

News brief



OFT penalties

New guidance provides some clarification

On 10 September 2012, the Office of Fair Trading (OFT) published new guidance on the manner in which it will set penalties for breaches of competition law (the guidance). The publication of the guidance follows a wide-ranging consultation launched by the OFT in October 2011 (the consultation) (www.practical-law.com/7-513-7650).

The guidance sets out a procedure consisting of six steps where the starting point is based on the company's relevant turnover, followed by a number of adjustments. While providing some clarity, the way in which fines will be calculated may still be open to challenge in future cases.

Step 1

The maximum starting point (step 1) for the calculation of penalties has been increased from 10% to 30% of a company's relevant turnover. The proposal in the consultation to set a minimum starting point of 25% met with strong opposition, and has not been included in the guidance. However, the OFT will use a starting point towards the upper end of the range for the most serious infringements.

The guidance clarifies that the relevant turnover to be used for the penalty calculation is that relating to the relevant market affected by the infringement, and to the financial year preceding the end of the infringement, rather than the year preceding the OFT's decision (as under the previous guidance). In exceptional circumstances, the calculation may rely on figures other than the published turnover.

However, it continues to be the case that the final amount of any penalty cannot exceed 10% of the worldwide turnover of the group in the last business year preceding the date of the OFT's decision.

Steps 2 and 3

As before, the starting point may be adjusted to take into account the duration of the infringement (step 2 of the fine calculation) and any aggravating or mitigating factors (step 3). The guidance introduces a new aggravating factor: persistent and repeated delays in responding to the OFT's requests could lead to an increase in penalties. This includes scenarios where the company persistently and repeatedly disrespects the time limits specified by the OFT, or otherwise persistently delays the OFT's investigation.

While repeated infringements continue to be an aggravating factor for penalty calculation, the guidance now clarifies that where the OFT, concurrent regulators or the European Commission (the Commission) have previously issued a decision relating to the same or similar infringements in the preceding 15 years, this may result in the amount (following the application of steps 1 and 2) being increased by up to 100%. The prior infringement decisions would be expected to be taken into account only where they had an impact in the UK.

The OFT has also clarified that evidence of appropriate compliance activities both before and after the infringement may result in a decrease in penalty of up to 10%. In exceptional circumstances, such as where compliance activities are used to conceal or facilitate an infringement

or to mislead the OFT, these may be treated as an aggravating factor.

Steps 4, 5 and 6

The OFT will now have to consider (in step 4) whether a penalty is proportionate as part of its overall assessment, after adjustments have been made on the basis of aggravating or mitigating factors. Under the previous guidelines, proportionality was considered when applying the other stages of the calculation. According to the OFT, the new approach is intended to ensure that penalties are not excessive or disproportionate in the particular circumstances of the case.

The penalty will be adjusted, if necessary, so as not to exceed the maximum of 10% of the group's worldwide turnover in the last business year preceding the date of the OFT's decision (step 5). In addition, if a penalty or fine has been imposed by the Commission or an authority in another EU member state in relation to an infringement, the OFT will not penalise the company again for the same anti-competitive effects.

A new formal step has been introduced in the final stage (step 6) at which leniency and settlement discounts and, in exceptional cases, reductions for financial hardship are to be applied. The guidance does not materially revise the leniency policy.

Implications of the changes

The guidance aligns the OFT's approach with that of the Commission, a number of European competition authorities, and international best practice. The guidance also takes into ac-

count the decisions of the Competition Appeal Tribunal (CAT) in 2011 regarding the construction and construction recruitment cases where the penalties imposed by the OFT were viewed by the CAT as disproportionately high and so were reduced significantly (*see News brief "Construction bid-rigging: implications for the OFT's fining policy"*, www.practicallaw.com/1-505-7463).

However, the OFT makes it clear in the guidance that it intends to impose severe financial penalties in relation to the infringements it considers to be the most serious, such as price fixing or market sharing agreements and serious abuses of a dominant position.

The wider range in the starting point for the calculation of penalties is envisaged to give the OFT greater flexibility in ensuring that penalties better reflect the seriousness of a particular infringement. The OFT's previous approach saw the penalties being adjusted for deterrence purposes. This approach was criticised for resulting in uncertainty and leading to disproportionate penalties. The guidance instead uses the higher starting point for penalty calculations to aid general deterrence with the figure being adjusted for specific deterrence and proportionality at a later stage. The OFT will continue to exercise its discretion in applying adjustments to penalties.

As a result, while businesses may have greater clarity regarding the detail and steps of the penalty calculation procedure, the wider range for starting points coupled with the proportionality adjustment mean that fine calculations might remain unpredictable and open to challenge.

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The guidance is at www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf.