



Law Society  
of Scotland

# Consultation Response

Draft revised CMA guidance on the appropriate amount of a penalty

September 2017



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Competition Law Sub-committee welcomes the opportunity to consider and respond to the CMA's consultation *Draft revised CMA guidance on the appropriate amount of a penalty*.<sup>1</sup> The Sub-committee has the following comments to put forward for consideration.

## Response

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### General remarks

Our comments relate specifically to the text included in footnote 34 of the draft penalties guidance<sup>2</sup> which effectively provides a 10% reduction to a penalty when this is considered to be merited on the basis of an undertaking's compliance activities.

As a starting point, we note that recognition of compliance activities is an important aspect of the UK competition law fining regime. This update to the guidance represents a good opportunity to give this important more prominence by clearly including it in more detail in the actual text of the guidelines. Raising the visibility of this reduction may indeed lead to more businesses reviewing their compliance activities. Currently buried in a footnote, it may not only be missed, but perhaps not afforded the same weight as other aspects of the penalty guidelines. We therefore support the clarification of this point in the final draft of the CMA Guidance as we consider that the current wording may lead to potential misinterpretation/legal uncertainty as to who would qualify for this reduction.

<sup>1</sup> <https://www.gov.uk/government/consultations/ca98-penalties-guidance>

<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/634986/clean-draft-guidance-ca98-penalty-calculation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/634986/clean-draft-guidance-ca98-penalty-calculation.pdf)

## Recommendations

We recommend the following clarifications in relation the proposed amended guidance:

1. An explanation of what exactly is meant by “a public statement regarding a commitment to compliance on the undertaking’s relevant website(s)”. In particular, the following may be addressed:
  - a. Specifying the level of detail that is required for such a statement and to this end, it may be helpful to include examples of such statements that the CMA would consider as meeting this criteria; and
  - b. Whether such statements must be visible on the publically accessible part of the company’s website itself, or included in the documents available, for example within a public compliance code; and
  - c. Clarifying what constitutes an undertaking’s “relevant website(s)” eg whether this would be the group website (investor-facing pages) or also the public facing websites of the subsidiaries
2. With respect to the following wording “*conducting periodic review of its compliance activities, and reporting that to the CMA*”, clarifications would be welcomed in particular the following questions:
  - a. Does periodic review of compliance activities and reporting that to the CMA relate to ‘post-infringement’ compliance activities only? Our reading of the proposed legislation is that it would apply to future conduct only but the drafting is confusing and the point should be clarified in the final guidance. In other words, an undertaking that has been fined needs to report back on changes it made to its compliance activities.
  - b. Or does this require general periodic reporting to the CMA, and of what length? We do not expect that such a requirement would appear as a footnote. If such a wider application is intended then the consultation should have included some level of cost benefit analysis of the impact on undertakings.
  - c. A number of legal professionals questioned whether the CMA indeed want to receive annual reports; and if so, will it provide any recognition or acknowledgment that reporting meets CMA’s requirements?
  - d. Would a standardised reporting form be helpful in this situation?
3. If indeed periodic reporting is what is intended by the CMA and this is clarified in the guidelines, then it would be welcomed if the following points were specified:
  - a. Reporting regularity – ‘periodic’ is an open term in this context; it would be helpful to include examples of what regularity the CMA envisaged for this, for example separating out this requirement for companies depending on their size, eg FTSE, large corporates and SMEs;
  - b. Time period for reporting – if the idea is that reporting should be a post-infringement requirement then this should be for a clearly specified and determined period rather than on an indefinite basis;

- c. Reporting level – which function should perform this reporting (legal, executive, compliance, risk?) and what level of seniority the report should be signed-off at;
  - d. Reporting detail – for example, would a statement that an undertaking performed annual compliance review be sufficient? Does CMA need evidence of the review, for example internal audit trail?
  - e. Acknowledgment – whether the CMA will acknowledge that the report when submitted meets with its requirements.
4. As a general point, as these are two new requirements in relation to quite a significant aspect of the fining guidelines, it may be appropriate to provide examples of public statements and annual reports that the CMA expect to see.

**For further information, please contact:**

Carolyn Thurston Smith  
Policy Team

Law Society of Scotland

DD: 0131 476 8205

[carolynthurstonsmith@lawscot.org.uk](mailto:carolynthurstonsmith@lawscot.org.uk)