UK NATIONAL REPORTER'S RESPONSE

TO QUESTIONS FOR LIDC OXFORD CONGRESS 2011

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1. GENERAL BACKGROUND

This report which has been prepared in accordance with the guidelines given by the International Rapporteur, to assist in preparing her report for the Oxford Congress in September 2011. It is was presented to the roundtable meeting of the Competition Law Association ("CLA") on 7 April 2011 to seek the views of members on its content.

This report is structured by reference to the questionnaire designed by the International Rapporteur, and deals with the positive law governing the application of penalties for

infringements of substantive competition law in the United Kingdom ("UK").[1] Following the CLA Roundtable meeting on 7 April 2011, this report has been updated so as to reflect the range of views expressed by CLA members regarding the "normative questions and recommendations" set out at section 4 of the International Rapporteur's questionnaire and to reflect any comments regarding the positive legal content.

References in this report to infringements of competition law ("infringements") are to infringements of Article 101 of the Treaty of the Functioning of the European Union ("TFEU"), Article 102 TFEU, Chapter I of the Competition Act 1998 ("CA 1998"),[2] and Chapter II CA 1998.[3]

2. LEGAL FRAMEWORK

2.1 Institutions

The UK Government is presently consulting on significant changes to the institutional structure of the UK competition law regime.[4] Possible changes under that revised structure are noted where appropriate, but the law is described as at 29 March 2011.

The bodies responsible in the first instance for deciding the amount of a fine for infringements are the Office of Fair Trading ("OFT") and by the regulators of specific sectors as set out in the table below.[5] The UK government is consulting on the merging

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1 This report does not deal with the application of penalties for breach of procedural requirements such as failures to produce information or documents.

2 The UK domestic counterpart to Article 101 TFEU.

3 The UK domestic counterpart to Article 102 TFEU. There are no penalties applying to breach of substantive UK merger control law. Penalties may apply in respect of procedural failings, e.g. ss 109-11 Enterprise Act 2002. Such penalties are not addressed further in this report.

4 *A competition regime for growth: A consultation on options for reform* issued by the Department for Business Innovation & Skills on 16 March 2011 ("the BIS Consultation").

5 See ss.36, 54(1) and paragraph 35 Schedule 13 CA 1998

of the OFT and the Competition Commission, which does not presently have any role in penalising infringements.[6]

Regulator	**Sector[7]**
The Office of Communications ("Ofcom")	Telecommunications, broadcasting and media
The Gas and Electricity Markets Authority ("GEMA"), associated with the Office of Gas and Electricity Markets ("Ofgem")	Energy
Director General of Electricity Supply for Northern Ireland	Electricity
Water Services Regulation Authority ("Ofwat")	Water
Office of Rail Regulation ("ORR")	Rail transport
Director General of Gas for Northern Ireland	Gas
Civil Aviation Authority ("CAA")	Air traffic services

The Competition Act 1998 (Concurrency) Regulations 2004/1077 provide for the allocation of jurisdiction between these sectoral regulators and the OFT, for the deciding of any dispute as to who should take jurisdiction over a case, and for the avoidance of any problems of double jeopardy by reason of two or more regulators investigating a case. The UK Government is presently consulting on whether to retain concurrent competition powers between sectoral regulators and a central competition authority and related issues.[8]

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6 See the BIS Consultation Executive Summary

7 The descriptions of the sectors involved are informal and are provided for the assistance of the International Rapporteur.

8 See the BIS Consultation at section 7.

In each case, the OFT or the sectoral regulator is required both to investigate alleged infringements pursuant to ss.25-31 CA 1998 and to take decisions as to whether a fine is payable and the amount of any such fine pursuant to ss.32-41 CA 1998.

In the remainder of this report, save where the contrary is indicated or the context otherwise requires, references to the OFT are intended to refer equally to the sectoral regulators acting in exercise of the powers conferred on them to impose penalties under ss.32-41 CA 1998.

Appeals against or with respect to penalties for infringements may be brought to the Competition Appeal Tribunal ("CAT"). The operation of the appeals structure is described in detail at section 2.5.2. below. Judgments of the CAT are not binding precedents for future cases.

2.2 Nature of the Rules governing the assessment of fines

2.1.1. Procedural Rules Applicable to Regulators

In investigating an alleged infringement and subsequently in taking a decision as to the penalty to be imposed in respect of an infringement, the OFT must comply with the procedural requirements set out in The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 S.I. 2004/2751 ("the OFT Rules").[9] Those rules were made by the OFT, after a process of consultation, and approved by the Secretary of State as required by Under sections 51, 54(1), 71 and 75A of and Schedule 9 to the Competition Act 1998. The OFT has recently published guidance on the procedure which it will follow in its investigation and enforcement role.[10]

Pursuant to Rules 4 and 5 of the OFT Rules, if the OFT proposes to make an infringement decision the OFT must give notice to each person who the OFT considers

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[9] The OFT Rules apply to the sectoral regulators by virtue of Rule 1(4) OFT Rules.

[10] *A guide to the OFT's investigation procedures in competition cases*, March 2011 OFT1263

is a party to an agreement, or is engaged in conduct, which the OFT considers constitutes an infringement ("a Statement of Objections") stating which prohibition[11] the OFT considers has been infringed. The Statement of Objections must state the facts on which the OFT relies, the objections raised by the OFT, the action the OFT proposes (including whether or not it proposes to impose a penalty) and its reasons for the proposed action.

As a matter of practice, the OFT will appoint one of its officers as the "Decision Maker", who it considers to be the person who is (internally) responsible for, *inter alia,* the decision to impose any penalty and the amount of such penalty.[12] However, the OFT continues to be the body who is legally responsible for the conduct of the investigation and the decisions made therein and the appointment of the Decision Maker does not have any external legal significance.

At the same time as issuing the Statement of Objections, the OFT will also give the recipients the opportunity to inspect its file. The OFT allows recipients of the Statement of Objections a reasonable opportunity, typically six to eight weeks, to inspect copies of disclosable documents on its file.[13] These are documents that relate to matters contained in the Statement of Objections, but excluding certain confidential information and OFT internal documents.

The Statement of Objections specifies the period within which any written representations on the matters contained in the Statement of Objections, including

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[11] That is, which one or more of the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) TFEU and the prohibition in Article 102 TFEU.

[12] OFT 1263 §5.5 The OFT will identify the Decision Maker to persons under investigation at the same time as it informs them of the existence of the investigation.

[13] OFT Rules, Rule 5(3); OFT 1263 §11.20

matters relating to penalty, must be made, usually being a period of between 40 and 60 working days.[14]

By Rule 5(4) of the OFT rules, the recipient of a Statement of Objections is entitled, in its written representations, to request a reasonable opportunity to make oral representations to the OFT on the matters referred to in the Statement of Objections, including on matters relating to penalty. That oral hearing will usually be held after the deadline for the submission of written representations.

According to the OFT Guidelines, the Decision Maker will attend all oral representations meetings unless it is impractical to do so. The meeting will be chaired by "*a senior OFT official who does not form part of the case team*".[15]

Following the Statement of Objections and the receiving of written and oral representations,[16] if the OFT decides to impose a penalty under s.36 CA 1998, at the same time as it issues notice of the infringements decision it must inform that undertaking in writing of the facts on which it bases the penalty and its reasons for requiring that undertaking to pay the penalty.[17] The OFT must publish that penalty.

The determination of penalty on appeal is described at section 2.5.2. below.

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[14] OFT Rules, Rule 5(2); OFT 1263 §12.3 Formal complainants and third parties who the OFT considers may be able materially to assist its assessment of a case may also be provided with an opportunity to submit written representations: OFT 1263 §12.7

[15] OFT 1263 §12.13

[16] If the process of taking written and oral representations leads the OFT to conclude that a materially different infringement has been committed from that in respect of which the Statement of Objections was issued, the OFT will issue a Supplementary Statement of Objections and provide a further opportunity to recipients to respond in the same way as before.

[17] s.36 CA 1998; OFT Rules Rule 8(2). Any infringement decision must in any case be issued "*without delay*" once the OFT has decided that there has been an infringement: s. 31 CA 1998; OFT Rules Rule 7

The UK Government is presently consulting on changes to the procedure for the finding of infringements and the determination of penalties. Options include retaining the present procedures with certain minor improvements; adopting a new administrative procedure under which an "Internal Tribunal" would take decisions on liability and penalty; and adopting a prosecutorial system under whic competition authorities would prosecute cases before the CAT which would take decisions on liability and penalty.[18]

2.2.2. Legislative rules determining the level of fines

S 36(8) CA 1998 provides that any penalty fixed by the OFT may not exceed 10% of the turnover of the undertaking[19] as calculated by reference to an order published from time to time by the Secretary of State, presently the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 ("the Turnover Order").

Until 1 May 2004, Article 3 of the Turnover Order provided that penalties should be based on turnover in the business year prior to the date on which the infringement terminated. That Article now provides that the turnover of an undertaking on which penalties should be based is the applicable turnover for the business year preceding the date on which the decision of the OFT is taken, or, if figures are not available for that business year, the one preceding it.[20]

As further set out below, there is also a statutory obligation on the OFT to publish guidance as to the setting of financial penalties and to have regard to that guidance in the setting of such penalties.

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18 See BIS Consultation section 5.

19 "*Undertaking*" is not directly defined in CA 1998 but by virtue of subsection 60(2) CA 1998 its meaning is governed by EU law, which treats it as encompassing any natural or legal person engaged in an economic activity regardless of its legal status.

20 Article 3 of the Turnover Order as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259)

In addition, legislative rules prescribe limited immunity from penalties based on the turnover of the parties involved. As regards the Chapter I prohibition, there is immunity from penalties where the combined turnover of the parties to the agreement for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £20 million and the agreement is not a price fixing agreement.[21] As regards the Chapter II prohibition, there is immunity from penalties where turnover of the undertaking for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £50 million..[22] In each case that immunity may be withdrawn by the OFT with prospective effect.[23]

2.2.3. Objectives of Fining Policy

The OFT has stated that:[24]

> *"The twin objectives of the OFT's policy on financial penalties are:*
> *• to impose penalties on infringing undertakings6 which reflect the seriousness of the infringement, and*
> *• to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices."*

In *Kier Group PLC and others v Office of Fair Trading* [2011] CAT 3 ("*Kier*") these objectives were the subject of broad agreement between the parties and were adopted by the Tribunal in its reasoning.[25]

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21 s39(1)-(3),(9) CA 1998 and Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 SI 262/2000, Regulations 2 and 3, Schedule 1.

22 Ss 40(1)-(3),(9) CA 1998 and Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 SI 262/2000, Regulations 2 and 4, Schedule 1.

23 Ss.39(4)-(8), 40(4)-(8) CA 1998

24 OFT 423 §1.4

25 See *Kier* at §§140, 175, 202, 231

2.2.4. The OFT's Guidelines on the setting of penalties

Under s 38(1) CA 1998, the OFT must prepare and publish guidance as to the appropriate amount of any penalty for breaches of the Chapter I and Chapter II prohibitions.[26] The OFT may alter the guidance at any time. Any guidance prepared or altered by the OFT must be approved by the Secretary of State. The OFT's present guidance was published in December 2004 ("the OFT Guidelines".[27]

By s.38(8) CA 1998, the OFT[28] is required to have regard to the guidance in force for the time being. The Court of Appeal has held that the obligation to have regard to the OFT Guidelines permits the OFT to depart from those Guidelines, but that the principles of good administration require that it should give reasons for doing so.[29] As explained at section 2.5 below, where a penalty decision is appealed, the CAT is able to take its decision as to the appropriate penalty unconstrained by the Guidance.

The OFT Guidelines set out its methodology for setting fines. That methodology is detailed in section 2.3.1. below.

2.2.5. Leniency

The OFT operates a leniency policy as set out in the OFT Guidelines.[30] There is no specific statutory underpinning for that leniency policy, separate from that relating to the imposition of fines generally which is set out above.

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[26] The obligation to publish guidance is specifically imposed on the OFT, not on the sectoral regulators. However, the sectoral regulators must have regard to the guidance published by the OFT.

[27] OFT's guidance as to the appropriate amount of a penalty, December 2004, OFT 423

[28] and the sectoral regulators

[29] See *Argos Limited and Littlewoods Limited and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318 ("*Argos*") at ¶161

[30] OFT 423 section 3

In addition to that leniency policy, in the OFT's investigation which lead to its Decision on *Bid rigging in the construction industry in England* ("the Construction Decision"),[31] it offered undertakings under investigation "*an opportunity to admit to those bid rigging activities and make certain ancillary promises in exchange for a guarantee that they would be given a 25 per cent reduction of any financial penalty*" that would ultimately be imposed in respect of any infringements for which admissions were received.[32] In other cases the OFT has also reached "*early resolution agreements*" by which a fine may be reduced to reflect admissions and decisions to cooperate with the OFT.

2.2.6. Punishment of Individuals

A penalty may be imposed on an individual insofar as that individual constitutes an "undertaking" for the purposes of s 36 CA 1998.[33] No such penalty has been imposed to date.

Further, an individual is guilty of an offence under s 188 Enterprise Act 2002 if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, certain hard-core anti-competitive arrangements (including bid-rigging, market sharing and price fixing agreements) ("the Cartel Offence"). An individual is guilty of the Cartel Offence even where he undertook the relevant acts on behalf of a body corporate or in the course of his employment. If convicted of the Cartel Offence on indictment,[34] penalties include imprisonment for a term not exceeding five years or to a fine [which is not subject to a statutory limit]. If summarily convicted of the

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31 Case CE/4327-04, leading to OFT Decision CA 1998/02/2009, 21 September 2009

32 The Construction Decision at §II.1481

33 Undertaking is not defined in the 1998 Act but by virtue of subsection 60(2) of the 1998 Act its meaning is governed by EU law, which treats it as encompassing any natural or legal person engaged in an economic activity regardless of its legal status: see *Kier* §32.

34 (that is, convicted on a trial by jury in the Crown Court)

Cartel Offence,[35] penalties include imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum (presently £5,000 in England and Wales; £10,000 in Scotland and £5,000 in Northern Ireland).[36]

2.3 General Methodology used in determining the amount of the fine

2.3.1. The Fining Methodology applied by the OFT

The OFT applies a five step methodology to the determination of penalty as described below. The same methodology is applied in respect of unilateral and multilateral infringements, but certain factors which are stated to be relevant at certain steps may be specific to unilateral or multilateral infringements.[37]

2.3.1.1. Step 1: Starting Point

At Step 1, the OFT selects a "starting point" for the financial penalty which is a percentage between 0% and 10%, having regard to the seriousness of the infringement.[38] That percentage is applied to the "relevant turnover" of the undertaking, that is "*the turnover of the undertaking in the relevant product market and relevant geographic market*

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35 (that is, convicted on a trial before magistrates in the Magistrates Court)

36 s.190(1)(b) Enterprise Act 2002, as read with Schedule 1 Interpretation Act 1978 (as amended) Magistrates' Courts Act 1980 s.32 (as amended); s.225(8) Criminal Procedure (Scotland) Act 1995 (as amended); Article 4 Fines and Penalties (Northern Ireland) Order 1984 (as amended).

37 For instance, aggravating factors under Step 4 include "role of the undertaking as a leader in, or an instigator of, the infringement" and "retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement". These aggravating factors would appear to apply only to multilateral infringements: see OFT 423 §2.15

38 See Penalty Guidance at §§2.3-2.9. The maximum starting point of 10% of relevant turnover is imposed by §2.8 of the Penalty Guidance. The CAT has recently commented that "*by using in the Guidance a starting range of 0% to 10% of relevant turnover, the OFT has confined itself quite narrowly...A more generous range would obviously provide more headroom at the outset, and greater scope for reflecting the circumstances of individual cases*" §109

affected by the infringement in the undertaking's last business year".[39] The CAT has recently held that relevant turnover for this purpose must be calculated in the business year the business year preceding the date when the infringement came to an end.[40] Tt has been held that in some circumstances it may be necessary for the starting point to be based upon the "net fees" charged by an undertaking rather than its "gross turnover".[41]

The OFT assesses seriousness on a case by case basis for all types of infringement, taking account of all the circumstances of the case. When making that assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration.[42]

In *Kier*, the CAT held that the aim of reflecting the seriousness of the infringement "*is very closely related to its harmful effects (actual or potential) on the specific market and on competitors and consumers in that market*". However, in the case of a penalty imposed for an "object" infringement, the CAT has held that the OFT is "*entitled to come to a view of the seriousness of [the infringement] based on its likely effects*" and is not required to determine the actual effects.[43] Where the case involves effects on particularly vulnerable

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39 Penalty Guidance at §2.7

40 See *Kier* §137. This was contrary to the approach taken by the OFT in the Construction Decision, where the OFT had calculated relevant turnover in the last business year preceding the date of the penalty decision.

41 See *Eden Brown Limited and others v OFT* [2011] CAT 8. That case related to the specific circumstances of undertakings engaged in the supply of recruitment services to the construction industry.

42 OFT 423 §2.5

43 See *Barrett Estate Services Limited and others v OFT* [2011] CAT 9 at §88.

consumers, the OFT has taken that into account in setting the starting point at Step 1 and the same approach was adopted by the CAT on appeal.[44]

2.3.1.2. Step 2: Adjustment for Duration

At Step 2, the starting point is adjusted to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement.[45]

2.3.1.3. Step 3: Adjustment for other factors, in particular deterrence

At Step 3 penalty may be adjusted as appropriate on a case by case basis to achieve the policy objectives of reflecting seriousness and ensuring deterrence, and in particular the latter.[46] Deterrence is aimed both at the undertaking being penalised and other undertakings considering infringing behaviour. Considerations include any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement and the special characteristics, including the size and financial position of the undertaking in question. An adjustment may be made to ensure a penalty is imposed even where the undertaking has no relevant turnover.[47]

In its Decisions on *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*[48] and the Construction Decision, the OFT imposed an adjustment for

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44 See *Exclusionary behaviour by Genzyme Limited*, OFT Decision CA98/3/03, 27 March 2003 at §418; *Genzyme Limited v Office of Fair Trading* [2004] CAT 4 at §702.

45 OFT 423 §2.10 Part years may be treated as full years for the purpose of calculating the number of years of the infringement. In exceptional circumstances the starting point penalty may be reduced on grounds of short duration.

46 Penalty Guidance §2.11-2.12

47 Penalty Guidance §2.13

48 OFT Decision CA 1998/01/2006, *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, 22 February 2006

deterrence on the basis of a "*minimum deterrence threshold*", which involved increasing the penalty after Step 2 to a level equivalent to a specific proportion of the undertaking's total worldwide turnover in the last business year prior to the Decision if the penalty did not otherwise exceed that threshold. On appeal from the first of those decisions, the CAT held that "*the adoption of the Minimum Deterrent Threshold is, in our view, an appropriate way in which to ensure that the overall figure of the penalty meets the objective of deterrence*".[49]

However, on appeal from the Construction Decision, the CAT criticised the OFT's application of a MDT, holding that the level chosen had been applied "*mechanistically*";[50] that in deciding on an adjustment for deterrence it was wrong "*not to give consideration to such profit information as is available along with other relevant factors*".[51] In considering whether an uplift for deterrence was necessary, the CAT had regard to the most recent available financial information in some cases.[52] The CAT has also held that "*the fact that a significant proportion of a construction firm's turnover comprises monies paid over to sub-contractors is a factor which affects the extent to which turnover can be regarded as a useful indicator of economic power in this market*" and that "*this is a factor to be weighed in the balance together with other factors as part of [a] case-by-case examination*".[53]

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49 *Makers UK Limited v Office of Fair Trading* [2007] CAT 11 §134

50 See *Kier* at §§164-170

51 See *Kier* at §171. The Tribunal also noted the need to have regard to "typical" margins on turnover in the industry at §172. The Tribunal in *GF Tomlinson Group Limited and others v Office of Fair Trading* [2011] CAT 7 ("*Tomlinson*") at §118 agreed with the Tribunal in *Kier* that the application of the MDT had "*led to disproportionate and excessive fines*"

52 See *Tomlinson* at §209.

53 See *Barrett Estate Services Limited and others v OFT* [2011] CAT 9 at §§64-66.

2.3.1.4. Step 4: Aggravating and Mitigating Factors

At Step 4, the OFT adjust the penalty for aggravating and mitigating factors. The Penalty Guidance specifically identifies certain aggravating and mitigating factors.[54]

Aggravating factors include: the role of the undertaking as a leader in, or an instigator of, the

Infringement; involvement of directors or senior management;[55] retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement; continuing the infringement after the start of the OFT's investigation; repeated infringements by the same undertaking or other undertakings in the same group; infringements which are committed with the intentionally rather than negligently;[56] and retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

Mitigating factors include: the role of the undertaking, for example, where the undertaking is acting under severe duress or pressure; genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement; adequate steps having been taken with a view to ensuring compliance with Articles 81 and 82 and the Chapter I and Chapter II prohibitions; termination of the infringement as

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54 Penalty Guidance §§2.14-2.16

55 The CAT has held that the absence of such involvement does not amount to a mitigating factor: *Quarmby Construction Company Limited v OFT* [2011] CAT 11 at §198(b).

56 The CAT held in *Napp Pharmaceutical Holdings Limited And Subsidiaries v Director General of Fair Trading* [2002] CAT 1 ("*Napp"*) at §§455-457 that an intentional infringement is one committed in circumstances where the undertaking was or must have aware that its conduct was of such a nature as to encourage a restriction or distortion of competition and an infringement is committed 'negligently' if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition. The Penalty Guidance specifically reflects this distinction.

soon as the OFT intervenes; and co-operation which enables the enforcement process to be concluded more effectively and/or speedily.

Further, in *Kier*, the CAT held that the fact that that conduct "*was not generally perceived within the industry as amounting to "bid-rigging" as ordinarily understood, nor regarded as illegitimate*" and the "*motivations*" for that conduct did "*have a bearing on the seriousness of the infringements in question*" and provide mitigation.[57]

2.3.1.5. Step 5: Adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy

At Step 5, the OFT adjusts the penalty to avoid exceeding the statutory maximum penalty of 10% of worldwide turnover,[58] and insofar as may be necessary to avoid the 'double jeopardy' principle[59] where a penalty or fine has been imposed by the European Commission, or by a court or other body in another Member State.[60]

2.3.2. Further Issues Raised by the International Rapporteur

The International Rapporteur asks how a large number of different factors are assessed and taken into account. Insofar as those factors are not dealt with above in the description of the general methodology applied by the OFT, they are dealt with below.

2.3.2.1. Size and Economic Power of the Infringing Undertaking

The International Rapporteur raises as a particular issue how the fine is made to depend on the size or economic power of the undertaking. As noted above, the methodology applied by the OFT to determine penalty takes a percentage of turnover in the relevant

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57 *Kier*, §§105-107

58 See section 2.2.2. above; Penalty Guidance §§2.17-2.19

59 The principle of *non bis in idem*.

60 Penalty Guidance §§2.20

market as its starting point and a cap is applied by reference to total turnover. The CAT has recently held that "*it would be wrong not to give consideration to such profit information as is available, along with other relevant factors, when deciding on the appropriate penalty*".[61] It further held that account should also be taken of the *typical* margin on turnover earned in the industry in question, in order to ensure that the ultimate penalty represents a proportionate and sufficient punishment and deterrent.[62]

2.3.2.2. Adjustment for Failing Firms

As regards an adjustment for "failing firms", no specific provision is made for such considerations in the Penalty Guidance. The CAT has held that "*[t]he financial position of the undertaking in question is not something that the OFT must consider in all cases, but rather is something that the OFT may consider, upon the application of an undertaking*" and that the onus is on the applicant to provide the regulator with all information and/or documentation it wishes to have taken into account.[63] In its investigation which led to the Construction Decision, the OFT considered a large number of such applications, The approach it adopted was to consider the following factors relative to the size of the penalty: the level of net current assets, the level of net assets, adjusted to take account of dividend payments in the last three years, and the level of profit (or loss) after tax averaged over the last three years.[64] The standard which it adopted was whether the evidence, taken in the round, indicated that payment of the full penalty, even in

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61 *Kier* §171

62 *Kier* §172

63 *Sepia Logistics Limited (formerly known as Double Quick Supplyline Limited) and Precision Concepts Limited* [2007] CAT 13 at §§100-101

64 The specific thresholds adopted by the OFT remain confidential. See *Tomlinson* §225.

instalments,[65] would seriously threaten the undertaking's financial viability.[66] If that standard was met, the OFT considered what reduction in penalty was warranted on the evidence before it. On appeal from that decision, the CAT has not so far criticised the outlines of the OFT's methodology. The Tribunal has further held that "*a reduction for financial hardship should be an exceptional step and that a high threshold is appropriate*".[67] When making its own reduction on the grounds of financial hardship, the CAT looked at the matter "*broadly*".[68] The CAT held that when considering financial hardship it is appropriate to look at the group as a whole rather than at the companies within the group that are directly involved in the infringing conduct.[69]

2.4 Comparison of Methodology used in competition matters versus other serious economic crimes or infringements

The CAT has recently rejected the submission that penalties imposed for breach of the Chapter I prohibition were flawed because they were out of proportion to breaches of health and safety law and the offence of corporate manslaughter, holding that such comparisons were "*too far removed from the competition regime with which we are dealing to be helpful in assessing the reasonableness of the fines imposed in this or in any other infringement decision under the 1998 Act*".[70]

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65 The penalised undertakings were offered the opportunity to pay the penalty in instalments over a period three years in that case.

66 Construction Decision §§VI.276-288

67 *Tomlinson* §262

68 See *Tomlinson* §236

69 See *Tomlinson* §232

70 *Tomlinson* §§138.

2.5 Other Material Aspects of the Rules governing the assessment of fines

2.5.1. Requirements of consistency with other penalty decisions

It is generally accepted that that the OFT is bound to observe the principle of equal treatment established by the case law of the Community Courts that comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified.[71] The OFT specifically applied the principle as between a number of parties to a decision in the Construction Decision.[72]

As regards consistency with its previous decisions, the OFT has stated that it:[73]

> *does not accept that it is in any event bound by its decisions in relation to the calculation of penalties in previous cases. Rather, the OFT considers that…it is free to adapt its policy as appropriate having regard to all relevant circumstances and its overall policy objectives on financial penalties, as set out in its Penalty Guidance*

If a penalty or a fine has been imposed by the Commission, or by a court or other body in another Member State, in respect of an agreement or conduct, the OFT , the CAT or any court on a further appeal must take that other penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct.[74]

The consistency of competition law penalties with penalties for other serious economic crimes is addressed at section 2.4 above.

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71 *Makers* §138, relying on Case T-213/00 *CMA CGM and others v Commission* [2003] ECR II-913, paragraph 406.

72 See Construction Decision §VI.210

73 See Construction Decision §VI.11. The point has not yet been subject to any judicial decision in the UK.

74 S.38(9) and 38(10) CA 1998

2.5.2. Appeals

An appeal against or with respect to a penalty imposed by the OFT or sectoral regulator may be brought to the CAT.[75] The making of an appeal against the imposition of a penalty suspends the effect of that decision.[76]

The CAT must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.[77] It has power to impose or revoke, or vary the amount of, the penalty.[78] Such appeals may be brought both on points of fact and law.[79]

The standard of review applied by the Tribunal has been described in the following terms:[80]

> *the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance. Indeed, it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed ab initio by an impartial and independent tribunal able to take its own decision unconstrained by the Guidance. Moreover, it seems to us that, in fixing a penalty, this Tribunal is bound to base itself on its own assessment of the infringement in the light of the facts and matters before the Tribunal at the stage of its judgment.*

The Tribunal has recently reconfirmed that standard but clarified that "*the Tribunal will disregard neither the Guidance nor the OFT's approach and reasoning in the specific case. On the other hand, the Tribunal is not bound by the Guidance, and should itself assess whether the*

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75 S.46(1),(2) and (3)(i) CA 1998

76 S46(4) CA 1998

77 CA 1998 Schedule 8 Part 1 Paragraph 3(1)

78 *ibid*, paragraph 3(2)(b)

79 CA 1998, Schedule 8, paragraph 2(2)(b)

80 *Napp* at §499, approved by the Court of Appeal in *Argos*.

penalty actually imposed is just and proportionate having regard to all relevant circumstances as put before the Tribunal in the course of the appeal".[81]

The CAT has power to vary the amount of the penalty imposed so as to increase the penalty.[82]

A further appeal lies to the Court of Appeal or, in the case of an appeal from Tribunal proceedings in Scotland, the Court of Session.[83] Such appeals require the permission of the CAT or the appeal court. Such an appeal is not limited to points of law.[84]

The UK Government is presently consulting on a possible changes to the appeals system in combination with changes to the administrative procedure, including a more limited standard of review.[85]

2.5.3. Compliance with Human Rights Standards

As regards compliance with international human rights standards, to some extent such compliance is secured by means of the following features of United Kingdom law:

(a) the primary and secondary legislation providing for the imposition of penalties and the procedure for that imposition must be read and given effect so far as it is possible to do so in a way which is compatible with ECHR rights;[86]

(b) it is unlawful for a public authority to act in a way which is incompatible with an ECHR right;[87]

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81 See *Kier* §74

82 See *Umbro Holdings Limited and Others v Office of Fair Trading* [2005] CAT 22 at §§213-219; on appeal *JJB Sports PLC v Office of Fair Trading* [20061 EWCA Civ 1318 at §257.

83 s.49 CA 1998.

84 *National Grid PLC v Gas and Electricity Markets Authority and others* [2010] EWCA Civ 114. At §92.

85 BIS Consultation, section 5 in particular at §§5.41-5.43

86 s.3(1) Human Rights Act 1998 ("HRA 1998")

(c) insofar as the rules relating to the imposition of penalties and the procedure for the imposition of penalties are contained in primary legislation and cannot be read compatibly with ECHR rights, a court with jurisdiction to do so may declare those rules to be incompatible with the ECHR but such a declaration does not prevent the rules from being applied;[88]

(d) insofar as rules relating to the imposition of penalties and the procedure for the imposition of penalties contained in secondary legislation may be incompatible with ECHR rights and primary legislation does not prevent the removal of that incompatibility, those rules may be set aside.[89]

Insofar as it may be necessary to do so, an action for judicial review may be brought in the course of an OFT investigation so as to secure compliance with human rights standards.[90] Further, those obligations may be relied upon in any subsequent appeal against penalty imposed. It has been held that Article 6(1) ECHR requires that the CAT have jurisdiction to review penalties "*ab initio ...[and] to take its own decision unconstrained by the Guidance*".[91]

In the recent appeals against the OFT's decision on Bid rigging in the Construction Industry in England, a number of appellants argued that aspects of the methodology used to determine penalty in their cases infringed international human rights standards, specifically Articles 6 and 7 of the European Convention on Human Rights ("ECHR")

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87 s.6 HRA 1998

88 s.4(2) and (5) HRA 1998

89 See *English Public Law* (2nd ed.), ed. Professor David Feldman, Oxford University Press 2009. In the event that primary legislation prevents the removal of the incompatibility, the court may make a declaration of incompatibility as at (c) above.

90 A challenge was brought on the grounds of procedural fairness in *Crest Nicholson plc v Office of Fair Trading* [2009] EWHC 1875 (Admin)

91 *Argos* at §499

and Article 1 of Protocol 1 ECHR. Such aspects included the change in the OFT's practice from calculating the starting point for penalties on the basis of turnover in the year prior to the end of the infringement to calculating it on the basis of turnover in the year prior to the decision[92] and the application of a MDT which was not specifically provided for in the Penalty Guidance.[93]

3. STATISTICS

Appendix 1 to this Draft Report contains a list of penalties imposed under the CA 1998 since its inception, and cases where although an infringement was found a decision was taken to impose no penalty.

CLA members did not consider that a general trend in the level of fines could be discerned given the difficulties of comparing the circumstances of different cases.

4. NORMATIVE QUESTIONS / RECOMMENDATIONS

The normative questions posed by the International Rapporteur were discussed by the members of the CLA at a roundtable meeting held on 7 April 2011 under the following broad headings:

- Institutions and Guidelines;
- Seriousness and Deterrence;
- Consistency with other fines; and
- Mitigation.

4.1 Institutions and Guidelines

Under this heading, the CLA discussed the following questions posed by the International Rapporteur:

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92 This submission was rejected by the CAT in *Tomlinson* at §110.

93 This argument appears to have been rejected by the CAT in *Kier* at §181

- What body should determine the level of fines (judicial/administrative)? If administrative, should the decision-maker be separate from the team that investigated the infringement?
- To what extent should the methodology used/level of fines be determined by, or be subject to the approval of, the legislature or politically-accountable government ministers, or should the level of fines and methodology used be left to independent competition authorities or courts?
- What role should courts play in supervising the fining decisions of independent competition authorities? To what extent should they have regard to guidelines issued by competition authorities?

These points were discussed in light of a recent consultation paper issued by the UK Department for Business, Innovation and Skills which presents options for reform of the UK system for investigating and prosecuting competition law infringements. Options include:

- the retention of the existing administrative system (with improvements);
- an adversarial or judicial system; and
- an internal tribunal within the competition authority.

CLA Members expressed the following views:

- One advantage of a prosecutorial system is that, given the size of penalties and the interventionist approach adopted by the CAT in recent cases, appeals are very likely to be brought in the present system. By contrast a prosecutorial system would enable companies to get to an ultimate decision more quickly, whilst reducing costs for business.
- However, some members doubted whether a prosecutorial system would really save much time or money. The OFT would still need to conduct significant fact-finding and at least advance to the equivalent of the statement of objections stage before prosecuting the case.
- It might be possible/desirable to separate the substantive issue of whether there has been a competition law infringement (which the competition authority could investigate under an administrative system) and the level of penalty (which could be left to the CAT to

determine under a judicial system). Some members expressed the feeling that, in the construction case, there had been significant duplication between the OFT's administrative investigation and the CAT's appeal process on the issue of penalties.

- Any change to a judicial system would require modifications to the OFT's leniency/immunity programme and the introduction of sentencing guidelines (in order to achieve a level of consistency and transparency). It was also not clear how the OFT's current policy of achieving deterrence could be achieved under a prosecutorial system.

4.2 Seriousness and Deterrence

Under this heading the CLA discussed the following questions posed by the International Rapporteur:

- To what extent should the level of fines reflect the size of the undertaking concerned? If so, how should "size" be measured? If turnover is to be used, what measure of turnover is appropriate (relevant market/overall turnover; year of infringement/year of fining decision)?

- How should the seriousness of an infringement be judged? To what extent should the anti-competitive intentions of the undertaking or its employees be relevant?

- To what extent should the actual effects of the infringement be relevant? Should the amount of the fine exceed the harm caused (or likely to have been caused) by it, in order to provide suitable deterrence bearing in mind a low likelihood of detection?

CLA Members expressed the following views:

- The issue was raised as to whether a consumer welfare or total welfare standard should be adopted when assessing the effect of an infringement: the UK currently adopts a consumer welfare standard whereas some jurisdictions such as New Zealand adopt a total welfare standard which focuses on the deadweight loss rather than the transfer from consumers to producers.

- There was some debate as to whether a system based on turnover (rather than profitability) was appropriate. Members generally agreed that relevant turnover (as a

proxy for the economic impact of the infringement) was the appropriate starting point. It also had the benefit of being certain and readily identifiable from statutory accounts (as opposed to profitability, which has many different measures).

- Members discussed whether larger fines should be imposed if the company is highly diversified (since the penalty may only account for a small proportion of its total turnover). This issue was linked to discussions (following the CAT's construction judgments) on the issue of the minimum deterrence threshold.
- The size of the market and profitability levels could then be considered as a sense check at step 3 of the guidelines.
- It would be relatively unusual for turnover not to be the appropriate starting point in step 1 (absent exceptional circumstances, such as those in the recruitment case, where the statutory measure of turnover did not reflect the economic reality of the parties' activities). The guidelines are sufficiently flexible for issues such as deterrence to be factored in at step 3 of the OFT's guidelines.

4.3 Consistency with other fines

Under this heading the CLA discussed the following question posed by the International Rapporteur: To what extent should the level of fines in competition cases be consistent with the level of fines imposed for other economic crimes/infringements (fraud / environmental law / consumer protection)?

This question was discussed the CAT's judgment in *Tomlinson* where it had concluded that corporate manslaughter and health and safety cases were too far removed from competition law infringements to provide a meaningful comparison as regards the level of penalty and focussed on whether other offences may provide more meaningful benchmarks.

CLA Members expressed the following views:

- Other possible comparators mentioned by members included the corporate offence in the new Bribery Act (where putting in place adequate compliance training and systems and

procedures operates as a defence to the corporate offence). Other possible comparators included the FSA (which had recently revised its guidance on setting penalties).

- There was some debate about whether the 10% range at step 1 (starting point) was appropriate. Members were not aware of any equivalent ranges for other economic crimes, but members referred to the 30% figure used by the European Commission in its fining guidelines, which is considerably higher.

4.4 Mitigation

Under this heading the CLA discussed the following question posed by the International Rapporteur: To what extent should fines on an undertaking reflect its behaviour after the infringement, such as co-operation/non-co-operation with the investigation / introduction of compliance measures / disciplinary action against employees involved / payment of compensation to victims?

CLA Members expressed the following views:

- There was some debate as to whether (and to what extent) the level of penalty should be reduced if the company has put in place a rigorous competition compliance programme, with differing views on this point. In particular, there was debate about how to deal with the issue of "rogue employees" in setting fines. It was pointed out that the OFT retains the ability to depart from the guidelines in particular cases. Hence, at least in theory, an individual could be prosecuted for the cartel offence whilst the company might not be fined for the infringement of competition law.
- A potential concern with any reduction in penalty being linked to the undertaking taking disciplinary action against employees is that it may encourage companies to identify scapegoats.

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28 March 2011

(updated with reference to CLA Roundtable Meeting on 19 May 2011)