

# The role of penalties in the UK Competition Regime

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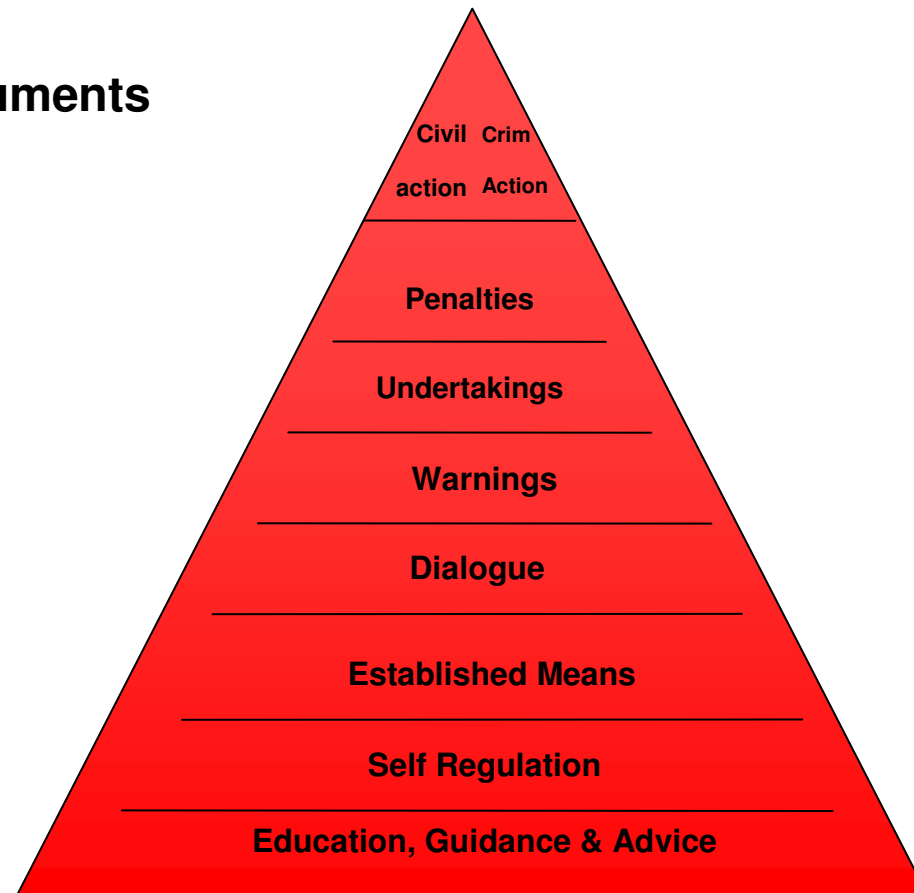
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# OFT Sanctions

- CA98 provides that where the OFT makes an infringement decision, it “may require” the infringing undertaking(s) to pay a penalty.
- The OFT may impose a penalty only when it is satisfied that the infringement has been committed intentionally or negligently by the undertaking.
- EA02:
  - Cartel (criminal) offence
  - Director Disqualification

# Deterrence & Compliance: Framework

Range of instruments  
Sliding scale



## Finning Policy

- ▶ **Twin policy objectives**
  - ▶ **Penalty should:**
    - ▶ reflect seriousness of infringement
    - ▶ ensure deterrence

## Achieving deterrence - evidence

- ▶ **Deloitte survey (2007)**
  - ▶ **Suggests there is a deterrent effect for OFT enforcement**
  - ▶ **Ratio of cartel agreements abandoned or significantly modified to those resulting in an OFT infringement decision**
    - ▶ **Legal survey - 5:1**
    - ▶ **Company survey – 16:1**
- ▶ **What is driving these?**

## Deloitte findings as fo 2007:

	Lawyers	Companies
1	Criminal penalties	Criminal penalties
2	Fines	Director disqualification
3	Director disqualification	Bad publicity
4	Bad publicity	Fines
5	Private damages	Private damages

## How to improve deterrence:

	Lawyers	Companies
1	Private damages	Publicity and education
2	Criminal prosecutions	More activity Larger fines
3	Publicity and education	
4	Faster decision making	Faster decision making
5	More activity/larger fines	Legal clarity

## Fines not optimal

- Perception of OFT policy team and caseworkers
- Instances of repeat offenders e.g. Roofing and Construction

## How to improve deterrence (3)

- ▶ **Higher penalties??**
    - ▶ Higher penalties in absolute terms??
    - ▶ Higher impact through selection of cases
  - ▶ **Track record of cases**
    - ▶ Not necessarily a question of numbers
    - ▶ Impact and breadth also important
    - ▶ Stream lining of procedures – role of settlement
  - ▶ **Greater use of personal sanctions**
    - ▶ First criminal charges in *Marine hose*
    - ▶ Further investigations underway
    - ▶ Director disqualification in addition or as an alternative
    - ▶ But test (dishonesty) + standard of proof for high for most cases
  - ▶ **Proposals to make private actions more attractive**
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## Guidance - 5 step penalty calculation

- **Step 1: starting point as percentage of “relevant turnover”**
  - **Step 2: adjustment for duration**
  - **Step 3: adjustment for other factors**
  - **Step 4: adjustment for aggravating and mitigating factors**
  - **Step 5: adjustment for statutory cap and double jeopardy**
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## Step 1 – starting point

- Starting point is a percentage of the relevant turnover of an undertaking.
  - Maximum starting point is 10% of relevant turnover.
  - Starting point is calculated by having regard to the seriousness of the infringement:
    - Relevant factors = nature of product, structure of market, market shares of undertakings involved, entry conditions, effect on competitors and 3<sup>rd</sup> parties, damage to consumers.
  - Horizontal price fixing and market sharing are most serious infringements – generally 8 to 10% starting point. Lower in roofing cases when only isolated instances of collusive tendering (rather than overall scheme).
  - 8 to 10% upheld by CAT in *Replica Kit*.
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## Step 2 – duration

- Starting figure may be adjusted to take into account duration of the infringement.
  - Where infringements last more than one year, practice is to round up additional duration to the nearest quarter to encourage speedy termination of infringements.
  - Where infringements have lasted less than one year (e.g. discrete collusive tenders in roofing cases), practice has been to treat as one year and make no adjustment.
  - CAT has accepted practice of not reducing for short duration as anti-competitive effect may extend beyond duration of infringement (*Aberdeen Journals*) or may be irreversible (*Apex*).
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## Step 3 – adjustment for other factors

- Figure at end of Step 2 may be adjusted in order to deter undertakings (both infringing undertaking and others) from engaging in anti-competitive practices.
  - Increase is applied where the step 2 figure represents a relatively small proportion of the undertaking's total turnover. Amount of penalty imposed on other parties may be a relevant factor.
  - Possibility to reduce at step 3 but has not been done so far.
  - Adjustment may take into account amount of gain from infringement, but rare because difficult to estimate gain (*Napp*).
  - CAT has accepted practice of increasing for deterrence but requires OFT to set out its methodology (*Makers*).
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## Step 4 – aggravating factors

- **Penalty may be increased for aggravating factors, such as:**
  - Instigator/leader role; involvement of senior management; retaliatory/coercive measures; repeated infringements; continuation of infringement.
- **Increase depends on facts of case and aggravating factor in question.**
- **Involvement of senior management is most common aggravating factor – normally 10 to 20% increase.#**
- **CAT wary of increase for continuing infringement during investigation (*Napp*) but accepted possibility for increase where infringement carried out in breach of compliance programme (*Replica Kit – Man United*).**

## Step 4 – mitigating factors

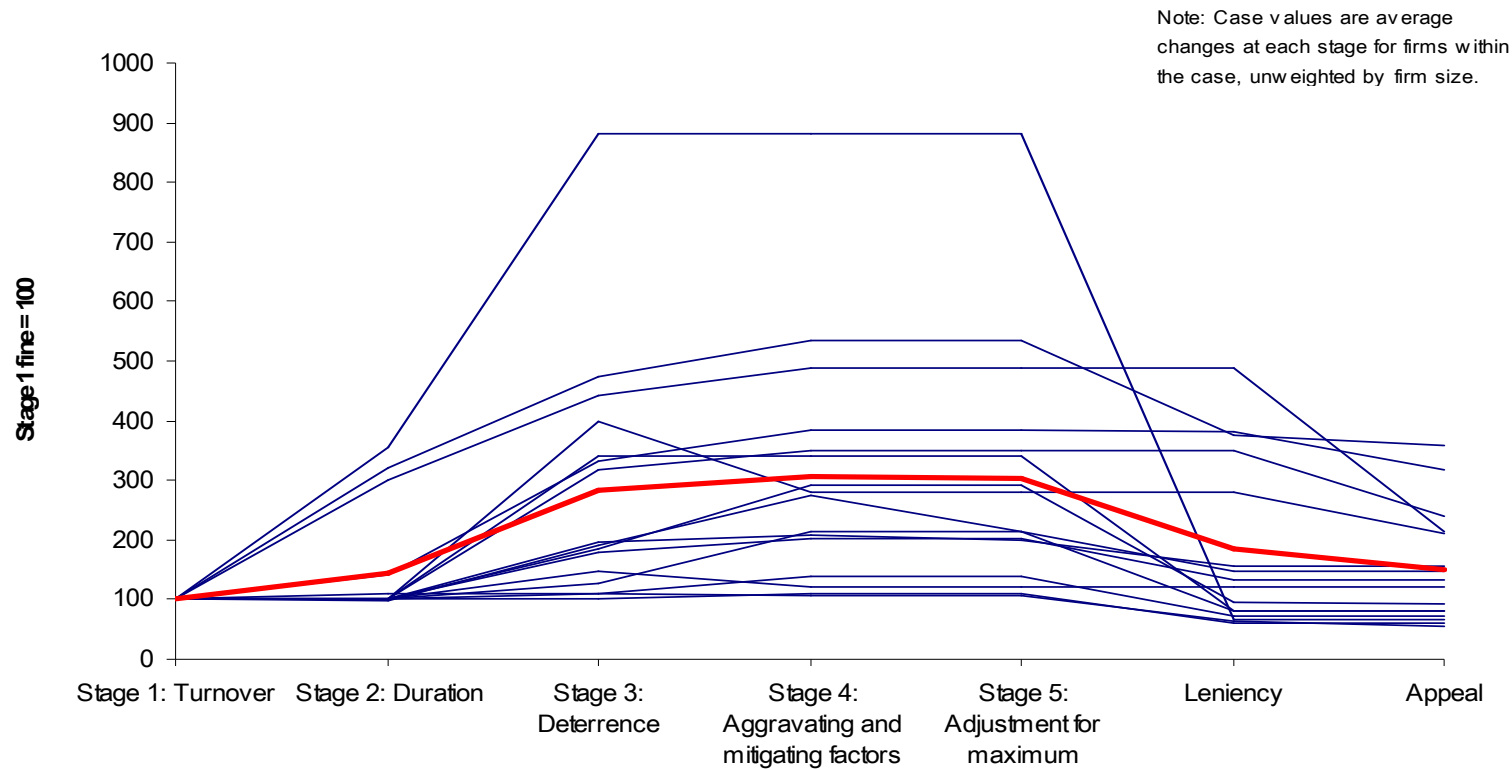
- **Penalty may be decreased for mitigating factors, such as:**
    - Severe duress/pressure; genuine uncertainty as to whether conduct constituted an infringement; steps taken to ensure compliance; cooperation; termination of infringement once OFT intervenes.
  - **Reduction depends on facts of case and mitigating factor in question.**
  - **Cooperation and taking action to ensure future compliance are most common mitigating factors – normally 10% reduction for each.**
  - **CAT found that if undertaking does not meet conditions for leniency, should not get equivalent discount via mitigation for cooperation – would undermine leniency programme (*Replica Kit – Umbro*).**
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## Step 5 – statutory cap

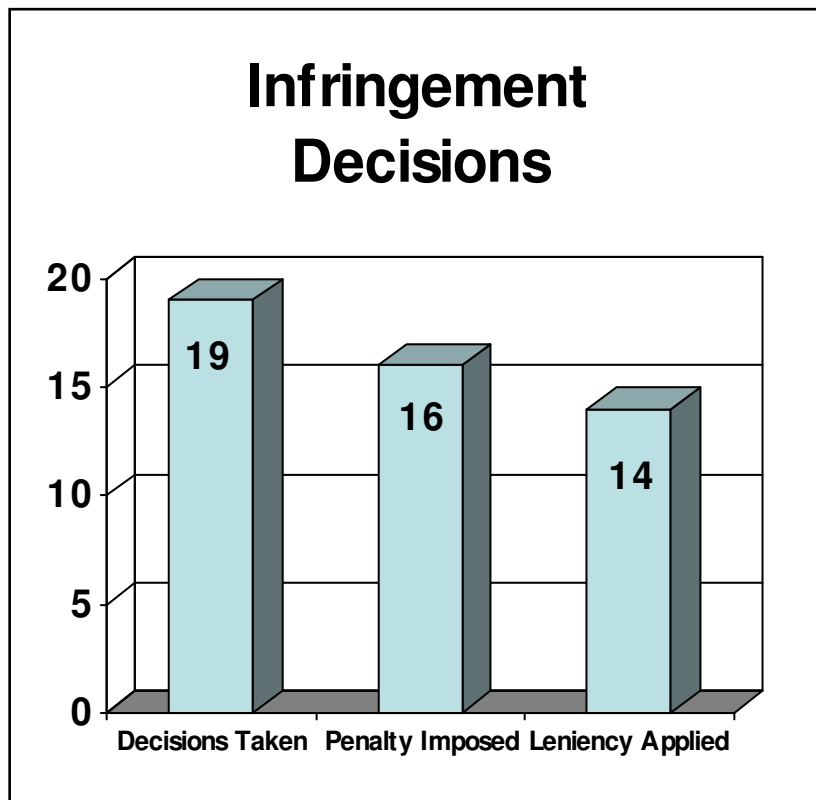
- **Penalty may need to be reduced to avoid exceeding statutory cap of 10% of undertaking's worldwide turnover – determined in accordance with SI 2000/309.**
  - **Where infringement terminated prior to 1 May 2004, previous statutory cap is also applied.**
  - **Statutory cap is very rarely exceeded – only 3 times out of the 74 penalties imposed on parties to infringements.**
  - **Double-jeopardy test also applied at this stage – OFT must take into account any penalty imposed by Commission, court or other body in respect of same agreement or conduct – has not yet arisen in practice.**
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# Penalty calculation in practice

Development of fines (per case)



# Penalties – an overview of practice



### Average Penalty as a Proportion of Turnover

	% of Relevant Turnover	% of Total Turnover
Pre-leniency	23.4%	1.8%
Post-leniency	12.9%	1.2%

