

**Competition and Markets  
Authority (CMA)**

**Administrative Penalties:  
Statement of Policy on the  
CMA's approach**

**Consultation document**

July 2013

CMA4con

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Any enquiries regarding this publication should be sent to us at: BIS CMA Transition Team on behalf of the CMA, Department for Business, Innovation, and Skills, 3<sup>rd</sup> Floor, 1 Victoria Street, London SW1H 0ET, or email [cmaconsultation@bis.gsi.gov.uk](mailto:cmaconsultation@bis.gsi.gov.uk).

This publication is also available at: [www.gov.uk/cma](http://www.gov.uk/cma).

## **Scope of this consultation**

### **Topic of this consultation**

The BIS CMA Transition Team (the Transition Team) (on behalf of the Competition and Markets Authority (CMA) and in consultation with the Office of Fair Trading (OFT) and Competition Commission (CC)) seeks the views of interested parties on the draft statement of policy set out in Annexe C of this document (the Statement). The Transition Team proposes to issue the Statement in relation to the CMA's powers to impose administrative penalties for failure to comply with certain investigatory and interim measures requirements in mergers, markets and antitrust investigations. Some of these powers were introduced by the Enterprise and Regulatory Reform Act 2013 (the ERRA13) and come into force on 1 April 2014 while others relate to existing powers being transferred from the CC to the CMA from 1 April 2014. This consultation is being carried out pursuant to obligations in the Enterprise Act 2002 (the EA02) and the Competition Act 1998 (the CA98) (in each case as amended by the ERRA13).

This consultation and the accompanying guidance have been drafted by the Transition Team which has been appointed by the CMA Chair Designate and Chief Executive Designate, and consists of individuals from the OFT, the CC and elsewhere.

In parallel with this consultation, the Department for Business, Innovation and Skills (BIS) has published for consultation proposed secondary legislation relevant to CMA powers to impose administrative penalties. Although referred to in this document, the proposed secondary legislation falls outside the scope of this consultation, and specific comments on it should be submitted to BIS as part of that separate consultation.

### **Geographical scope**

The geographical scope of this consultation is primarily the UK.

### **Basic information**

This consultation is aimed at those who have an interest in the CMA's investigations pursuant to the CA98 and EA02 (as amended by the ERRA13). In particular, it may be of interest to businesses and their legal and other advisors.

### **How to respond**

We would welcome your comments on any aspect of the Statement. In particular, your feedback is sought on the specific questions set out in this consultation

document. Please respond to as many questions as you are able and provide supporting evidence for your views where appropriate.

You can respond to this consultation:

By email to [cmaconsultation@bis.gsi.gov.uk](mailto:cmaconsultation@bis.gsi.gov.uk)

By post to:

The BIS CMA Transition Team on behalf of the CMA

(c/o Xinru Li and Easha Lam)

Department for Business, Innovation, and Skills

3<sup>rd</sup> Floor, Orchard 2

1 Victoria Street

London

SW1H 0ET

When responding to this consultation, please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.

Please also indicate whether you are happy for your response to be published on the CMA's website. Further information regarding our use of data received through this consultation is provided below.

### **Enquiries**

If you have any questions relating to this consultation please contact Xinru Li or Easha Lam on the email address above or by telephone on 020 7215 2078 or 020 7215 2044.

### **Closing date**

Responses should be received by 5pm on Friday 6 September 2013.

### **Next Steps**

The Transition Team will consider the responses to this consultation document and make amendments to the Statement where appropriate. The CMA Board (once

established) will decide on the matters being consulted on and the content of the final guidance, which will be published in advance of 1 April 2014.

### **Compliance with the Cabinet Office Consultation Principles**

This consultation complies with the Cabinet Office Consultation Principles. A list of the key criteria, along with a link to the full document, can be found at Annexe B.

### **Consultation Period**

The deadline for responses to this consultation is eight weeks. While this represents an expedited consultation period, we note that the in-depth Government consultation exercise which led to the decision to create the CMA asked a number of questions and yielded a number of valuable responses on issues related to this consultation, which have informed the proposed approach to the Statement regarding penalties for failure to comply with certain investigatory and interim measures powers.

Furthermore, the timetable for the formation of the CMA requires that consultation on numerous proposed guidance documents be carried out within a very short period of time. The Transition Team considers that, given these considerations, the eight week consultation period is an appropriate one to obtain responses from interested parties.

### **Feedback about this consultation**

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Mr John Conway

Consultation Coordinator

1 Victoria Street

London SW1H 0ET

Telephone 020 7215 6402 or e-mail: [john.conway@bis.gsi.gov.uk](mailto:john.conway@bis.gsi.gov.uk)

### **Data use statement for responses**

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to publish or refer to the responses we receive to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a

business which, if published, would or 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, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

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# 1 INTRODUCTION

## Background

- 1.1 The CMA will be established under the ERRA13 as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the CC and many of the functions of the OFT will be transferred to the CMA and these bodies abolished. The CMA's primary duty will be to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 The CMA will have a range of statutory powers to address problems in markets:
- under the EA02, the CMA will be able to investigate mergers which could potentially give rise to a substantial lessening of competition and specify measures which the merging parties must take to protect competition between them while the investigation takes place
  - the EA02 will also enable the CMA to conduct market studies and investigations to assess particular markets in which there are suspected competition problems, and to require market participants to take remedial action which the CMA may specify
  - the CMA will have powers to enforce a range of consumer protection legislation (either directly or through Part 8 of the EA02) and to bring criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)
  - the CMA will also be able to bring criminal proceedings against individuals who commit the cartel offence under the EA02,<sup>1</sup> and
  - finally, under the CA98 the CMA will be able to investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position.
- 1.3 The ERRA13 implements a number of enhancements to these statutory powers (compared to the powers available to the CC and OFT), in order to

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<sup>1</sup> See section 188 of the EA02.



improve the robustness of decision-making, increase the speed and predictability of the CMA's activities and strengthen the UK's competition regime as a whole.<sup>2</sup> The Transition Team has produced a series of draft guidance documents to assist the business and legal communities and other interested parties in their interactions with the CMA and is consulting publicly on them.

## Purpose of this consultation

1.4 The primary purpose of this document is to consult on the Transition Team's proposed approach towards the use of powers the CMA will have to impose administrative penalties on persons who fail to comply with:

- notices requiring the attendance of witnesses, production of documents or supply of estimates, forecasts, returns or other information and certain other requirements in Phase 1 and Phase 2 mergers and markets investigations (EA02 Requirements)<sup>3</sup>
- notices requiring the provision of information or documents or certain other requirements in CA98 investigations (CA98 Requirements),<sup>4</sup> and
- interim measures<sup>5</sup> in mergers cases (Merger IMs).<sup>6</sup>

For the purposes of this document, EA02 Requirements, CA98 Requirements and Merger IMs shall be collectively referred to as Investigatory Requirements. A person that fails to comply with an Investigatory Requirement shall be referred to as **P**.

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<sup>2</sup> An overview of the changes and an introduction to the CMA is contained in the document *Towards the CMA* (CMA1), which has been published in parallel with this consultation document.

<sup>3</sup> Sections 110 and 174A of the EA02. The powers in section 110 also apply to some regulatory references. See, for example, references made under Section 12 of the Transport Act 2000 pursuant to section 12B(1) of that Act.

<sup>4</sup> Section 40A of the CA98, as amended by the ERRa.

<sup>5</sup> By virtue of section 94A(8) of the EA02, interim measures for these purposes are undertakings under section 80 or orders under section 72 or 81 or paragraph 2 of Schedule 7 of the EA02.

<sup>6</sup> Section 94A of the EA02, as amended by the ERRa.

## 2 LEGAL FRAMEWORK

### Introduction

- 2.1 Currently, the OFT and CC each have a number of measures available to incentivise compliance with Investigatory Requirements. The CC has the ability to impose administrative penalties for failure to comply with EA02 Requirements in Phase 2 mergers and markets investigations, while failures to comply with certain EA02 Requirements and CA98 Requirements imposed by the OFT can result in criminal sanctions. Merger IMs are enforceable by the OFT and CC through civil proceedings. Criminal penalties also exist in respect of deliberate interference with OFT and CC investigations.
- 2.2 Following its review of the UK competition regime, the Government decided:
- that the CMA should have the same investigatory and enforcement powers across all its mergers and markets processes (with existing investigatory powers being extended to make them available to the CMA throughout the 'end-to-end' markets process)
  - to enhance the investigatory powers available in CA98 cases
  - to align the sanctions for non-compliance with the CMA's investigatory powers so that the same type of sanction applies across these functions
  - that a system of administrative (civil) financial penalties (currently available to the CC) might be a quicker, more efficient and more proportionate method of dealing with most categories of failure to comply with Investigatory Requirements than the criminal sanctions currently available to the OFT, and
  - to introduce administrative financial sanctions for failure to comply with Merger IMs (with the power to enforce these by civil proceedings being retained).
- 2.3 These reforms have been implemented by the ERA13 and are intended also to create a more effective deterrent to failing to co-operate with an investigation.
- 2.4 The CMA is required to prepare and publish a statement of policy in relation to the use of its new administrative penalties powers. In particular, the statement must cover the considerations relevant to the determination of the

amount and, in certain circumstances, the nature of any penalty imposed under those new powers.<sup>7</sup>

## **Summary of the CMA's powers**

### *Failure to comply with EA02 Requirements and CA98 Requirements*

- 2.5 Under the EA02 as amended by the ERRA13, the CMA may impose administrative penalties on persons who fail, without reasonable excuse, to comply with requirements under sections 109 and 174 of the EA02.<sup>8</sup> This includes failures to give evidence, provide information or produce documents required by the CMA. Penalties may also be imposed on those who intentionally obstruct or delay another person in copying documents that that person is required to produce.<sup>9</sup> These powers will be available across the entire mergers and markets investigation processes.
- 2.6 Similarly, under the CA98 as amended by the ERRA13, the CMA may impose administrative penalties on persons who fail, either intentionally or without reasonable excuse, to comply with requirements imposed on them under sections 26, 26A, 27, 28 or 28A of the CA98 at any point in the CMA's investigation.<sup>10</sup> These include failures to answer questions asked by the CMA, failures to produce documents required by the CMA or failures to comply with the CMA's powers to enter premises (either with or without a warrant). They also include failure to provide adequate or accurate information in response to CA98 Requirements.
- 2.7 Certain criminal offences in relation to interference with the CMA's investigatory powers will operate alongside the civil CMA's civil enforcement powers. Broadly speaking, criminal offences will remain for:
- obstructing the exercise of certain CMA powers
  - intentional alteration, suppression or destruction of documents the CMA has required, and

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<sup>7</sup> Sections 94B(2), 116(2) and 174E(2) of the EA02 and section 40B(2) of the CA98.

<sup>8</sup> Sections 110(1) and 174A(1) of the EA02 as amended by the ERRA.

<sup>9</sup> Sections 110(1) and (3) EA02 (mergers) and 174A(1) and (3) of the EA02 (markets), as amended by the ERRA.

<sup>10</sup> Section 40A(1) of the CA98 as amended by the ERRA.

- knowing or reckless provision of false or misleading information to the CMA (or another person) in connection with a CMA investigation.

2.8 In terms of the type and amount of the penalty, the CMA will be able to impose such penalties as it considers appropriate,<sup>11</sup> subject to certain restrictions as well as statutory maxima set by the Secretary of State (the approach to different types of failure to comply is discussed in chapter 4 below).

2.9 The current maxima – specified by the Competition Commission (Penalties) Order 2003 – are £20,000 for fixed penalties and £5,000 for daily penalties, whether applied in combination or alone. In parallel with this consultation on the approach to using the CMA’s new administrative penalty powers, the Department for Business, Innovation and Skills (BIS) is consulting on increasing the above penalty levels to the maxima permitted under the EA02 and CA98, which are £30,000 in the case of a fixed penalty and £15,000 in relation to a daily penalty (including in the cases where a combination of a fixed penalty and a daily penalty may be imposed).

2.10 The CMA powers summarised above are described in more detail in chapter 2 and Annexe B of the Statement.

#### *Failure to comply with Merger IMs*

2.11 The EA02 as amended by the ERRA13 gives the CMA the power to impose administrative penalties for failure to comply with Merger IMs. Where the CMA considers that a person has, without reasonable excuse, failed to comply with a Merger IM, it may impose a penalty of such fixed amount as it considers appropriate (penalties calculated by reference to a daily rate are not applicable to failures to comply with Merger IMs).

2.12 A penalty for failure to comply with Merger IMs may be up to 5% of the total value of the turnover of the enterprises owned or controlled by P (both within and outside the UK).<sup>12</sup> As such, the actual value of the penalty will depend on the size of the enterprise controlled by P.

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<sup>11</sup> Section 111(1) of the EA02 (mergers), Section 174D(1) of the EA02 (markets) and section 40A(1) of the CA98.

<sup>12</sup> Section 94A(2) of the EA02. The Secretary of State may by order specify that the maximum percentage of turnover to be considered is less than 5%, but may not increase it above 5%: section 94A(6) of the EA02.

- 2.13 The Secretary of State may, by order, specify when an enterprise is to be to be considered to be 'controlled' by P and the methodology for calculating the relevant turnover inside and outside of the UK. In particular, this may specify the amounts which are, or which are not, to be treated as comprising an enterprise's turnover and the date or dates by reference to which an enterprise's turnover is to be determined.<sup>13</sup> BIS is consulting on a draft order covering these issues (the Draft Order) in parallel with this CMA consultation.
- 2.14 Broadly speaking, the Draft Order provides that control is not limited to outright voting control of an enterprise, but includes situations falling short of outright control. These include:
- the ability materially to influence the policy of the enterprise (known as 'material influence')
  - the ability to directly or indirectly control the policy of the enterprise (known as 'de facto' control), and
  - having a controlling interest.<sup>14</sup>
- 2.15 The turnover relevant for calculating the amount of penalty will be the post-tax revenue from the sale of goods and provision of services to businesses or to consumers that fall within the ordinary activities of the enterprise, both within and outside the UK in the year preceding the one in which the relevant interim measures were imposed. Chapter 4 of the Statement sets out in further detail the CMA's proposed approach to calculating the amount of penalty for Merger IM penalties in accordance with the Draft Order.

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<sup>13</sup> Sections 94A(3) and (4) of the EA02.

<sup>14</sup> See Article 2(1) of the Draft Order.

### 3 ROLE AND POLICY OBJECTIVES OF ADMINISTRATIVE PENALTIES

#### Introduction

3.1 The changes made by the ERA13 to the penalties for failure to comply with Investigatory Requirements reflect a number of key policy objectives. It is intended that the primary objectives of the CMA's policy on administrative penalties for failure to comply with EA02 Requirements and CA98 Requirements and Merger IMs will be:

- to ensure that the CMA can gather information to carry out its functions with the **best possible knowledge of the relevant facts** and in **compliance with relevant investigation timetables** (in particular, but not limited to, statutory timetables in mergers and markets cases)
- to **prevent action which might prejudice any mergers or markets reference or impede the taking of action following such a reference**, such as to prevent detrimental and irreversible changes to market dynamics and to ensure the CMA can take effective and appropriate remedial action if it concludes that is necessary, and
- to ensure that the **threat of penalties will deter future non-compliance** with Investigatory Requirements, by those on whom penalties have been imposed and other persons who may be considering future non-compliance.

#### Conduct of investigations

3.2 There are a number of potential adverse consequences for the CMA (and others) if information requested by the CMA is not received in accordance with specified deadlines, is provided in incomplete or inadequate form or is withheld entirely. These include:

- increased costs associated with the investigation (both to the CMA and others)
- delays to the investigation in question, which could have serious adverse commercial and/or other consequences for the CMA, businesses and consumers (and also lead to increased costs)
- reduced accuracy or quality of the CMA's decisions, and / or

- in the most extreme circumstances, the CMA reaching a different decision from the one it would have reached if the required information had been available.

3.3 The ability to impose penalties for failure to comply with Investigatory Requirements will contribute to achieving the CMA's policy objectives and to avoiding the adverse consequences described above. In terms of delay to investigations, the ERRA13 amendments to the statutory timetables applicable to merger and markets investigations require the CMA to work to shorter timescales than was previously the case.<sup>15</sup> The CMA's new penalty powers will incentivise compliance with Investigatory Requirements to ensure that the CMA is able to fulfil its new timetable obligations and perform its investigations efficiently. Since market operators are the primary beneficiaries of the CMA's new obligations, it is right that they should shoulder a fair share of this responsibility by ensuring the CMA is provided with accurate and relevant information in good time.

3.4 Moreover, given the significant consequences of substantive decisions in mergers, markets and CA98 investigations, it is vital for the CMA to be able to take such decisions based on information that is as accurate and complete as possible. A solid evidential basis is vital to ensure that investigations and enforcement action are well directed and justified. Put another way, the CMA will need high quality information to make robust, high quality decisions.

3.5 It would be highly undesirable if persons on whom Investigatory Requirements are imposed were able to frustrate investigations by providing insufficient, inadequate, or delayed responses to CMA investigations (or by failing to provide responses altogether) in order to further their own interests. Like the OFT and the CC, the CMA will take compliance with Investigatory Requests very seriously, particularly where it affects the CMA's ability to carry out its functions. For example, a party to a CA98 or merger investigation might not wish to provide information that could lead to an adverse outcome for it. Equally, a third party to an investigation might not wish to provide information indicating that a competitor's activity under investigation was not of concern. It is envisaged that the CMA's

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<sup>15</sup> See *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2con) [currently in draft and being consulted on] and *Market studies and market investigations: Supplemental guidance on the CMA's approach* (CMA3con) [currently in draft and being consulted on].

administrative penalty powers will be used wherever necessary to target any such attempts to 'game the system' and to deter future failures to comply.

### **Preserving existing conditions pending outcome of investigations**

3.6 It is essential that the CMA has effective powers to ensure that anti-competitive harm does not arise prior to the completion of investigations. As such, the ERRA13 gives the CMA improved powers to suspend the integration of companies in anticipated mergers and the further integration of companies in completed mergers, at both Phase 1 and Phase 2. These strengthened interim measures powers are complemented by the CMA's ability to impose penalties where the measures are not complied with.

### **Deterrence**

3.7 The imposition of administrative penalties is designed to deter failure to comply with Investigatory Requirements. There are two aspects to the deterrence objective. First, the imposition of penalties is intended to deter persons who fail to comply with Investigatory Requirements in a given case from committing similar failures in the future (specific deterrence). Secondly, the imposition of penalties is intended to deter undertakings at large, from failing to comply with Investigatory Requirements (general deterrence). Overall, therefore, administrative penalties seek to encourage a 'culture of compliance', which will enhance the CMA's ability to carry out its functions.

3.8 In addition to ensuring the timely provision of accurate and complete data to inform investigations, it is also considered that administrative penalties should reflect the seriousness of the failure to comply. In accordance with the CMA's obligation to act proportionately, those failures to comply which carry particularly adverse consequences and/or reflect a significant level of culpability are likely to be more heavily penalised than those having minimal effects and/or result from mere negligence.

#### **Question 1**

Do you consider that there are any other roles or objectives that should be taken into account when considering the CMA's approach to administrative penalties?

Please give reasons for your views.



## 4 PROPOSED APPROACH TO ADMINISTRATIVE PENALTIES

### Overall approach to the statement of policy

4.1 As noted at paragraph 2.4 above, the CMA is required to prepare and publish a statement of policy in relation to the use of its new powers to impose administrative penalties. The Statement is designed to meet this obligation and to provide transparency and certainty regarding the CMA's approach to imposing such penalties. Chapter 4 of the Statement sets out various factors it is expected the CMA will consider when assessing:

- whether to impose a penalty
- the type of penalty that should be imposed
- the level of penalty that should be imposed, and
- whether to extend any applicable statutory timetable.

To further assist relevant stakeholders, Annexe A to the Statement sets out a number of illustrative worked examples to help illustrate how these general principles will be applied in specific circumstances.

#### Question 2

Do you agree that the level of detail in the Statement is appropriate?

Please give reasons for your views.

### The decision to impose a penalty

4.2 A number of factors that may make the imposition of a penalty more likely have been identified. These factors relate directly to the achievement of the intended CMA policy objectives with regard to the use of its new powers. Where, for example, a failure to comply adversely affects the CMA's investigation, perhaps by making it more difficult to obtain accurate information in time to meet statutory timetables, it is expected that a penalty will be more likely to be imposed. Similarly, where P intentionally fails to comply with an Investigatory Requirement in order to derive an advantage, this indicates a particular disregard for its compliance obligations and the CMA's functions. Wilful non-compliance is likely to require more stringent measures to deter P from failing to comply with future Investigatory Requirements, and as such intentional failures will be treated more severely

than negligent failures (although, depending on the circumstances, it is possible that negligent failures may also lead to substantial penalties).

- 4.3 It is expected that the CMA will have regard to the fact that it may also extend an investigatory or assessment timetable in the event of non-compliance. However, there should be no expectation that a decision to extend a timetable will mean that no penalty is imposed.
- 4.4 The factors set out in the Statement are not exhaustive, nor will the presence or absence of any of these individual factors determine whether a penalty will be imposed. These are, however, considered to be factors which directly relate to the achievement of the policy objectives set out in chapter 3 and, as such, will generally be relevant to the CMA's assessment.

### **Reasonable excuse**

- 4.5 The CMA may not impose a penalty where the person on whom Investigatory Requirements have been imposed has a 'reasonable excuse' for its failure to comply. The CMA is expected to consider on a case-by-case basis whether a reasonable excuse is present but the Statement gives some guidance on the approach that the Transition Team proposes the CMA will take to assessing reasonable excuse.

### **Factors affecting the type of penalty imposed**

- 4.6 There are some failures to comply for which the CMA may only impose a penalty of a particular type. The CMA may, for example, impose only a fixed penalty where P has intentionally obstructed or delayed another person in copying documents produced to them (in the context of mergers and markets investigations). For those cases where the CMA will be able to decide whether to impose a fixed, daily penalty or both, the Statement sets out a non-exhaustive list of factors the CMA may consider.
- 4.7 One of the most significant factors in this assessment is whether a penalty is likely to incentivise swift compliance with the Investigatory Requirements. Daily penalties, for example, (either alone or in combination with a fixed penalty) may create greater incentives for P to comply urgently, since the penalty imposed is directly related to the amount of time taken to remedy the failure.
- 4.8 The need to generate deterrent effects (both specific and general) will also be relevant to the type of penalty imposed. Where the circumstances require

a strong deterrent message, for example where there is an egregious or persistent failure to comply with Investigatory Requirements, it may be important to impose a penalty at a level that can only be reached by the combination of fixed and daily penalties.

- 4.9 Further, there may be some cases where it is appropriate to impose a penalty notwithstanding the fact that the failure to comply has been remedied, in order to reflect the gravity of the failure or to achieve deterrence. In cases of extended and continuing failure to comply with the Investigatory Requirements, the CMA may be more likely to impose a daily penalty for the duration of the failure, together with an additional fixed penalty, to emphasise the seriousness of the failure and achieve deterrence.

### **Factors affecting the level of penalty imposed**

- 4.10 As set out in chapter 2 above, the CMA's ability to impose administrative penalties for failure to comply with Investigatory Requirements is subject to statutory caps. Below those caps, the CMA has discretion as to the level of the penalty it may impose.
- 4.11 Chapter 4 of the Statement sets out a number of factors that it is expected the CMA will take into account when assessing the appropriate level of a penalty. A range of case circumstances will be taken into account, including circumstances relating both to the specific failure to comply (and its factual context) and the person on whom the Investigatory Requirements were imposed.
- 4.12 Factors include the scale of adverse effects on the case (such as costs) that will be incurred by the CMA if the investigation has to be extended because of failures to comply with Investigatory Requirements in a timely and acceptable fashion. Whether the failure is deliberate or designed to secure an advantage, or is committed by a person who has previously committed such failures, will also be relevant factors having regard to the need to reflect the seriousness of the failure to comply and send a message of deterrence.
- 4.13 On the other hand, it would not necessarily serve the CMA's intended policy objectives to punish disproportionately minor failures in the context of general compliance with Investigatory Requirements, or accidental failures which are promptly corrected. As such, a history of compliance, either in the present or in earlier investigations, is likely to be taken into account in assessing any penalty. Any steps taken by P to ensure failures do not occur in future may also affect the level of penalty.

4.14 The financial and administrative resources of P may also form part of the assessment. Where P has significant resources, it may not only have greater capacity to comply with Investigatory Requirements (therefore increasing the seriousness of infringement failure to comply), but may also require a more significant penalty in order to be incentivised to comply in future (meaning a higher penalty is required to generate deterrence).

#### **Decision to extend timetables or deadlines**

4.15 The CMA may extend the time limit within which certain of its duties to carry out investigations must be discharged if it considers that P has failed (with or without reasonable excuse) to comply with Investigatory Requirements in the context of such a reference or investigation.<sup>16, 17</sup>

4.16 In reaching a decision on whether to extend the time limit, it is expected that the CMA will consider all relevant factors on a case-by-case basis to determine whether an extension is appropriate. While this is likely to be a highly fact-specific assessment, the following, non-exhaustive factors may form part of the assessment:

- whether the extension is necessary to enable the Investigatory Requirements to be complied with and for the CMA to complete its functions, and
- whether any extension may jeopardise the effectiveness of any remedy the CMA might wish to impose, for example a divestment in the case of a completed merger.

4.17 It is intended that the CMA would not usually expect to use minor occurrences of non-compliance or those with limited impact to justify extensions to statutory timetables. In addition, the fact that a failure to comply is particularly serious (for example a deliberate failure by a recidivist designed to achieve an advantage) will not necessarily make an extension more likely. The Transition Team considers that the driving policy objective in such decisions will be the ability of the CMA to carry out its investigations

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<sup>16</sup> Sections 34ZB, 39(3) and 41A(3) of the EA02 (mergers) and sections 138A(3) of the EA02 (markets).

<sup>17</sup> See *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2con) [currently in draft and being consulted on] and *Market studies and market investigations: Supplemental guidance on the CMA's approach* (CMA3con) [currently in draft and being consulted on].

effectively, as opposed to reflecting the seriousness of failures to comply or sending a deterrence message.

### **Question 3**

Do you agree with the approach in chapter 4 of the Statement to determining whether to impose a penalty, the level at which penalties should be set and the various factors to be taken into account?

Please give reasons for your views.

### **Specific factors relating to the calculation of turnover for failure to comply with Merger IMs**

4.18 As noted above, the CMA may impose a penalty on P of up to 5% of the enterprises they own or control. It is envisaged that the CMA will assess the turnover of the enterprises P controls (i.e that it has a material interest in, de facto control over or a controlling interest in) on a case-by-case basis. The Transition Team notes, however, that it will be important for the CMA to be able to make decisions on penalties for failures to comply with Merger IMs quickly and efficiently without detracting significant resources from its substantive merger assessment or holding up the progress of the investigation. Assessing material influence may not always be a straightforward exercise and may take more time and resources to assess compared to de facto control and controlling interest. Given this, there may be some benefit to an approach of including turnover based on material influence only in cases where it is necessary to do so, for example where the business structure is such that only the material influence test would capture sufficient turnover under P's control to give rise to a deterrent penalty. The Transition Team will take a final view on this issue having regard to the views of respondents to the consultation.

### **Question 4**

Do you agree with the approach in the Statement to assessing the turnover of enterprises owned or controlled by P? In particular, do you have views on whether turnover based on material influence should be used in all cases? Please give reasons for your views.

## Transitional arrangements

4.19 The Statement notes that the penalty powers there outlined will come into force at the same time that the substantive investigative and interim measures powers to which they relate come into force. Subject to a number of exceptions – in relation to which see the draft procedural guidance documents for the relevant substantive powers<sup>18</sup> – both substantive and penalty powers will come into force on 1 April 2014.

### Question 5

Is the Statement sufficiently clear to assist you in understanding how the CMA will set administrative penalties for failure to comply with the relevant Investigatory Requirements?

Please describe any areas which are not sufficiently clear, the reasons for this and recommendations you may have.

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<sup>18</sup> See *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2con); *Market studies and market investigations: Supplemental guidance on the CMA's approach* (CMA3con) and [the CMA's CA98 rules]. The latter document is not part of the current consultation but the CMA Transition Team will be consulting on it starting in September 2013.

## ANNEXES

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## **A QUESTIONS FOR CONSULTATION**

### **Question 1**

Do you consider that there are any other roles or objectives that should be taken into account when considering the CMA's approach to administrative penalties?

Please give reasons for your views.

### **Question 2**

Do you agree that the level of detail in the Statement is appropriate?

Please give reasons for your views.

### **Question 3**

Do you agree with the approach in the Statement to determining whether to impose a penalty, the level at which penalties should be set and the various factors to be taken into account?

Please give reasons for your views.

### **Question 4**

Do you agree with the approach in the Statement to use the material influence test when determining turnover only in cases where the business structure is such that only the material influence test would meaningfully capture P's turnover?

Please give reasons for your views.

### **Question 5**

Is the Statement sufficiently clear to assist you in understanding how the CMA will set administrative penalties for failure to comply with the relevant Investigatory Requirements?

Please describe any areas that are not sufficiently clear, the reasons for this and any recommendations you may have.



## **B CONSULTATION CRITERIA**

[The Civil Service Reform Plan](#) commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process.

As a result the Government is improving the way it consults by adopting a more proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and focussing on real engagement with key groups rather than following a set process.

The key Consultation Principles are:

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before
- departments will need to give more thought to how they engage with and consult with those who are affected
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy, and
- the principles of the Compact between Government and the voluntary and community sector will continue to be respected.

The full Cabinet Office Consultation Principles can be found on the Cabinet Office website at: [www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance](http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance).

This guidance replaces the [Code of Practice on Consultation](#) issued in July 2008 on the BIS website.

## **C DRAFT REVISED GUIDANCE**

# **Competition and Markets Authority (CMA)**

## **Administrative Penalties: Statement of Policy on the CMA's approach**

[Month] 2014

CMA4con

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Any enquiries regarding this publication should be directed to [the CMA – contact details are available on the CMA’s website at [www.gov.uk/cma/](http://www.gov.uk/cma/)].

This publication is also available from our website at: [www.gov.uk/cma](http://www.gov.uk/cma).

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# 1 INTRODUCTION

1.1 This document sets out the CMA's statement of policy regarding its powers<sup>1</sup> to impose administrative penalties<sup>2</sup> on a person who fails to comply with:

- notices requiring the attendance of witnesses, production of documents or supply of estimates, forecasts, returns or other information in Phase 1 and Phase 2 mergers and markets investigations<sup>3</sup> (EA02 Requirements)
- requirements to provide information or documents or certain other requirements in antitrust investigations<sup>4</sup> (CA98 Requirements), and
- interim measures<sup>5</sup> in mergers cases<sup>6</sup> (Merger IMs).

In this document EA02 Requirements, CA98 Requirements and Merger IMs will be collectively referred to as Investigatory Requirements. A person that commits an infringement of any Investigatory Requirements is referred to as **P**.

1.2 Where applicable, this document also sets out the considerations relevant to extending the period in which the CMA will carry out its investigations,

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<sup>1</sup> Sections 94A and 110 (mergers) and 174A and 174B (markets) of the EA02 and section 40A of the CA98. Further details on these powers are contained in the CMA publications *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) [currently in draft and being consulted on] and *Market studies and market investigations: Supplemental guidance on the CMA's approach* (CMA3) [currently in draft and being consulted on]. As at [1 April 2014], markets powers under Part 4 of the EA02 and CA98 powers are applied and enforced, concurrently with the CMA, by the regulators for communications and postal matters, gas, electricity, water and sewerage, railway, air traffic and health services (the Regulators). Accordingly, where the Regulators have concurrent powers, references to the CMA in this statement of policy should be taken to include the Regulators in relation to their respective industries. It should be noted that the Regulators may have their own guidance on penalties in relation to the exercise of their regulatory, rather than concurrent, powers.

<sup>2</sup> As required by section 94B(1) of the EA02, this statement of policy also covers the CMA's power to bring civil proceedings to enforce mergers interim measures under section 94(6) of the EA02.

<sup>3</sup> Sections 110 (mergers) and 174A (markets) of the EA02. The powers in section 110 also apply to some regulatory references. See, for example, references made under Section 12 of the Transport Act 2000 pursuant to section 12B(1) of that Act.

<sup>4</sup> Section 40A of the CA98.

<sup>5</sup> By virtue of section 94A(8) of the EA02, interim measures for these purposes are undertakings under section 80 or orders under section 72 or 81 or paragraph 2 of Schedule 7 of the EA02.

<sup>6</sup> Section 94A of the EA02. As required by section 94B(1) of the EA02, this statement also covers the CMA's powers to bring civil proceedings to enforce mergers interim measures under section 94(6) of the EA02.

consider undertakings in lieu of a reference (UILs) and prepare and publish its reports and/or decisions in mergers and markets cases.

### **Requirement for a statement of policy and scope of this document**

- 1.3 The CMA is required to prepare and publish a statement of policy in relation to the use of its enforcement powers under sections 94, 94A, 110(1) and (3) and 174 of the EA02 and section 40A of the CA98; in respect of powers under sections 94 and 94A of the EA02 the statement may not be published until the Secretary of State has approved it.<sup>7,8</sup>
- 1.4 This statement of policy (Statement) reflects the views of the CMA at the time of publication and the CMA may publish a revised statement of policy from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research.<sup>9</sup> It may in due course be supplemented, revised or replaced. When preparing or revising its statement of policy the CMA must consult such persons as it considers appropriate (in respect of Merger IMs powers under section 94A of the EA02 the Secretary of State must be consulted).<sup>10</sup> The CMA's website will always display the latest version of the Statement.
- 1.5 Although it covers many of the points likely to be of immediate concern to businesses and their advisers, this document makes no claim to be comprehensive. It cannot, therefore, be seen as a substitute for the EA02 and the regulations and orders made under the EA02, nor can it be cited as a definitive interpretation of the law. Anyone in any doubt about whether they may be affected by the legislation should consider seeking legal advice.
- 1.6 When reaching decisions regarding enforcement action for failure to comply with the investigatory powers described above, the CMA must have regard to

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<sup>7</sup> Sections 94B(1) and 94B(5), 116(1) and (2) and 174E(1) of the EA02 and section 40B(1) of the CA98.

<sup>8</sup> In particular, it must include a statement about the considerations relevant to the determination of the amount and, in certain circumstances, the nature of any penalty imposed under the above mentioned sections of the CA98 and EA02 (sections 94B(2), 116(2) and 174E(2) of the EA02 and section 40B(2) of the CA98).

<sup>9</sup> The CMA may revise its statement of policy at any time and must publish any revised statement of policy (in respect of mergers interim measures powers under section 94A of the EA02 the revised statement may not be published until the Secretary of State has approved it) (sections 94B(3) and (5), 116(3) and 174E(3) of the EA02 and section 40B(3) of the CA98).

<sup>10</sup> Sections 94B(4), 116(4) and 174E(4) of the EA02 and section 40B(4) of the CA98.

this Statement.<sup>11</sup> The CMA will apply this Statement flexibly according to the circumstances of the case. However, different considerations may be relevant to the assessment of the appropriate administrative penalty, depending on which statutory power the CMA is using.

- 1.7 You may find it useful to read this document alongside other CMA, OFT and/or CC documents, including *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) [currently in draft and being consulted on]; *Market studies and market investigations: Supplemental guidance on the CMA's approach* (CMA3) [currently in draft and being consulted on]; *Competition Act 1998: Guidance on the CMA's investigation procedures* [to be consulted on in due course]; *CMA's Competition Act 1998 Rules* [to be consulted on in due course] and the documents listed in Annexe D, which were first published by the OFT and CC, and have been adopted by the CMA. This document supersedes the CC's *Statement of Policy on Penalties* (CC5).<sup>12</sup>
- 1.8 This Statement takes effect from [1 April 2014]. The powers made available to the CMA by the ERRA13 will apply to mergers, markets and CA98 investigations from [1 April 2014], subject to a number of exceptions.<sup>13</sup>

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<sup>11</sup> Sections 110(9) and 174A(8) of the EA02 and section 40B(6) of the CA98 provide that the CMA must have regard to the statement of policy most recently published at the time of the relevant failure. A similar requirement applies to the Regulators by virtue of the legislation that conferred on them concurrent powers under the CA98 and EA02. However, it should be noted that while the Regulators must have regard to this statement of policy their approach may differ in some respects. It is therefore advisable to consider also any procedural guidance published by the Regulators in an investigation carried out by them.

<sup>12</sup> To the extent that it refers to powers the CC had to impose penalties for failure to comply with certain investigative powers prior to the ERRA13, it also supersedes the CC document *General Advice and Information* (CC4).

<sup>13</sup> See paragraph 5.11 below.



## 2 LEGAL FRAMEWORK

### Penalties for failure to comply with Investigatory Requirements<sup>14</sup>

- 2.1 Under the EA02 (in relation to markets or mergers investigations), the CMA may impose administrative penalties on persons who fail, either intentionally or without reasonable excuse, to comply with requirements imposed on them under sections 109 and 174 of the EA02.<sup>15</sup> This includes failures to attend interviews or meetings with the CMA, failures to provide evidence, or failures to produce documents required by the CMA. Penalties may also be imposed on persons who intentionally obstruct or delay another person in copying documents produced to that other person.<sup>16</sup>
- 2.2 Similarly, under the CA98, the CMA may impose administrative penalties on persons who fail, either intentionally or without reasonable excuse, to comply with requirements imposed on them under sections 26, 26A, 27, 28 or 28A of the CA98.<sup>17</sup> These include failures to answer questions asked by the CMA, failures to produce documents required by the CMA or to comply with the CMA's powers to enter premises (either with or without a warrant). They also include failure to provide adequate or accurate information in response to a request.

### Criminal offences

- 2.3 Certain criminal offences in relation to interference with the CMA's investigatory powers operate alongside the enforcement powers detailed in this Statement. It is a criminal offence where a person:
- intentionally alters, suppresses or destroys any document which the person has been required to produce by the CMA under its EA02 powers in mergers and markets cases<sup>18</sup>
  - knowingly or recklessly provides false or misleading information to the CMA or the Secretary of State in connection with any of their mergers functions under Part 3 of the EA02, or<sup>19</sup>

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<sup>14</sup> See also Annexe B below which contains a high-level summary table of the CMA powers and corresponding penalties for non-compliance covered by this statement of policy.

<sup>15</sup> Sections 110(1) and 174A(1) of the EA02.

<sup>16</sup> Sections 110(1) and (3) EA02 (mergers) and 174A(1) and (3) of the EA02 (markets).

<sup>17</sup> Section 40A(1) of the CA98.

<sup>18</sup> Section 110(5) of the EA02 (mergers) and section 174A(4) of the EA02 (markets).

- in relation to CA98 investigations
  - obstructs the CMA in the exercise of its powers to carry out inspections under sections 27, 28 or 28A of the CA98
  - intentionally or recklessly destroys or otherwise disposes of, falsifies or conceals a document which they have been required to produce under the CMA's CA98 powers, or
  - knowingly or recklessly provides false or misleading information to the CMA or another person in connection with a CA98 investigation.<sup>20</sup>

In relation to obstructing the exercise of powers under section 27 of the CA98, a person is liable, on summary conviction, to a fine not exceeding the statutory maximum<sup>21</sup> and, on conviction on indictment, to a fine. For all the other EA02 and CA98 offences, a person is liable, on summary conviction, to a fine not exceeding the statutory maximum and, on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.<sup>22</sup>

- 2.4 For mergers and markets investigative powers, where an act is capable of constituting both (a) a failure warranting an administrative penalty **and** (b) a criminal offence, the CMA cannot impose an administrative penalty if P has been found guilty of the criminal offence.<sup>23,24</sup>

### **Amount of penalty**

- 2.5 The CMA may impose such administrative penalty as it considers appropriate,<sup>25</sup> subject to the statutory maxima specified by order of the Secretary of State. The current maxima specified by the [Competition and Markets Authority (Penalties) Order 2014] are as follows:

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<sup>19</sup> Section 117 of the EA02 (mergers). This provision also applies where such information is provided to OFCOM or Monitor under Part 3 of the EA02.

<sup>20</sup> Sections 42 to 44 of the CA98.

<sup>21</sup> It should be noted that section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the LASPOA) provides for the statutory maximum fine on summary conviction to become an unlimited fine. If and when this section comes into force, references in the EA02, CA98 and this guidance to the statutory maximum fine on summary conviction should be read in light of the changes made by the LASPOA.

<sup>22</sup> Sections 110(7) and 174A(6) of the EA02 and sections 42(6) and (7), 43(2) and 44(3) of the CA98.

<sup>23</sup> Sections 110(8) and 174A(7) of the EA02.

<sup>24</sup> Equally, a criminal offence is not committed by a person where the CMA has imposed an administrative penalty in relation to the act in question. See section 110(6) of the EA02.

<sup>25</sup> Section 111(1) of the EA02 (mergers), Section 174D(1) of the EA02 (markets) and section 40A(1) of the CA98.

- [£30,000] (fixed amount)
- [£15,000] (daily rate), and
- [£30,000] and [£15,000] (fixed amount and daily rate together).

2.6 Where the penalty is being imposed because P has intentionally obstructed or delayed another person in copying documents produced to them (in the context of mergers and markets investigations), the penalty must be a fixed amount.<sup>26</sup> For other failures, committed without reasonable excuse, the penalty may be:

- a fixed amount
- an amount calculated by reference to a daily rate, or
- a combination of a fixed amount and an amount calculated by reference to a daily rate.<sup>27</sup>

Where the CMA is entitled to impose both a fixed and a daily penalty for a particular failure to comply, it may simultaneously impose fixed and daily penalties up to the maximum specified for each type of penalty.<sup>28</sup>

### **Interaction with power to extend mergers and markets investigations**

2.7 The CMA may extend the initial period within which certain of its duties to carry out mergers and markets investigations or to consider UILs must be discharged if it considers that a relevant person has failed (with or without reasonable excuse) to comply with any Investigatory Requirement issued by the CMA in relation to the reference or investigation.<sup>29</sup> In appropriate cases, the CMA has the power to both extend its statutory timetable and impose a fine on parties who fail to comply with Investigatory Requirements.<sup>30</sup> This is discussed further in chapter 4 below.

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<sup>26</sup> Sections 111(3) and 174D(3) of the EA02.

<sup>27</sup> Sections 111(2) and (3) and 174D(2) and (3) of the EA02 and section 40A(1) of the CA98.

<sup>28</sup> Section 111(7) EA02 (mergers), section 174D(6) EA02 (markets) and section 40A(3) CA98

<sup>29</sup> Sections 34ZB of the EA02 and 39(3) of the EA02 (mergers) and sections 138A(3) of the EA02 (markets). This power is in addition to the power to extend the timetable where there are special reasons to do so (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) [currently in draft and being consulted on] and *Market studies and market investigations: Supplemental guidance on the CMA's approach* (CMA3) [currently in draft and being consulted on].

<sup>30</sup> Section 110(2) (mergers) and section 174A(2) (markets) of the EA02.

## Penalties for failure to comply with mergers interim measures powers

- 2.8 The CMA may impose a fixed penalty (but not a daily penalty) for failure to comply with Merger IMs, for example an undertaking or order to suspend pre- or post-merger integration.<sup>31</sup> The penalty may not exceed 5% of the total value of the turnover (both in and outside the UK) of the enterprises owned or controlled<sup>32</sup> by P.<sup>33</sup> The actual amount of the penalty will therefore depend on the size of the enterprises owned or controlled by P.
- 2.9 This power to impose penalties sits alongside the ability of any person who may be affected by a breach of the Merger IM to bring an action where they have sustained loss or damage.<sup>34</sup> The CMA is also able to bring such civil proceedings to enforce interim measures it imposes. The interaction between these two powers is explained further in paragraph 4.19 below.

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<sup>31</sup> Section 94A(1) of the EA02. Pursuant to section 94A(8) of the EA02, 'interim measure' for these purposes means an undertaking under section 80 of the EA02 or an order under section 72 or 81 of the EA02.

<sup>32</sup> Section 94A(2) of the EA02.

<sup>33</sup> This must be determined (by the Secretary of State) in accordance with sections 94A(3) to (5) of the Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014 (the Interim Measures Order), [SI 2014/XXXX].

<sup>34</sup> Section 94 of the EA02. See also *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) [currently in draft and being consulted on].

### 3 POLICY OBJECTIVES

3.1 The CMA's investigatory and interim measures powers are intended to:

- ensure that the CMA can expediently gather information to carry out its functions with the best available evidence in compliance with relevant investigation timetables (in particular but not limited to statutory timetables in mergers and markets cases)
- prevent action which might prejudice any reference, impede the taking of action following a reference, or cause detrimental and irreversible changes to market dynamics, and
- ensure that the threat of penalties will deter future non-compliance with relevant CMA powers, by those on whom penalties have been imposed and other persons who may be considering future non-compliance.

3.2 It follows that there are a number of possible adverse consequences for the CMA if a person fails to comply with Investigatory Requirements:

- the costs of the investigation may increase
- the investigation may be delayed, which could have commercial and other adverse implications for the CMA, parties and consumers, and again increase costs for the CMA and parties
- the accuracy or quality of the CMA's decisions may be reduced
- any remedial action that may be required in Phase 2 of a merger investigation may be prejudiced, and / or
- in the most extreme circumstances the CMA could come to a different decision from the one it would have reached if the information had been available.

3.3 The CMA's penalty powers play an important role in incentivising compliance with Investigatory Requirements and are designed to support those powers. The CMA takes failure to comply very seriously and therefore will not hesitate to impose a penalty where appropriate.

## **4 STATEMENT OF POLICY ON WHETHER AND IN WHAT AMOUNT ADMINISTRATIVE PENALTIES WILL BE IMPOSED**

### **A. Factors influencing decision to impose a penalty**

#### **General**

4.1 The CMA will consider whether to impose an administrative penalty on a case-by-case basis, taking into account all relevant circumstances.<sup>35</sup> However, the CMA 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 CMA's investigation, in particular the ability to obtain evidence relevant to the determination of issues being investigated and the ability to meet statutory or administrative timetables
- the failure to comply is significant and/or flagrant
- P has previously failed to comply with an information request or CMA decision, whether in the current investigation or previously (that is, there is an element of 'recidivism')
- the imposition of a penalty is required to encourage (swift) compliance by P, and
- P sought to obtain an advantage or derive benefit from the failure.

4.2 The procedure used by the CMA when imposing Investigatory Requirements may also be relevant to the imposition of penalties. The CMA may be more likely to impose a penalty for failure to comply with Investigatory Requirements where the CMA has provided a draft request or set a deadline for compliance which takes P's comments into account.

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<sup>35</sup> It should be noted that persistent and repeated unreasonable behaviour that delays the OFT's enforcement action is an aggravating factor under the [OFT/CMA] Guidance as to the appropriate amount of penalty for substantive infringements of competition law (OFT423). Where necessary, the CMA will consider on a case-by-case basis whether any non-compliance with information gathering powers merits both an administrative penalty and the application of the aggravating factor in OFT 423.

## Reasonable excuse

- 4.3 For the majority of the CMA's Investigatory Requirements, penalties can only be imposed if a failure to comply is 'without reasonable excuse'.<sup>36</sup> The EA02 and CA98 do not define the phrase. The CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. However, the CMA may be more likely to consider that there is a 'reasonable excuse' when a significant and genuinely unforeseeable or unusual event beyond P'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 prevented P from meeting a deadline might, depending on the circumstances, amount to a reasonable excuse.
- 4.4 The CMA will expect an individual (or individuals) to be responsible for ensuring Investigatory Requirements are fully understood and that the CMA's powers are complied with, even when using external advisers, for example to assist them with their response. The CMA is unlikely (save in exceptional circumstances) to accept an excuse where P has not made a reasonable effort to meet the deadline, for example because it was forgotten.

## Decision to extend timetables/deadlines

- 4.5 The CMA may extend the time limit within which certain of its duties to carry out merger and markets investigations and to consider UILs must be discharged if it considers that P has failed (with or without reasonable excuse) to comply with any Investigatory Requirement which is given in relation to the reference or investigation.<sup>37, 38</sup>

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<sup>36</sup> Sections 94A(1) and 110(1) (mergers) and 174A(1) of the EA02 (markets); and section 40A(1) of the CA98.

<sup>37</sup> Sections 34ZB, 39(3) and 41A(3) of the EA02 (mergers) and sections 138A(3) of the EA02 (markets). Such an extension comes into force when published by the CMA and continues in force until (a) the person concerned provides the information or documents to the satisfaction of the CMA, or (as the case may be) appears as a witness in accordance with the requirements of the CMA, or (b) the CMA publishes its decision to cancel the extension. See section 107 of the EA02 and sections 34ZB(7), 39(8) and 41A(7)(b) of the EA02 (mergers) and section 138A(5)(b) of the EA02 (markets).

<sup>38</sup> See *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) [currently in draft and being consulted on] and *Market studies and market investigations: Supplemental guidance on the CMA's approach* (CMA3) [currently in draft and being consulted on].

- 4.6 In reaching a decision on whether to extend the time limit, the CMA will consider all relevant factors on a case-by-case basis. These might, for example, include the CMA's assessment of whether the extension is necessary to enable the Investigatory Requirements to be complied with and for the CMA to complete its functions, and whether any extension may jeopardise the effectiveness of any remedy the CMA might wish to impose (for example a divestment in the case of a completed merger). Any decision not to extend the relevant statutory deadline will be kept under review.
- 4.7 In relevant circumstances, when considering whether to impose a penalty for non-compliance the CMA will have regard to the fact that it may also extend a timetable deadline for non-compliance. Where the CMA may both impose a penalty and extend the timetable in relation to the same failure,<sup>39</sup> there should be no expectation that the CMA will only use one of these powers. For example, where the failure has delayed the timetable the CMA may decide to extend the timetable **and** impose a penalty.

## **B. Factors affecting the type of penalty imposed**

- 4.8 Depending on the type of case and the powers concerned, the CMA may impose:
- **a fixed penalty only:** for failure, without reasonable excuse, to comply with Merger IMs<sup>40</sup> and for intentionally obstructing or delaying another person in copying documents produced to them,<sup>41</sup> or
  - **a fixed penalty and/or a daily penalty:** for failure, without reasonable excuse, to comply with other investigatory powers under the EA02 (mergers and markets cases) or the CA98.<sup>42</sup>

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<sup>39</sup> Section 110(2) of the EA02 provides that the CMA may impose a penalty for failure to comply with requirements imposed under section 109 of the EA02 and extend the timetable under section 39(4) of the EA02. Similarly, section 174A(2) of the EA02 provides that the CMA may both impose a penalty for failure to comply with requirements imposed under section 174 of the EA02 and extend the timetable under section 138A(3) of the EA02.

<sup>40</sup> Section 94A(1) of the EA02.

<sup>41</sup> Sections 111(3) and 174D(3) of the EA02.

<sup>42</sup> Sections 111(2) and (3) and 174D(2) and (3) of the EA02 and section 40A(1) of the CA98. See also Annexe B below, which contains a high-level summary table of the CMA powers and corresponding penalties for non-compliance covered by this statement of policy.



4.9 Where the CMA has a choice as to the type of penalty that may be imposed, it will consider a number of factors, including the following, on a case-by-case basis:

- **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 Investigatory Requirements. Daily penalties, for example, (either alone or in combination with a fixed penalty) may create greater incentives for parties to comply swiftly with Investigatory Requirements since the penalty imposed on P is directly related to the time P takes to comply with the request. It is also likely that daily penalties may result in a greater overall penalty than the maximum fixed penalty if P fails to comply promptly. They may be particularly appropriate in situations where timely compliance is likely to be of utmost importance, for example where statutory timetables are involved.
- **The deterrent effect of the penalty.** The CMA will consider the level of penalty that is likely to have the requisite deterrent effect, both on P and more generally on those who may be subject to Investigatory Requirements in the present or in future investigations. This assessment may affect the level of fixed, daily or combined penalty that is set. Further, where it is important to send a strong deterrent message, for example where there is an egregious or persistent failure to comply it may be important to impose a penalty at a level that can only be reached by the combination of fixed and daily penalties.
- **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 can only be used for a continuing period of non-compliance after formal notice of the imposition of a penalty.<sup>43</sup> In cases of an extended and unremedied failure to comply with Investigatory Requirements, the CMA may be more likely to impose a daily penalty for

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<sup>43</sup> See sections 111(5)(b) and 174D(9)(a) of the EA02 (mergers and markets) and section 40A(6)(b) of the CA98.

the duration of the failure,<sup>44</sup> together with an additional fixed penalty to underline the seriousness of the failure and/or achieve deterrence.

### **C. Factors affecting the level of penalty imposed**

4.10 The CMA will assess all the relevant circumstances of the case in the round when determining an appropriate and proportionate penalty. These may include the factors referred to in sections A and B of this chapter. The CMA may also consider the following non-exhaustive factors on a case-by-case basis:

- the scale of adverse effects on the case (including costs) that will be incurred by the CMA if the investigation has to be extended to take account of information provided late
- any prejudice failure to comply with Merger IMs might cause to the CMA's ability to take remedial action if that would be deemed necessary following the merger investigation
- the nature and gravity of the failure, including whether the failure was intentional and whether there was any attempt to conceal the failure from the CMA
- the reasons given by P for the failure to comply with the Investigatory Requirements
- whether P derived any advantage from its failure or might reasonably be expected to do so
- any steps taken by P to ensure compliance or to discipline responsible individuals
- continuation of failure after P became aware of the contravention or failure, or of the CMA's concern that there might have been a contravention or failure
- whether the involvement of senior management or officers contributed to any failure, including whether such individuals made arrangements for

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<sup>44</sup> Unless the duration falls in a period after which the CMA cannot impose a fine. See sections 110A(1) and 174B(1) of the EA02 (mergers and markets) and section 40A(7)(b) and (c) of the CA98.

suitable resources to be made available to comply with the Investigatory Requirements

- the size and administrative and financial resources available to P, and
- whether P has ever failed to comply with an Investigatory Requirement or CMA decision, either in the current investigation or previously (that is, whether there is an element of 'recidivism'). 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.

### **Specific factors relating to the level of penalty for failure to comply with Merger IMs**

4.11 A penalty for failure to comply with Mergers IMs may not exceed 5% of the total value of the turnover (both in and outside the UK) of the enterprises owned or controlled by P, determined in accordance with the [Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014] (the Interim Measures Order). The Interim Measures Order makes provision for determining:

- when an enterprise is to be treated as controlled by a person, and
- the turnover (both in and outside of the UK) of an enterprise.<sup>45</sup>

### *Control*

4.12 The Interim Measures Order provides that control is not limited to outright voting control of an enterprise, but includes situations falling short of outright control. These include:

- the ability materially to influence the policy of the enterprise (known as 'material influence')
- the ability to directly or indirectly control the policy of the enterprise (known as 'de facto' control), and
- having a controlling interest.<sup>46</sup>

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<sup>45</sup> It should be noted that the Interim Measures Order and the CMA's approach to control set out in this Statement relate solely to determining the penalty for failure to comply with Merger IMs under section 94A(2) of the EA02.

- 4.13 The CMA will consider the enterprises that P controls on a case-by-case basis.
- 4.14 The CMA may, having regard to all the circumstances, determine whether P is able directly or indirectly to control or materially to influence the policy of a body corporate (without having a controlling interest in it) or the policy of an individual, a partnership or an unincorporated association or group of persons in carrying on an enterprise.<sup>47</sup>
- (i) Material influence
- 4.15 The CMA will assess material influence on a case-by-case basis, focusing on the overall relationship between P and the particular enterprise and on P's ability materially to influence policy relevant to the behaviour of a particular enterprise in the marketplace. 'Policy' in this context means the management of a business, and thus includes the strategic direction of an entity or group of entities and its ability to define and achieve its commercial objectives. In conducting its analysis, the CMA will also have regard to the factors set out in the CMA document *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2),<sup>48</sup> used when considering material influence for jurisdictional purposes.
- (ii) De facto control
- 4.16 The CMA will consider whether, in all the circumstances, P has de facto control of an enterprise, notwithstanding that it holds less than the majority of voting rights in a company (that is, it does not have a controlling interest). This is likely to include situations where in practice P has control over more than half of the votes actually cast at a shareholders' meeting. It might also involve situations where an investor's industry expertise leads to its advice being followed to a greater extent than its shareholding would seem to warrant (although this factor could equally be relevant to a finding of material influence).
- (iii) Controlling interest
- 4.17 Broadly speaking, under the Interim Measures Order P will have a controlling interest in an enterprise where it (a) holds a majority of the voting rights in a

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<sup>46</sup> See Article 2(1) of the Interim Measures Order.

<sup>47</sup> See Article 2(4) of the Interim Measures Order.

<sup>48</sup> See also the publication *Merger Assessment Guidelines* (OFT1254/CC2).

company, or (b) is a member of the company and either (i) has the right to appoint or remove a majority of its board of directors, or (ii) controls alone a majority of the voting rights in the company (pursuant to an agreement with other shareholders or members).<sup>49</sup> Only one shareholder can have a controlling interest, but it is not uncommon for a company to be subject to the control (in the wider sense described above) of two or more major shareholders at the same time – in a joint venture, for instance. Thus it is possible for a minority shareholder to have material influence over a company’s policy even though someone else owns a controlling interest.

### *Turnover*

- 4.18 The Interim Measures Order provides that turnover for present purposes is the turnover (both in and outside the UK) of the enterprises owned or controlled by P in the accounting period immediately preceding the date on which the relevant Merger IM came into force.<sup>50</sup> Generally, the CMA will take the turnover figure<sup>51</sup> from an enterprise’s latest published accounts, where these are available. However, in exceptional circumstances, it may be appropriate to use different sources of information as better reflecting an enterprise’s turnover for these purposes. In addition, the Interim Measures Order makes special provision for determining the turnover of credit institutions, financial institutions and insurance undertakings.

### *Interaction between penalty powers and power to bring civil proceedings*

- 4.19 As noted at paragraph 2.9 above, the CMA may bring civil proceedings to enforce Merger IMs it has imposed **and** impose penalties in relation to a failure to comply with Merger IMs. The CMA does not generally expect to bring civil proceedings as it would usually expect parties suffering loss to take such action. However, the CMA will consider whether to use the power on a case-by-case basis, having regard to the nature of the failure when deciding whether it is appropriate to use its powers to bring such civil proceedings.

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<sup>49</sup> See Article 2(2) of the Interim Measures Order.

<sup>50</sup> See Article 3 of the Interim Measures Order. Relevant turnover will be calculated after the deduction of sales rebates, value added tax and other taxes directly related to turnover.

<sup>51</sup> The relevant turnover will be calculated after the deduction of sales rebates, value added tax and other taxes directly related to turnover.

## 5 PROCEDURE

### General

5.1 The following general procedural requirements apply to all administrative penalties the CMA may impose. Once the CMA has reached a decision to impose an administrative penalty, the CMA shall give notice of the penalty to P as soon as practicable.<sup>52</sup> This notice must specify:

- that the CMA has imposed a penalty on P
- 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
- the failure, obstruction or delay which the CMA considers gave it the power to impose a penalty
- any other facts which the CMA 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 CMA
- 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
- details of P's rights to apply to have the dates on which payments are due varied under section or to appeal the imposition or nature of the penalty, or the amount of the penalty or the specified date or dates of payment.<sup>53</sup>

### Appeals

5.2 Where P is aggrieved by the imposition or the nature of the penalty for failure to comply with EA02 Requirements or CA98 Requirements, its amount or the date by which the penalty is required to be paid P may appeal to the

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<sup>52</sup> Sections 94A(7), 112(1), 174D(1) of the EA02 and section 40A(9) of the CA98.

<sup>53</sup> Section 112(2) of the EA02.

Competition Appeal Tribunal.<sup>54</sup> Where P is aggrieved by the imposition or nature of a penalty for failure to comply with Merger IMs, the amount of the penalty or any date by which the penalty is required to be paid, P may appeal to the Competition Appeal Tribunal.<sup>55</sup>

- 5.3 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.<sup>56</sup>
- 5.4 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 CMA may recover the penalty and any interest which has not been paid; in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the CMA.<sup>57</sup>

### **Other procedural points**

- 5.5 In addition to the statutory procedural requirements noted above, the CMA will follow the procedures set out in paragraphs 5.6 to 5.8 below. It should be noted that, notwithstanding the procedures below, time for the purposes of assessing duration relevant to a fine will start to run from when the failure takes place.
- 5.6 Where it appears that P has failed to comply with an Investigatory Requirement, before making a final decision to impose a penalty the CMA will generally write to P, describing the apparent failure to comply and inviting that person to specify in writing the reasons for that failure. If the CMA is not satisfied that P had a reasonable excuse, and considers that enforcement by means of imposition of a penalty is appropriate, it will issue a provisional decision setting out the reasons for its proposed action and the approach that it proposes to take in imposing a penalty. However, if the CMA considers that P does not have any reasonable excuse for its failure to comply with the Investigatory Requirement, the CMA may issue its provisional decision, without first requesting that the person concerned provides its reasons for the failure.

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<sup>54</sup> Sections 114 and 174D(10) of the EA02 and section 40A(9) of the CA98.

<sup>55</sup> Section 94A(7) of the EA02, which provides that the right to appeal against the imposition of a penalty in section 114 of the EA02 applies to penalties imposed for failure to comply with interim measures.

<sup>56</sup> Section 113 of the EA02.

<sup>57</sup> Section 115 EA02.

- 5.7 Before the CMA decides whether to make a provisional decision final, P will be given a reasonable opportunity to make representations on the provisional decision to the CMA. 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 statutory or administrative timetable, and in any event will not usually exceed one week.
- 5.8 If the CMA decides to impose a penalty for non-compliance with an Investigatory Requirement, it will notify P of its decision as soon as practicable thereafter and will issue a notice under section 112 of the EA02 (see paragraph 5.1 above).

### **Decision-making in relation to administrative penalties**

- 5.9 The way that the CMA makes decisions in its investigations depends on the statutory power in question. The CMA has issued procedural guidance in relation to mergers, markets and CA98 investigations, which sets out how key decisions in relation to investigations under those statutory powers will be made. See *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), *Market studies and market investigations: Supplemental guidance on the CMA's approach* (CMA3) and the *Competition Act 1998: Guidance on the CMA's investigation procedures* [to be consulted on in due course].
- 5.10 Decisions in relation to the imposition of the penalties covered in this Statement will be made by the person who makes substantive decisions in mergers, markets and CA98 investigations as described in the aforementioned guidance documents. Broadly speaking, administrative penalty decisions will be made as follows:
- **Mergers investigations** (in relation to penalties for failure to comply with Investigatory Requirements):
    - Phase 1 (investigation before a decision to refer a merger has been made): the Phase 1 decision maker, generally the [Chief Executive or the Senior Director of Mergers, or in some cases another official at the grade of [Senior Director] or above], and
    - Phase 2 (investigation after a decision to refer a merger has been made): the CMA inquiry group.
  - **Market investigations:**
    - Phase 1 (investigation before a decision to make a market investigation reference has been made): the senior official who has operational



responsibility for the market study, who would typically be an official at Director (Senior Civil Service) level or above, or, in some cases, the CMA Board, and

- Phase 2 (investigation after a decision to make a market investigation reference has been made): the CMA market reference group appointed to conduct the investigation.
- **CA98 investigations:**
  - 'Phase 1' (up until the issue of a Statement of Objections): the Senior Director who has overall charge of the investigation or in some cases another official at that grade or above, and
  - 'Phase 2' (after a Statement of Objections has been issued): the Case Decision Group.

### Transitional arrangements

5.11 This section explains the transitional arrangements that apply to the imposition of administrative penalties in mergers, markets and CA98 investigations that are ongoing as at 1 April 2014 (or which begin after that date) under the EA02 or the CA98 as amended by the ERA13 (the New Law). Subject to a number of exceptions, the penalty powers outlined in this Statement come into force at the same time that the substantive investigative and interim measures powers to which they relate come into force. The position is broadly as follows:

- **Mergers investigatory and interim measures powers:** subject to a number of exceptions, the New Law will apply to merger investigations that are ongoing as at (or which commence on or after) 1 April 2014 but only where the relevant Investigatory Requirements have been imposed after that date
- **Market investigatory powers:** subject to certain exceptions,<sup>58</sup> the New Law will apply to market studies that are ongoing as at (or which commence on or after) 1 April 2014 and market investigations where a reference is made on or after that date or which are ongoing as at that date, and

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<sup>58</sup> See *Mergers: Guidance on the CMA's jurisdiction and procedure* for further details.

- **CA98 investigatory powers:** subject to certain exceptions,<sup>59</sup> the New Law will apply to CA98 investigations that are ongoing as at (or which commence on or after) 1 April 2014 but only where the relevant Investigatory Requirements have been imposed after that date.

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<sup>59</sup> See *Market studies and market investigations: Supplemental guidance on the CMA's approach* for further details.

## **ANNEXE A – PRACTICAL EXAMPLES**

To assist relevant stakeholders, this annexe sets out some non-exhaustive illustrative examples of how the CMA powers described in the statement of policy above might apply in selected potential scenarios. They do not form part of the CMA's formal statement of policy and are without prejudice to the CMA's ability to determine its approach to the imposition of a penalty on a case-by-case basis.

### **Example 1**

#### **Scenario**

Company A is a small enterprise. Two of A's competitors, B and C, have notified their proposed merger to the CMA. In the circumstances of the case, the CMA sends a formal information request under section 109 of the EA02 to A as part of its investigation into the effects of the merger of B and C. The information request is sent to A's Chief Executive, who accidentally misfiles the request and forgets about it. When contacted by the CMA the day after the deadline has passed, the General Counsel is hugely apologetic and offers to provide the majority of the requested information later that day, with the remainder to follow the next day. A has provided several very helpful responses to CMA information requests in the past, and has an impeccable compliance record.

#### **Analysis**

The CMA would be likely to consider this a minor/mitigated failure. It is based on an administrative error, which:

- a has taken immediate and satisfactory steps to rectify – A did not seek to benefit in any way from the failure to comply, and
- given the limited delay in providing the information (provided the outstanding information is indeed received promptly) is unlikely to have a material adverse impact on the CMA's investigation.

In some cases of this nature the CMA may decide not to impose an administrative penalty.

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## **Example 2**

### **Scenario**

D is a major operator in a market with three other key players. The CMA has received numerous complaints that prices in the market have increased exponentially in recent years, and believes there may be features of the market which are producing anti-competitive effects. It therefore decides to conduct a market study, sending information requests under section 174 of the EA02 to D and several of its competitors. D's response to the information request is extremely unhelpful. Many questions are ignored or receive one-word answers. When asked to estimate its market share, D states 'around 25%'. The responses from D's competitors, however, indicate that D's share is closer to 35%, and further investigation reveals a presentation to D's Board estimating its market share to be 32% at the relevant time.

### **Analysis**

The CMA would be likely to consider this a serious failure, which would certainly warrant a penalty. Inadequate and indeed inaccurate information has been provided to the CMA, in all likelihood in order to prejudice the CMA's investigation to D's benefit. In order to reflect the seriousness of the failure to comply and deter future failures of this sort, the CMA would be likely to consider both a fixed penalty (which is likely to be at the upper end of the range) and a daily penalty (likely to be at the upper end of the range) until D provides complete, adequate and accurate responses to the information request.

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## **Example 3**

### **Scenario**

The CMA is investigating a major company, E, in relation to suspected breaches of a dominant position under the CA98. During a dawn raid on E's premises under section 28 of the CA98, a director refuses to provide the combination to unlock a filing cabinet, claiming that the contents are 'personal and confidential'. The director also attempts to prevent the CMA from taking copies of a number of documents, arguing that they are covered by legal professional privilege. It is later revealed that these documents and the contents of the filing cabinet were neither personal nor

privileged, but were highly incriminating. The obstructive behaviour of the director caused considerable delays to the CMA's investigation.

## **Analysis**

The CMA would consider this a deliberate/aggravated failure. It might consider whether it is appropriate to seek to take criminal action against the individual director as opposed to imposing an administrative fine. In the event that the CMA decides not to proceed with such criminal action the CMA is likely to seek to impose a very significant penalty. The director clearly intended to unjustifiably obstruct the CMA's investigation in the hope that it would prevent the CMA from obtaining important evidence of possible further infringements. In order to mark the seriousness of the failure to comply with its powers and to send a strong deterrent message about such behaviour, the CMA would likely impose the maximum fixed penalty as well as the maximum daily penalty until the requests are complied with. The director's conduct might also be capable of constituting a criminal offence under section 42(7) of the CA98. Consideration of an administrative penalty as described is without prejudice to the CMA's ability to consider prosecution for the criminal offence.

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## **Example 4**

### **Scenario**

The CMA, through its market intelligence functions, has become aware of a recently completed acquisition by company F of its competitor, company G. The CMA has reasonable grounds for suspecting that the two enterprises have ceased to be distinct. In order to prevent the companies from starting integration of their respective businesses, the CMA makes an interim enforcement order under section 72 of the EA02 to prevent pre-emptive action by the companies, including that:

- the business of company F should be carried on separately and under a separate brand identity from the business of company G, and
- the assets of each of company F and company G are maintained and preserved.

The order is formally executed by both companies. F and G do not own or control any other enterprises. However, shortly thereafter company F begins to market the products produced by company G under the company F brand. The CMA also receives complaints from third parties that company F has been actively seeking to sell the site occupied by company G to a property developer.

In the business year preceding the date when the interim measures came into force, the turnover of company F and all of the enterprises it owned or controlled (including company G) was £10 million.

## **Analysis**

The CMA would be likely to consider this an egregious failure. The steps taken to integrate the businesses could seriously prejudice the CMA's ability to impose an effective remedy if that was considered justified following its merger investigation. Company F has ignored an express order from the CMA and has not offered any explanation for its actions. Moreover, company F would be profiting from its failure to comply with the interim measures.

Accordingly, the CMA is likely to impose a very significant penalty on company F to encourage swift compliance with the interim measures, potentially at or close to the maximum penalty of 5% of turnover (in and outside the UK) of the enterprises owned or controlled by company F (section 94A of the EA02), which would be £500,000 in this case. The interim measures are also enforceable by civil proceedings (section 94 of the EA02). In the particular circumstances of this case the CMA might also consider seeking an injunction from the High Court to ensure compliance for the duration of its investigation.

## ANNEXE B – SUMMARY TABLE OF CMA INVESTIGATORY POWERS AND AVAILABLE PENALTIES

CMA POWER	PENALTY FOR FAILURE TO COMPLY	FURTHER INFORMATION
<b>Mergers investigatory powers</b>		
Section 109 EA02 – <i>powers to require evidence, documents and/or attendance at interviews/meetings</i>	Fixed penalty of up to [£30,000] and/or daily penalty of up to [£15,000]	<p>These powers are available to the CMA throughout the whole merger review process, from before Phase 1 up to any period of monitoring and enforcement after Phase 2</p> <p>Penalties may be imposed where there is no reasonable excuse for the failure to comply</p>
	Fixed penalty of up to [£30,000] (but not a daily penalty) may be imposed on those who obstruct or delay copying of documents (section 110(3) EA02)	<p>These powers are available to the CMA throughout the whole merger review process, from before Phase 1 up to any period of monitoring and enforcement after Phase 2</p> <p>Obstruction or delay must be intentional</p>

CMA POWER	PENALTY FOR FAILURE TO COMPLY	FURTHER INFORMATION
	<p>Criminal offence to intentionally alter, suppress or destroy any document requested under section 109 EA02 (section 110(5) of the EA02)</p> <p>It is also a criminal offence knowingly or recklessly to provide false or misleading information to the CMA, the Secretary of State (and OFCOM and Monitor) in connection with any of their functions under Part 3 of the EA02 (mergers) (section 117 of the EA02)</p> <p>For both offences, a person is liable, on summary conviction, to a fine not exceeding the statutory maximum and, on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both</p>	<p>For mergers investigatory powers under sections 109 and 110 EA02, where an act constitutes both (a) a failure warranting administrative penalty and (b) a criminal offence, the CMA cannot impose an administrative penalty if a person has been found guilty of the criminal offence. Equally, the criminal offence is not committed where the CMA has imposed an administrative penalty in relation to the act in question</p>
<b>Markets investigatory powers</b>		
<p>Section 174 EA02 - <i>powers to require evidence, documents and/or attendance at interviews/meetings</i></p>	<p>Fixed penalty of up to [£30,000] and/or daily penalty of up to [£15,000]</p>	<p>These powers are available to the CMA once it has published a market study notice and so may be used during market studies (Phase 1) as well as market investigations (Phase 2)</p> <p>Penalties may be imposed where there is no reasonable excuse for the failure to comply</p>
	<p>Fixed penalty of up to [£30,000] (but not a daily penalty) may be imposed on those who obstruct or delay copying of documents (section 174A(3) EA02)</p>	<p>Obstruction or delay must be intentional.</p>



CMA POWER	PENALTY FOR FAILURE TO COMPLY	FURTHER INFORMATION
	<p>Criminal offence to alter, suppress or destroy any document requested under section 174 EA02. A person is liable, on conviction on indictment, to imprisonment for a term of up to two years and/or to a fine (section 174A(4) of the EA02)</p> <p>It is also a criminal offence knowingly or recklessly to provide false or misleading information to the CMA, the Secretary of State (and OFCOM and Monitor) in connection with any of their functions under Part 4 of the EA02 (markets) (section 180 of the EA02)</p>	<p>For markets investigatory powers under sections 174 and 174A EA02, where an act constitutes both (a) a failure warranting administrative penalty and (b) a criminal offence, the CMA cannot impose an administrative penalty if a person has been found guilty of the criminal offence</p>
<b>CA98 investigatory powers</b>		
Section 26 CA98 – power to require information and documents by notice	Fixed penalty of up to [£30,000] and/or daily penalty of up to [£15,000]	Financial penalties may be imposed where there is no reasonable excuse for the failure to comply
Section 26A CA98 – power to require questions to be answered by notice	In addition to the CMA's administrative penalty powers, it is a criminal offence to obstruct the exercise of the CMA's powers under sections 27, 28 and 28A of the CA98 (section 42 CA98), to destroy or falsify documents (section 43 CA98) or to provide false or misleading information (section 44 CA98)	
Section 27 CA98 – power to enter business premises without a warrant		
Section 28 CA98 – power to enter business premises under a warrant	In relation to obstructing the exercise of powers under section 27, a person is liable, on conviction on	

<b>CMA POWER</b>	<b>PENALTY FOR FAILURE TO COMPLY</b>	<b>FURTHER INFORMATION</b>
Section 28A CA98 – power to enter domestic premises under a warrant	indictment, to a fine. For the other offences, a person is liable, on conviction on indictment, to imprisonment for a term of up to two years and/or to a fine	
<b>Mergers interim measures powers</b>		
Section 94A EA02 – power to impose penalty for failure to comply with an interim measure (without reasonable excuse)	Maximum of 5% of the total value of the turnover (both in and outside the UK) of the enterprises owned or controlled by the person on whom the penalty is imposed	<p>This power is available to the CMA at both Phase 1 and Phase 2 of a merger review process</p> <p>Penalties may be imposed where there is no reasonable excuse for the failure to comply</p>

## ANNEXE C – STATUS OF OFT AND CC GUIDANCE DOCUMENTS AND PUBLICATIONS

The table below indicates the status of OFT and CC guidance documents and publications relevant to the administrative penalty powers covered in the Statement that had been published and were in effect prior to the transfer of the mergers, markets and CA98 functions to the CMA on 1 April 2014. Certain of those documents have been adopted by the CMA Board in order to facilitate transition to the new UK merger, markets and CA98 regime, and to minimise disruption to parties and the CMA.

OFT/CC CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/obsolete <sup>1</sup>	Adopted by the CMA Board <sup>2</sup>
CC4	General Advice and Information	✓	-
CC5	Statement of Policy on Penalties	✓	-
CC6	Competition Commission: guidance to merger reference groups, market reference groups and special reference groups	✓	-
CC18	Merger procedural guidelines	✓	-
OFT441	How will the Enterprise Act 2002 change the Competition Act 1998 regime?	✓	-
OFT511	Market investigation references	-	✓
OFT518	Overview of the Enterprise Act	✓	-
OFT519	Market studies: guidance on the OFT approach	-	✓
OFT527	Mergers jurisdictional and procedural guidance	✓	-
OFT530	Practical information – everything you need to know about the Enterprise Act	✓	-
OFT1254/ CC2	Merger assessment guidelines	-	✓
OFT1263rev	The OFT's CA98 procedures guide	✓	-
SI 2004/2751	The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004	✓	-

<sup>1</sup> OFT and CC publications listed in this column have, at the date of publication of this guidance, been replaced, or rendered obsolete, by CMA guidance or publications.

<sup>2</sup> OFT and CC publications listed in this column have been adopted by the CMA Board (subject to any guidance prepared by the CMA in the future).

Parties should refer to those documents listed above as having been adopted by the CMA board (the adopted guidance) for further details on the substance and procedure around the substantive powers which the CMA may impose penalties for failure to comply with. This is subject, in particular, to the following general limitations:

- all references in the adopted guidance listed above to issues of jurisdiction or procedure in mergers and markets cases must be read in the light of the CMA markets and mergers guidance documents *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) [currently in draft and being consulted on] and *Market studies and market investigations: Supplemental guidance on the CMA's approach* (CMA3) [currently in draft and being consulted on]
- in the cases of conflict between those guidance documents and the adopted guidance, those guidance documents prevail
- the original text of the adopted guidance has been retained unamended: as such, that text does not reflect or take account of developments in case law, legislation or practice since its original publication, and
- all the adopted guidance should be read subject to the following cross-cutting amendments:
  - references to the 'OFT' or 'CC' (except where referring to specific past OFT or CC practice or case law), should be read as referring to the CMA
  - references to 'referral to the CC' or 'a reference to the CC' should be read as referring to the referral of a case by the CMA (or Secretary of State) of a case for a Phase 2 investigation involving an Inquiry Group of CMA panel members
  - references to articles of the EC Treaty should be read as referring to the equivalent articles of the Treaty on the Functioning of the European Union (TFEU)
  - certain OFT or CC departments, teams or individual roles may not be replicated in the CMA, or may have been renamed; a copy of the CMA's organisational chart is available on the CMA's website, and
  - parties should check any contact details against those listed on the CMA's website, which will be the most up to date.