

Statement of Policy on the Enforcement of the SAU's Information Gathering Powers

11 July 2022
CMA164con

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About this consultation

Introduction

This consultation seeks the views of interested parties on the **draft Statement of Policy in relation to the enforcement by the Subsidy Advice Unit (SAU) of its information-gathering powers** as set out in the Subsidy Control Act 2022 (the Act) and United Kingdom Internal Market Act 2020 (UKIM Act).

Background

To fulfil its functions of monitoring and reporting, the SAU may need to gather information from public authorities, businesses or individuals. The Act gives the SAU the powers to issue a notice requiring a person to provide information or documents and to impose penalties where an information notice is not complied with. The nature of the penalties that the SAU can apply is set out in section 43 of the UKIM Act.

Under section 42 of the UKIM Act, the SAU must publish and consult on a Statement of Policy (the Statement) in relation to its approach to enforcing its information gathering powers. The SAU must have regard to this Statement when reaching decisions about what action to take for failure to comply with an information notice.

This consultation document sets out the SAU's draft Statement and seeks the views of interested parties. The SAU will publish a final version of the Statement before any enforcement action is commenced.

The draft Statement draws on the CMA's existing guidance and its experience of using its formal information-gathering powers. However, given that the SAU is a new function, with an advisory rather than a decision-making role, the draft Statement sets out the broad principles which the SAU expects to apply in enforcing its information-gathering powers and the likely factors that may influence its decisions. The SAU will review this Statement in light of experience after an appropriate period of operation.

Duration of this consultation

This consultation on the draft Statement will run from 11 July 2022 to 10 August 2022.

Please note:

The CMA is currently consulting interested parties on **draft guidance on the operation of the CMA's subsidy control functions**, with responses requested by 11:59pm on 10 August 2022. [See here for further details](#).

How to respond to this consultation document

The consultation will run for 4 weeks¹ from 11 July 2022 to 10 August 2022.

Responses should be submitted by email no later than 23:59 on 10 August 2022 and should be sent to: SAU@cma.gov.uk. Any queries about the consultation should also be sent to: SAU@cma.gov.uk.

You are welcome to send a combined response to the CMA's current consultation on its draft guidance to the operation of the CMA's subsidy advice functions referred to above and this consultation on the draft Statement of Policy, but please indicate that you are doing so when you respond.

When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest. In pursuance of our policy of openness and transparency,² we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please also provide a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive at the same time.

Statement about how we use information and personal data that is supplied in consultation responses

Any personal data that you supply in responding to this consultation will be processed by the CMA (which includes, for these purposes, the SAU), as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.

¹ It is usual CMA practice to consult on guidance for a period of 4 weeks and this remains our standard approach, which we adapt in accordance with the purpose and context of the consultation in line with Cabinet Office principles

² [CMA6 Transparency and disclosure: Statement of the CMA's policy and approach \(publishing.service.gov.uk\)](#)

We are processing this personal data for the purposes of our work under Part 4 of the Act. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account.

For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#). Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002 (EA02).

We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.

Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration representations made by you here in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under the EA02.

If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

After the consultation

After the consultation, we will decide whether to make changes to the Draft Statement. We will publish a final version of the Statement and a summary of the responses received that fall within the scope of the consultation on our webpages. As noted above, we propose to publish non-confidential versions of the responses received. These documents will be available on our webpages and respondents will be notified when they are available.

Contents

	<i>Page</i>
1. Introduction	5
2. Legal Framework	7
3. Policy Objectives.....	10
4. The SAU's policy on enforcing its information-gathering powers	13

1. Introduction

- 1.1 The Subsidy Control Act 2022 (the Act) provides the Competition and Markets Authority (CMA)³ with monitoring and reporting functions,⁴ under which it will monitor and report on the effectiveness of the operation of the subsidy control regime established by the Act and its impact on competition and investment within the United Kingdom.⁵ These functions will be undertaken by the Subsidy Advice Unit (SAU), which will sit within the CMA.⁶
- 1.2 The SAU is granted information gathering power for the purpose of assisting it in carrying out any of its monitoring and reporting functions. This is done through the application (subject to minor modifications) of sections 41 to 43 of the United Kingdom Internal Market Act 2020 (UKIM Act) on information-gathering powers, their enforcement and penalties.⁷
- 1.3 Under section 41 of the UKIM Act, the SAU has the power to issue a written notice requiring a person to provide information or documents, or to use section 5 of the Enterprise Act 2002 (EA02) for these purposes.
- 1.4 Section 42 of the UKIM Act gives the SAU the power, in certain circumstances, to impose penalties in accordance with section 43 of the UKIM Act where an information notice is not complied with.

Requirement for a Statement of Policy

- 1.5 Section 42 of the UKIM Act also requires the publication of a Statement of Policy (the Statement) setting out how the SAU will undertake the enforcement of its information gathering powers and what factors the SAU will use to decide the nature and amount of any financial penalty imposed.⁸ This will be done before any action to enforce an information notice is commenced.

³ The Enterprise and Regulatory Reform Act 2013 established the CMA as the UK's competition authority responsible for ensuring that competition and markets work well for consumers. The CMA is an independent non-ministerial department. Its work is overseen by a Board and led by the Chief Executive and senior team.

⁴ Section 65 of the Act

⁵ Part 4 of the Act also provides the CMA with the functions to advise public authorities in respect of certain subsidies or subsidies schemes that they refer to it. The information gathering power provisions however do not apply to these functions.

⁶ For the remainder of this Statement, we will use the term SAU when referring to the CMA discharging its subsidy control functions. For further information on the SAU's functions see: SAU, [Guidance on the operation of the CMA's subsidy control functions](#). [Note: a draft version of this Guidance is currently being consulted on – see [here](#) for further details. The final version of this Guidance will be referred to in the final version of this Statement.]

⁷ Section 67 of the Act

⁸ See sections 42(6) and 42(7) of the UKIM Act.

- 1.6 This document is the Statement required under the UKIM Act. It is not a definitive statement of, nor substitute for, the law itself. If you want to understand the legal basis for the regime, you should refer to the relevant legislation and guidelines and, if necessary, seek independent legal advice.
- 1.7 When reaching decisions regarding enforcement action for failure to comply with an information notice, the SAU must have regard to this Statement.⁹ The SAU will apply this Statement flexibly according to the circumstances of the case. Different considerations may be relevant to the assessment of the appropriate penalty, depending on which statutory power the SAU is using.
- 1.8 This Statement reflects the views of the SAU at the time of publication. It draws on the CMA's existing guidance and its experience of using its formal information-gathering powers.¹⁰ However, because the SAU is a new function, with an advisory rather than a decision-making role, the Statement sets out the broad principles which the SAU expects to apply in enforcing its information-gathering powers and the likely factors that may influence its decisions. The SAU will review this Statement in light of experience after an appropriate period of operation.
- 1.9 The SAU will consult each relevant national authority and such other persons as it sees fit in the process of putting together or revising its policy approach.¹¹ The SAU's webpages will always display the latest version of the Statement.

⁹ See section 42(3) of the UKIM Act.

¹⁰ Detailed guidance on the CMA's approach to penalties and other sanctions is available in [Administrative Penalties: Statement of policy on the CMA's approach](#) (CMA4).

¹¹ See sections 42(8) and 42(9) of the UKIM Act.

2. Legal Framework

2.1 This Chapter describes the legal framework that applies to the information-gathering powers placed on the SAU by Section 65 of the Act.

The SAU's information-gathering powers

2.2 Under section 41 of the UKIM Act, the SAU has the power to send a written notice (hereafter referred to as a '**section 41 notice**') requiring a person to provide information or documents, to assist it to carry out its reporting and monitoring functions under section 65 of the Act, or to use section 5 of the EA02 for these purposes.¹² A section 41 notice can require:

- a person to produce any documents, which are in their custody or control, as specified in the notice;¹³ and/or
- any person who carries on a business to provide estimates, forecasts, returns or other information as specified or described in the notice.¹⁴

2.3 A section 41 notice will specify where, when, how (including the format and means of conveyance) and to whom the documents and/or information must be produced.¹⁵ The notice must also state the purpose for which it has been issued, including which of the functions carried out by the SAU is relevant, and include information about the potential consequences of not complying.¹⁶

2.4 Where the information is not otherwise in a legible form, a section 41 notice may require the provision of a legible and intelligible copy of the information.¹⁷

2.5 A section 41 notice cannot require a person to provide documents or information that the person could not be compelled to produce, or give in evidence, in civil proceedings before the High Court, or Court of Session in Scotland; or to travel more than ten miles from where they live unless the

¹² In relation to the SAU, the powers conferred under section 5 EA02 relate only to matters considered under the Act.

¹³ See section 41(2) of the UKIM Act.

¹⁴ See section 41(3) of the UKIM Act.

¹⁵ See section 41(4) of the UKIM Act.

¹⁶ See section 41(6) of the UKIM Act.

¹⁷ See section 41(5) of the UKIM Act.

SAU offers to pay their travel expenses.¹⁸ The SAU may copy any document that has been provided to it in accordance with a section 41 notice.¹⁹

Enforcement

- 2.6 Section 42 of the UKIM Act empowers the SAU to impose a penalty in accordance with section 43 where it considers that a person has:
- without reasonable excuse, failed to comply with any requirement of a section 41 notice;²⁰ or
 - intentionally obstructed or delayed any person in the exercise of the power under section 41(7).²¹
- 2.7 Before it can take any action to enforce a section 41 notice, the SAU must have regard to this Statement.²²
- 2.8 The SAU is empowered to enforce the requirements of a section 41 notice by imposing a penalty where it considers that the person receiving the request for information has not complied.²³ The SAU cannot impose financial penalties where more than four weeks have expired beginning on the day on which its section 65 report is published or is laid before Parliament (whichever is the later).²⁴

Penalties

- 2.9 The SAU will be able to choose between a range of possible types of penalties and fix appropriate amounts having regard to this Statement and the facts of the case. The maximum penalty that can be imposed is set by the Secretary of State for the Department for Business, Energy & Industrial Strategy (BEIS).

¹⁸ See sections 41(8) and 41(9) of the UKIM Act.

¹⁹ See section 41(7) of the UKIM Act.

²⁰ See section 42(1) of the UKIM Act.

²¹ See section 42(2) of the UKIM Act.

²² See section 42(3) of the UKIM Act.

²³ See section 42(1) of the UKIM Act.

²⁴ See section 42(4) of the UKIM Act, as modified by section 67(2) of the Act.

- 2.10 Penalties for failing to comply with a section 41 notice can be a single fixed amount, a daily rate, or both.²⁵ Penalties for intentionally obstructing or delaying the provision of information will be a fixed amount.²⁶
- 2.11 In any of these cases, the Secretary of State must specify maximum amounts through secondary legislation not exceeding £30,000 for a fixed amount and £15,000 for the daily rate.²⁷ The Secretary of State must consult the CMA, each other relevant national authority and any other relevant persons before deciding on the maximum amounts and daily rates.²⁸
- 2.12 The calculation of the daily rate must not include any days before the SAU served a penalty notice concerning failure to provide information on the person in question.²⁹ The penalty stops accumulating on the day that the requirements under the section 41 notice are satisfied or the day the SAU has concluded the exercise of the relevant function. The SAU can specify an earlier date for the rate to stop accumulating should it wish, whether before or after the penalty imposed.³⁰
- 2.13 A person can appeal a penalty decision in accordance with sections 112 to 115 of the EA02, which set out procedural requirements and provide for appeals to the Competition Appeal Tribunal.³¹

²⁵ See section 43(2) of the UKIM Act.

²⁶ See section 43(3) of the UKIM Act.

²⁷ See sections 43(4) to 43(6) of the UKIM Act. The fixed amount refers to either a penalty for a breach of a requirement of a notice under section 41 of the Act, or for intentionally obstructing or delaying a person copying documents provided in accordance with an information notice (section 41(7) of the Act)).

²⁸ See section 43(8) of the UKIM Act. The current maxima specified by The United Kingdom Internal Market Act 2020 (Maximum Penalty) Regulations 2021 are: £30,000 fixed amount; £15,000 (daily rate), and £30,000 and £15,000 (fixed amount and daily rate together).

²⁹ See section 43(9) of the UKIM Act.

³⁰ See sections 43(9) to 43(10) of the UKIM Act.

³¹ See section 43(11) of the UKIM Act.

3. Policy Objectives

The SAU's use of information-gathering powers

- 3.1 The SAU may need to gather information from businesses, public authorities, or individuals. The SAU will use this information to enable it to fulfil its monitoring and reporting functions under section 65 of the Act.³²
- 3.2 The provision of timely, complete and accurate information will be critical to the SAU's effectiveness and ability to fulfil its functions. The SAU has a range of options in how it will gather this information. For instance, it may decide, depending on the circumstances, to request information on a voluntary basis, or invite relevant respondents to attend meetings or calls.³³

When the SAU will use its information-gathering powers

- 3.3 Where appropriate, the SAU will use its statutory information-gathering powers to obtain information from businesses, public authorities, and, as necessary, individuals.³⁴ Before the SAU issues a section 41 notice it will have due regard to the impact of any such request on the addressee.
- 3.4 Section 41 notices are most likely to be used where the SAU considers it necessary to obtain information that is essential for its monitoring reports and that could not be obtained in a timely manner through other means. For example, the SAU may seek evidence from specific businesses to analyse the likely or actual market impact of a subsidy or subsidy scheme where this information is not readily available from elsewhere.

Type of information the SAU may request

- 3.5 The SAU may ask for information or documents under the person's custody or control, as well as information that is not already written down, such as market share estimates based on knowledge or experience. For example, the SAU may ask for internal business reports, strategy documents and other internal

³² For further information on the SAU's functions see: [Guidance on the operation of the CMA's subsidy control functions](#) . [Note: a draft version of this Guidance is currently being consulted on – see [here](#) for further details. The final version of this Guidance will be referred to in the final version of this Statement].

³³ The SAU will not need to use its statutory powers when gathering information through informal and voluntary means.

³⁴ The SAU can only use its statutory information-gathering powers for the purposes of fulfilling its functions under section 65 of the Act.

data. The SAU may also require that employees of the business providing any document explain its contents.

- 3.6 The SAU will only ask for documents or information which, in its opinion, are relevant to its monitoring and reporting functions at the time of the request.

How the SAU will issue section 41 notices

- 3.7 The SAU will aim to be fair and reasonable in its requests for information. It will adopt a flexible approach – the form of its engagement with respondents may differ depending on the individual circumstances.
- 3.8 The SAU will, wherever possible, invite addressees of section 41 notices to comment on the section 41 notice, including the information required and the deadline(s) for providing it. Where it is practical and appropriate to do so, the SAU will send a section 41 notice in draft, so that it can consider comments from the proposed recipient in advance of issuance.
- 3.9 The SAU's section 41 notices will set out their purpose and the relevant SAU function to which the request relates, specify or describe the documents and/or information that the SAU requires, give details of where and when they must be produced and set out the consequences, if any, that may apply if the recipient does not comply.
- 3.10 The SAU will set a reasonable deadline for all section 41 notices. The deadline specified in the section 41 notice will depend on the nature and the amount of information that the SAU has requested.
- 3.11 Addressees should make known any potential difficulties in responding (such as administrative, resourcing, financial, logistical and practical issues) as early as possible within the timeframe set out in the notice, or as soon as they become aware that they may not meet the stipulated deadline. Addressees should also raise with the SAU any matters they do not understand as soon as possible after receiving a request.
- 3.12 The SAU will, in particular, take into consideration any concerns raised by notice addressees about their ability to provide the information required – including given the nature and the type of the information requested and the resources available to them.
- 3.13 The SAU may send out more than one request to the same addressee during its consideration of the issues. For example, the SAU may ask for additional information after considering material submitted in response to an earlier request.

The importance of the SAU's enforcement powers

- 3.14 Given the importance of information to the SAU's monitoring and reporting functions, there are a number of possible adverse consequences if an addressee fails to comply with a section 41 notice. If information is delayed, incomplete or unreliable this will impact on the quality of the SAU's reports and therefore the decisions that the UK Government or public authorities might take based on these outputs, with potential implications for the effective operation of the UK subsidy control regime and for the addressees.
- 3.15 The SAU will expect recipients to comply fully with any section 41 notice within the given deadline and will generally only agree to an extension in exceptional circumstances. This is especially the case where the SAU has engaged with them on the scope and purpose of the request and the proposed deadline for its completion, to help them comply.

4. The SAU's policy on enforcing its information-gathering powers

General statement

- 4.1 As set out at paragraph 2.6, the UKIM Act empowers the SAU to impose a penalty in accordance with section 43, where a section 41 notice is not complied with.
- 4.2 In developing the Statement, the SAU has drawn on the experience of the CMA in the use of its powers to impose administrative financial penalties for non-compliance with some of the CMA's information gathering powers in relation to CA98 investigations, and its mergers and markets cases.³⁵
- 4.3 When assessing whether and in what amount a penalty should be set, the SAU will have regard to the factors referred to in this Chapter in the round, including the nature and gravity of the failure, any adverse effects on the SAU's functions, the notice addressee's reason for the failure and the size and administrative and financial resources available to the addressee.
- 4.4 In particular, the SAU considers that where penalties are imposed these should help to ensure that the SAU can fulfil its monitoring and reporting functions and deter future non-compliance, without being disproportionate or excessive.

Factors influencing SAU's decision whether to impose a penalty

- 4.5 The SAU will consider whether to impose an administrative penalty on a case-by-case basis, taking into account all relevant circumstances.
- 4.6 However, the SAU may be more likely to impose a penalty where it considers one or more of the following factors are present:
- the failure to comply is likely to have an adverse impact on the SAU's ability to fulfil its monitoring and reporting functions and to do so in a timely way;

³⁵ Detailed guidance on the CMA's approach to penalties and other sanctions is available in [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#).

- the failure to comply is significant (whether committed intentionally or negligently);³⁶
- the addressee has previously failed to comply with a section 41 notice whether as part of the SAU's current consideration or previously (that is, there is an element of 'recidivism');
- the imposition of a penalty is required to encourage swift compliance by the addressee; and/or
- the addressee sought to obtain an advantage or derive benefit from the failure to comply.

4.7 The procedure used by the SAU when issuing a section 41 notice may also be relevant to the imposition of penalties. The SAU may be more likely to impose a penalty for failure to comply with the section 41 notice where the SAU has provided a draft request or set a deadline for compliance which takes the addressee's comments into account. Addressees should raise any potential difficulties in responding as early as possible within the timeframe set out in a section 41 notice – for example relating to administrative, resourcing, financial, logistical and practical issues – or any matters they do not understand with the SAU as soon as possible after receiving a request, or as soon as they become aware that they may not meet the stipulated deadline.

Reasonable excuse

4.8 Under section 42(1) of the UKIM Act, SAU will only impose a penalty if a failure to comply is 'without reasonable excuse'. The circumstances that constitute a reasonable excuse are not defined or fixed and the SAU will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. However, the SAU will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond the addressee's control has caused the failure and the failure would not otherwise have taken place. For example, a significant and demonstrable IT failure (which could not reasonably have been foreseen or avoided) which

³⁶ For the purposes of this Statement a failure is 'intentional' if the addressee must have been aware, or could not have been unaware, that its conduct was of such a nature as to lead to a failure to comply and a failure is 'negligent' if the addressee ought to have known that its conduct would result in a failure to comply with a section 41 notice.

prevented the addressee from meeting a deadline might, depending on the circumstances, amount to a reasonable excuse.

- 4.9 The SAU will expect the person to whom the section 41 notice applies to be responsible for ensuring the requirements are fully understood and that the SAU's powers are complied with, even when, for example, using external advisers to assist them with their response. As noted in paragraph 4.7 above, addressees should make known any difficulties and raise any queries in relation to an information request as soon as possible. The CMA is unlikely (save in exceptional circumstances) to accept an excuse where the addressee has not made a reasonable effort to meet the deadline in respect of a section 41 notice.

Factors influencing the type of penalty imposed

- 4.10 Penalties for failing to comply with a section 41 notice can be a single fixed amount, a daily rate or both.³⁷ Penalties for intentionally obstructing or delaying the provision of information will be a fixed amount.³⁸
- 4.11 Where the SAU has a choice as to the type of penalty that may be imposed, it will consider a number of factors, in the round, on a case-by-case basis. These may include the factors referred to in this chapter as well as the following non-exhaustive factors:
- **The factual circumstances in which a penalty is being considered.** The assessment of whether to impose a fixed or daily penalty, or a combination of the two, will involve consideration of the need to incentivise timely compliance with the section 41 notice. Daily penalties, for example, may be particularly appropriate in situations where timely compliance is likely to be of utmost importance, for example where the report that the response will inform is considered urgent and/or vital to SAU's fulfilment of its monitoring and reporting functions.
 - **The deterrent effect of the penalty.** The SAU will consider the level of penalty that is likely to have the requisite deterrent effect, both on the addressee and more generally on those who may be subject to current or future section 41 notices, having regard to the need for the penalty to be

³⁷ See section 43(2) of the UKIM Act.

³⁸ See section 43(3) of the UKIM Act.

proportionate in all the circumstances. This assessment may affect the level of fixed, daily or combined penalty that is set.

- **Whether the failure to comply has been remedied.** In some cases where an initial failure has been remedied, it may still be appropriate to impose a penalty to reflect the nature and gravity of the failure and/or to achieve deterrence. In those circumstances, only a fixed penalty would be available as daily penalties will only be used for a continuing period of non-compliance after formal notice of the imposition of a penalty. In cases of an extended and unremedied failure to comply with a section 41 notice, the SAU may be more likely to impose a daily penalty for the duration of the failure, together with an additional fixed penalty to underline the seriousness of the failure and/or achieve deterrence, while still ensuring that the penalty is proportionate in all the circumstances.

Factors influencing the level of penalty imposed

4.12 Under section 43 of the UKIM Act, the SAU may impose such administrative penalties as it considers appropriate subject to the statutory maxima specified by order of the Secretary of State.³⁹

4.13 The current maxima specified by The United Kingdom Internal Market Act 2020 (Maximum Penalty) Regulations 2021 are:

- £30,000 fixed amount;⁴⁰
- £15,000 (daily rate); and
- £30,000 and £15,000 (fixed amount and daily rate together).

4.14 The SAU will assess all the relevant circumstances of the case in the round in order to determine a penalty that is reasonable, appropriate and thus proportionate in the circumstances. The SAU is likely to set penalties towards the upper end of the relevant statutory maxima for the most serious failures to comply and/or where it is necessary to do so having regard to the addressee's size and financial position. The assessment may include the factors referred

³⁹ See sections 43(4) to 43(8) of the UKIM Act.

⁴⁰ The fixed amount refers to either a penalty for a breach of a requirement of a notice under section 41 of the UKIM Act, or for intentionally obstructing or delaying a person copying documents provided in accordance with an information notice (section 41(7) of the UKIM Act).

to in this chapter as well as the following non-exhaustive factors on a case-by-case basis:

- the scale of the adverse effects (including costs) that will be incurred by the SAU if it has to extend its work;
- the nature and gravity of the failure, including: whether it was intentional or negligent, whether there was any attempt to conceal the failure;
- the size of the addressee (if they are a business) and the administrative and financial resources available to them;
- the reasons given for the failure;
- whether the addressee has derived any advantage from its failure to comply;
- any steps taken in mitigation to ensure failures do not occur in the future, or to discipline responsible individuals;
- the continuation or cessation of the failure after the addressee became aware of it, or of the SAU's concern that there might have been a failure;
- whether the involvement of senior management contributed to the failure, including whether such individuals made arrangements for suitable resources to be made available to comply with the section 41 notice; and
- whether the addressee has previously failed to comply. The seriousness of any past failure(s), the time that has elapsed since the failure(s) occurred, and any other relevant factors may be taken into account.

The procedures SAU will follow

4.15 The SAU will follow the procedures set out below when it proposes to apply an administrative penalty. Notwithstanding the procedures below, for the purposes of assessing duration relevant to a fine, time will start to run from when the failure takes place. However, daily penalties are only incurred from the date of the penalty notice.⁴¹

4.16 Where it appears that the addressee has failed to comply with a section 41 notice without reasonable excuse, the SAU will issue a provisional decision

⁴¹ Section 43(9) of the UKIM Act.

setting out the reasons for its proposed action, the approach that it proposes to take in imposing a penalty and the proposed nature and level of penalty. The addressee will be given a reasonable opportunity to make written representations on the provisional decision to the SAU. The period within which representations must be received will be determined on a case-by-case basis having regard to the nature of the failure to comply and the constraints of the relevant timetable, and in any event will not usually exceed one week. The CMA will consider any representations received on its reasons for the proposed approach to and level of the penalty.

Process

4.17 Once the SAU has reached a decision to impose an administrative penalty, the SAU shall give notice of the penalty to the addressee as soon as practicable.⁴² This notice must specify:

- that the SAU has imposed a penalty on the addressee;
- whether the penalty is a fixed penalty, calculated by reference to a daily rate, or both;
- the amount of the penalty, and where calculated by reference to a daily rate, the day on which the amount starts to accumulate and might cease to accumulate;⁴³
- the failure, obstruction or delay which the SAU considers gave it the power to impose a penalty;
- any other facts which the SAU considers justify the imposition of a penalty and the amount of the penalty;
- the manner in which, and the place at which, the penalty is required to be paid to the SAU;
- the date or dates by which the penalty or (as the case may be) different portions of it are required to be paid;
- that the penalty or different portions of it may be paid earlier than the date or dates by which it or they are required to be paid; and

⁴² Section 112(1) EA02.

⁴³ See sections 43(9) and 43(10) of the UKIM Act.

- the details of the addressee's rights to apply to have the dates on which payments are due varied or to appeal the imposition or nature of the penalty, or the amount of the penalty or the specified date or dates of payment.⁴⁴

4.18 When the SAU has reached a decision to impose an administrative penalty it will publish details of the penalty on its webpages, including the addressee, the reason for imposing the penalty, and the nature and size of the penalty.

Interest

4.19 If the whole or any portion of a penalty is not paid by the date by which it is required to be paid, interest will be payable on the unpaid balance at the rate specified in section 17 of the Judgments Act 1838.⁴⁵

Appeals

4.20 Where the addressee is aggrieved by the imposition or the nature of the penalty for failure to comply with a section 41 notice, its amount or the date by which the penalty is required to be paid, the addressee may appeal to the Competition Appeal Tribunal.⁴⁶

4.21 Where an addressee makes an appeal, the SAU will not require a penalty to be paid until the application has been determined, withdrawn or otherwise dealt with by the Tribunal.

4.22 Where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal against the decision, the SAU may recover the penalty and any interest which has not been paid.

⁴⁴ Sections 112(2)(i) and 114(1) EA02.

⁴⁵ Sections 113(1) EA02.

⁴⁶ Section 114 EA02.