infringement, the base aggregate turnover will be £200 million. In this example, we assume that Undertaking B has no turnover in the affected market in the UK on the basis that it and Undertaking A entered into a market sharing agreement.
[10] Based on the example in the previous footnote, Undertaking A's share of supply will be 75%, and Undertaking B's share of supply will be 25%.
[11] Guidance, fn.21. Based on the previous two footnotes, the undertakings' aggregate turnover in the affected market in the UK is £150m (i.e. Undertaking A's turnover). Accordingly, the "relevant turnover" of Undertaking A will be £112.5m (75% of £150m) and the "relevant turnover" of Undertaking B will be £37.5m (25% of £150m).
[12] Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) [2006] OJ C210/2 (Commission's Guidance), para.18.
[13] The approach of liming the scope of the relevant turnover to undertakings' aggregate turnover in the affected market in the UK was not in the version of the guidance issued for consultation ("Draft CMA's guidance as to the appropriate amount of a penalty CMA73", fn.21). This change is welcome.
[14] In the CMA's recent *Hydrocortisone* Decision, the CMA uplifted one of Allergan's fines from £6.8m to £74.3m (CMA Decision: *Hydrocortisone tablets, excessive and unfair pricing and anti-competitive agreements* Case 50277, 15 July 2021, para.10.288).
[15] This revised approach has a potential deflationary effect on fines. This is because, prior to the Guidance, the relevant turnover of Undertaking A (following the example at footnotes 9 to 11 above) is 100% of its UK turnover in the relevant product market (i.e. £150 million), whereas it is 75% of its UK turnover in the relevant product market under the approach of the Guidance (i.e. £112.5m). While the relevant turnover of Undertaking B was zero prior to the guidance, the CMA would increase the fine at step 4, potentially by a material amount.
[16] Guidance, para.2.10.
[17] *Balmoral Tanks Ltd v CMA* [2017] CAT 23.
[18] *Balmoral Tanks Ltd v CMA* [2017] CAT 23 at [138].
[19] *Balmoral Tanks Ltd v CMA* [2017] CAT 23 at [141].
[20] Guidance, para.2.11.

## Step 3: Aggravating and mitigating factors

Step 2 of the Guidance allows the CMA to adjust the figure arrived at following the application of step 1 to account for the duration of the infringement.[21] The Guidance does not propose changes to this step, so this article does not comment on this further.

The Guidance has, however, made two important changes to step 3. Step 3 of the Guidance allows the CMA to increase the level of the penalty because of aggravating factors and decrease the penalty because of mitigating factors. Both changes relate to the mitigating factors; the first is to alter its guidance on whether genuine uncertainty will be a mitigating factor, and the second is to remove compliance programmes as a mitigating factor.

### *Genuine uncertainty as a mitigating factor*

The predecessor to the Guidance stated that genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement would potentially be a mitigating factor. Other competition authorities also consider this as a mitigating factor.[22] Providing for genuine uncertainty to be a mitigating factor follows a simple intuition; an undertaking that commits an infringement but nonetheless was genuinely uncertain that its conduct was unlawful is less culpable, and therefore less warranting of punishment, than an undertaking that commits an infringement knowing that its conduct was unlawful.

Nevertheless, the Guidance reduces the scope of genuine uncertainty as mitigating factor. The Guidance states that this mitigating factor will not generally be available, noting that, for a penalty to be imposed, an undertaking at least ought to have known that its conduct would result in a restriction or distortion of competition.[23] However, the Guidance notes that a "reduction may, however, be warranted as a result of exceptional circumstances specific to the conduct of the investigation which created genuine uncertainty", and "where the legal characterisation of the infringement is truly novel". On the latter point, the Guidance states that this should be distinguished from cases in which the CMA applies established competition law principles to novel patterns of fact; albeit such cases may be relevant at step 4.[24]

This article argues that this narrowing is inappropriate. First, the Guidance notes, correctly, that it is possible that an undertaking ought to have known that its conduct would result in a restriction or distortion of competition, but nonetheless operated under genuine uncertainty that its conduct was unlawful. Such an undertaking is of reduced culpability, as noted above. Given this, it is unclear what the Guidance is seeking to add by stating that this genuine uncertainty must be "as a result of exceptional circumstances specific to the conduct of the investigation", or indeed why this should be so as a matter of principle. Rather, the change in language suggests that there will be (unexplained and unidentified) other cases where the undertaking in question was genuinely uncertain, but which the CMA will not afford a reduction.

Second, as noted above, the Guidance states that a reduction may be available where the legal characterisation of the infringement is novel, but not where the CMA applies established competition law principles to novel patterns of fact—the latter case only being relevant at step 4. This distinction is unprincipled. Competition law is fast evolving, and new markets and sectors pose new questions as to how to apply established law to the facts. Applying the law to the facts is a highly skilled task. There is no reason in principle why a fine may be reduced where the legal characterisation is novel, but not when the law is being applied to novel facts in a manner that was, to the undertaking, genuinely uncertain at the time.

Yet the Guidance seeks to support this distinction, and its position that the application of established competition law principles to a novel pattern of facts is only relevant at step 4, by citing the CAT's judgment in *Generics (UK) Ltd v CMA* [2021] CAT 9 (*Paroxetine II*). This citation is inapposite. As an initial point, the CAT did not suggest any rule that such cases are to only come in it at step 4. Rather, it noted that there is a degree of overlap between the individual steps in the penalty assessment and, given this, the CMA did not fall into error merely by locating its assessment of how to account for novel facts at step 4 rather than step 3. Instead, the CAT noted that "the important point is that it should be addressed and what matters is the overall calculation which results".[25] It is quite clear that the CAT would have also found no error had the CMA located its assessment also at step 3.

Moreover, the CAT's judgment in *Paroxetine II* applied the predecessor to the Guidance, which enabled the CMA to apply a *reduction* at step 4.[26] As the quote above notes, the CAT's finding was that it does not matter whether the reduction occurs; however, a reduction in that case was required. In contrast, under the Guidance, and as explained below, step 4 no longer provides for a reduction, only for increases. Accordingly, and as fn.34 of the Guidance explains, in cases concerning the application of established competition law principles to

[21] Guidance, para.2.14.
[22] For example, although not in the Commission's Guidance, the Commission in *Car Emissions* reduced the parties' fine by 20% because the Commission had no previous enforcement practice as regards sanctioning cartels solely on the basis of an infringement of Article 101(1)(b) of the Treaty of the Functioning of the European Union (Summary of the Commission's Decision: *Car Emissions* Case AT.40178, 8 July 2021, recital 22 (the full Decision was not published as at the date of the publication of this article)).
[23] Guidance, paragraph 2.18, citing *Argos Ltd and Littlewoods Ltd v OFT* [2005] CAT 13 at [221]; *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 at [466]; and *Aberdeen Journals Ltd v Office of Fair Trading* [2003] CAT 11 at [484] and [485].
[24] Guidance, para.2.18 and fn.34.
[25] *Generics (UK) Ltd v CMA (Paroxetine II)* [2021] CAT 9; [2021] 5 C.M.L.R. 12 at [176].
[26] Indeed, the CMA applied a 10% reduction at step 4 in that case, and the CAT increased the reduction to 40% (*Paroxetine II* [2021] CAT 9 at [186]).

a novel pattern of facts, the only possible outcome will be to apply a "lower (or no) uplift" at step 4. This is contrary to CAT's judgment in *Paroxetine II*.

### *No reduction for compliance activities*

In the previous Guidance, the CMA could reduce a penalty at step 3 by up to 10% where the undertaking took adequate steps with a view to ensuring compliance with competition law. This mitigation factor has been removed. The CMA justified this removal in its consultation on the basis that undertakings are legally obligated to respect competition rules, and that such laws are nowadays very well embedded and should be widely understood. Given this, the CMA states that it expects businesses to take steps to ensure compliance with competition law. Moreover, the level of any penalty should incentivise an undertaking to take appropriate competition law compliance steps, so a reduction at step 3 is unnecessary.[27]

The CMA is correct to note that undertakings are legally obligated to respect competition rules. However, its proposal appears misguided both as a matter of principle, but also as a matter of incentives.

There are two key principled reasons why compliance programmes should amount to mitigation. First, it is important to recognise that competition law compliance programmes can never eliminate the risk that breaches will occur. Even the best programmes generally only minimise risks. With this in mind, consider a case in which an undertaking has robust competition law compliance programmes in place but, despite this, one of its employees causes an infringement of competition law. Such an undertaking is less culpable than an undertaking that has no competition law programme in place. This follows from the simple intuition that someone who tries their best, but fails, is less at fault than one who is careless or reckless and, because of this, fails. Yet the Guidance treats both cases alike.

The second reason of principle is that the existence of a competition law compliance programme communicates that the undertaking intends to not infringe in the future.[28] It is again a simple intuition that, as a matter of principle, someone who does wrong, but then signals remorse by setting themselves up, as best they can, to not do wrong again, is less worthy of punishment than someone who takes no steps to prevent a repeat of its wrongdoing. Again, the Guidance treats both cases alike.

Moreover, the CMA's claim that this mitigation step is unnecessary to incentivise undertakings from breaching competition law appears to be based on speculation, not evidence. First, the CMA's claim that competition law is very well embedded and should be widely understood by businesses is not apparent. A recent study conducted on behalf of the CMA found that "[f]amiliarity with competition law remains relatively low (24% know it well), and only a minority (6%) feel they have a good understanding of non-compliance penalties or sanctions".[29] There therefore remains good grounds for trying to incentivise undertakings to increase their familiarity with competition law; an important aspect of such familiarisation is competition law compliance programmes.

Second, and as noted by a number of respondents to the CMA's consultation, the incentive created by the compliance discount appears to have an effect. In 2020, the In-house Competition Lawyers Association carried out a survey of in-house lawyers' compliance activities. 82% of respondents to the survey believed that offering the possibility of discounts for effective compliance programmes would result in higher investment in compliance programmes.[30] The position in the Guidance may therefore have the effect of reducing investments in competition law compliance programmes at a time when familiarity of competition law is low.

Third, although some other authorities also do not afford discounts for competition law compliance policies (notably the European Commission), the position in the Guidance is, in general, out of kilter with international[31] and domestic[32] best practices. The CMA's proposal to depart from best practice meant that it should have ensured that its proposal was backed by principled and rigorous evidence. Yet it provided no evidence that the removal of the mitigating factor was warranted and, as noted, both principle and the evidence call for its retention.

## Step 4: Specific deterrence

In the predecessor to the Guidance, step 4 assessed both specific deterrence and proportionality. A fine could therefore go up or down at this stage. In the Guidance, the issue of proportionality is removed from step 4 and instead is placed at step 5. This is because, in the CMA's view, the question of proportionality asks whether, in the round, the level of the penalty is appropriate. This can only be done once all the inputs for the penalty are completed.[33]

Moreover, the Guidance makes a number of changes to the factors that should be taken into account at step 4. First, the Guidance provides greater scope and emphasis on increasing penalties to ensure specific deterrence.[34] Second, it places greater emphasis on the penalty needing to account for the financial benefit the undertaking gains

[27] CMA, "Draft CMA's guidance on the appropriate amount of a penalty, Consultation document CMA73CON" para.4.13.
[28] *Kier Group Plc v OFT* [2011] CAT 3 at [217].
[29] IFF Research, "Competition Law Business Tracking Research: Competition & Markets Authority" (May 2021), para.1.4, available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001931/CMA_Competition_Law_Business_Survey_2021_Final_Report_.pdf*.
[30] See OECD, "Working Party No. 3 on Co-operation and Enforcement Competition Compliance Programmes—Note by BIAC" (8 June 2021), para.24.
[31] Competition law compliance programmes warrant a discount notably in the US, Canada, Spain, and recently Germany.
[32] Competition law compliance policies are considered as relevant factors by each of the Financial Conduct Authority, the Serious Fraud Office, Ofcom, and Ofgem.
[33] CMA, "Draft CMA's guidance on the appropriate amount of a penalty, Consultation document CMA73CON", paras 4.20 to 4.21.
[34] Guidance, paras 2.19 to 2.21.

from the infringement, calling for any penalty to "exceed an undertaking's likely gains from an infringement by a material amount".[35] Third, the Guidance states that, when assessing the financial position of an undertaking for the purposes of deterrence, the CMA will generally take account of total worldwide turnover as the primary indicator of the size of the undertaking and its economic power.[36]

This article considers that there are circumstances where it would be appropriate for the CMA to increase the level of a penalty to account for the size of an undertaking.[37] However, this article considers that step 4 of the Guidance appears to contain four core areas of concern.

First, s.36(7A) CA98 states that, in fixing a penalty, "the CMA must have regard to […] the seriousness of the infringement concerned, and the desirability of deterring both the undertaking on whom the penalty is imposed and others from […]" infringing competition law. Accordingly, while deterrence forms part of the assessment, the seriousness of the infringement must also be considered. The CAT has previously recognised that these need to be balanced against each other, and has warned that considering deterrence without recourse to seriousness is inappropriate:

> "Whilst deterrence is a relevant consideration when assessing proportionality in this context, so equally is the culpability of the offender/seriousness of the offence. If these two considerations pull in different directions, a fair balance should be sought. Where a provisional penalty at Step 1 is deemed insufficient for the purpose of deterrence (or for that matter does not properly reflect the seriousness of the offence) it is proper to increase it. But the culpability consideration must not be lost to view, and it may well impose some limit on the extent of any increase based purely on deterrence."[38]

However, in contrast to this, step 4 of the Guidance makes no mention of seriousness and, instead, focusses exclusively on deterrence. This risks decoupling deterrence from seriousness and has shades of the "Minimum Deterrence Threshold" that the CAT previously deprecated.[39]

The decoupling of deterrence from seriousness can also be seen in the increased focus on requiring the penalty to materially exceed any financial benefit. There is no necessary correlation between financial benefit and seriousness; undertakings might benefit greatly from "by effects" vertical infringements, which are generally recognised to be less serious infringements. Similarly, the location of this assessment after step 4 risks enabling the CMA to cancel out any reductions afforded in mitigation at step 3 on the basis that the resulting fine is too low. These paragraphs of the Guidance therefore materially decouple seriousness and deterrence.

Second, the Guidance takes a very narrow view of what comprises deterrence, focusing exclusively on the deterrence effect of the undertaking having to pay the penalty. This view appears somewhat outdated. For example, the Court of Appeal in *Phenytoin* recognised that a finding of infringement can lead to non-negligible reputational stigma, which could have adverse ramifications for that company in the marketplace. It also recognised that a finding of infringement by way of a decision by the CMA can result in statutory follow-on damages claims which piggy-back upon the infringement decision.[40] In addition, the CMA has increasingly sought to disqualify directors on the back of its infringement decisions.

It is also important to recognise that the role that follow-on damages play in deterring undertakings is increasing. The Damages Directive[41] has been fully implemented into UK law since 2017,[42] and infringement decisions are routinely succeeded by follow-on damages claims, often backed by litigation funders. This is amplified by the recent, increasingly permissive approach to opt-out class actions,[43] which are now being brought with increasing frequency. While the exact amount that will be awarded at the end of such actions cannot be certain at the time the CMA imposes its penalty, the CMA can nevertheless be confident that it is probable that such actions will be commenced.

Accordingly, the Guidance's single focus on ensuring the penalty achieves deterrence, while ignoring other factors that also achieve deterrence, risks leading the CMA to imposing penalties that, when considered with other deterring factors, go well beyond what is necessary to deter, and which are therefore disproportionate.

Third, the Guidance provides very little colour on the size of the uplifts that may be appropriate due to the size of the undertaking or due to out of market turnover. This is in stark contrast with the specific and controlled steps that are calculated as steps 1 to 3. Even under the predecessor to the Guidance, which was less permissive in this regard, the CMA often imposed staggering uplifts at step 4—sometimes over 1,000%.[44] These levels of uplifts render the analysis at steps 1 to 3 meaningless, but also provide the CMA with extraordinary discretion to set penalties at the level it wants, without having to

[35] Guidance, paras 2.19 to 2.22. No guidance is provided as to how much is "material".
[36] Guidance, para.2.20.
[37] See to this effect *Eden Brown Ltd v OFT* [2011] CAT 8 at [98]; *Kier Group Plc v OFT* [2011] CAT 3 at [177].
[38] *Kier Group Plc v OFT* [2011] CAT 3 at [175].
[39] *Kier Group Plc v OFT* [2011] CAT 3 at [174] et seq.
[40] *CMA v Pfizer UK Ltd* [2020] EWCA (Civ) 339; [2020] 4 C.M.L.R. 18 at [115].
[41] EU Directive 2014/104/EU on damages for competition law infringements [2014] OJ L349/1.
[42] The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385).
[43] See the Supreme Court's recent judgment in *Mastercard Inc v Merricks CBE* [2020] UKSC 51; [2021] Bus. L.R. 25.
[44] In the CMA's recent *Hydrocortisone* Decision, the CMA uplifted one of Allergan's fines from £6.8m to £74.3m (CMA Decision: *Hydrocortisone tablets, excessive and unfair pricing and anti-competitive agreements* Case 50277, 15 July 2021, para.10.288). The reasons provided by the CMA for this uplift are relatively light.

ground the amount of the uplift in any specific analysis. This article suggests that this is contrary to the ordinary principles of good administration. Moreover, this leaves open the possibility that the main input to the level of many of the penalties that the CMA will impose will be based on little guidance or control. This is also contrary to principles of legal certainty and risks capricious decision making.

Fourth, it is notable that one of the reasons the Guidance states justifies uplifts due to the size of an undertaking is that "[a]ny penalty that is too low to deter an infringing undertaking from breaching competition law in the future is also unlikely to deter other undertakings that may be considering anti-competitive activities".[45] This conflates general and specific deterrence, however. The scope of general deterrence is to deter other undertakings from infringing. This is a factor that the Guidance accounts for at step 1. On the other hand, specific deterrence is about deterring the undertaking subject to the decision, which is the scope of step 4, at least on the face of the Guidance. The inclusion of this additional factor in the Guidance at step 4 therefore suggest an unwarranted expansion of the scope of step 4. And it also risks double counting, since general deterrence is already a factor for increasing the seriousness percentage at step 1.

## Conclusion

Step 5 of the Guidance calls for the CMA to take a step back and to assess the proportionality of the fine reached at the end of step 4.[46] This is an appropriate goal, and it is hoped that this will provide an avenue for the CMA to reduce any excesses. However, as shown in this article, the revised Guidance allows the CMA to reach significant sums by the end of step 4. It may be that the CMA will be less inclined to recognise that a proposed penalty is disproportionate when it follows from the relevant steps of the Guidance.

As shown in this article, the overall construction of the Guidance is inappropriately slated towards increasing the level of penalties that the CMA can impose. The starting point of the assessment is expanded at step 1 to allow for the CMA to increase the relevant turnover. Important mitigating factors are reduced or removed at step 3. And step 4 has been recalibrated to focus on deterrence to the exclusion of reflecting the seriousness of infringement. Beyond the point of the change in calibration, the rationale provided for these changes are often thin and unprincipled. It is hoped that the CAT will impose a degree of control over the CMA by interpreting the potential excesses of the Guidance in a narrow manner, for there is virtue in proportionality.

[45] Guidance, para.2.19.
[46] Guidance, para.2.24. Step 5 also calls for the CMA to adjust the penalty, if necessary, to ensure that it does not exceed the maximum penalty allowed by statute.