

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

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# 1 INTRODUCTION

1.1 This document sets out the CMA's statement of policy regarding its powers under the Enterprise Act 2002 (EA02) and Competition Act 1998 (CA98), as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA13),<sup>1</sup> to impose administrative penalties 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>2</sup> (EA02 Requirements)
- requirements to provide information or documents or certain other requirements in antitrust investigations<sup>3</sup> (CA98 Requirements), and
- interim measures<sup>4</sup> in mergers cases<sup>5</sup> (Merger IMs).

In this document EA02 Requirements and CA98 Requirements will be referred to collectively as Investigatory Requirements. A person that fails to comply with any Investigatory Requirements or Merger IMs is referred to as **P**. In this context, P refers to individuals and to both bodies corporate and unincorporated.

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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) and *Market studies and market investigations: Supplemental guidance on the CMA's approach* (CMA3). 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, airports and air traffic services 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> 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>3</sup> Section 40A of the CA98.

<sup>4</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>5</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.

- 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, 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>6,7</sup>
- 1.4 This statement of policy (Statement) – which was approved by the Secretary of State on 8 January 2014 – reflects the views of the CMA at the time of publication. 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>8</sup> It may in due course be supplemented, revised or replaced. When preparing or revising its Statement the CMA must consult such persons as it considers appropriate (in respect of Merger IMs powers under sections 94 and 94A of the EA02 the Secretary of State must be consulted).<sup>9</sup> The CMA’s webpages 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.

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<sup>6</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>7</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>8</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>9</sup> Sections 94B(4), 116(4) and 174E(4) of the EA02 and section 40B(4) of the CA98.

- 1.6 When reaching decisions regarding enforcement action for failure to comply with the investigatory powers described above, the CMA must have regard to this Statement.<sup>10</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. For example, although daily penalties may be used for failure to comply with Investigatory Requirements in mergers, markets and CA98 cases, they may in practice be used to a greater extent in Phase I merger investigations which involve shorter deadlines, where statutory deadlines are approaching in mergers or markets cases or where the relevant information is needed for analysis at a pivotal point in the investigation, in order to incentivise swift compliance with Investigatory Requirements.
- 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); *Market studies and market investigations: Supplemental guidance on the CMA's approach* (CMA3); *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8); *Competition and Markets Authority Competition Act 1998 Rules* and the documents listed in Annexe C,<sup>11</sup> 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 has effect from 1 April 2014. The powers made available to the CMA by the ERRA13 apply to all investigations, subject to the transitional arrangements provided for by the Secretary of State for mergers, markets and CA98 investigations that are ongoing as at 1 April 2014. For information on the transitional arrangements that apply to mergers, markets

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<sup>10</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>11</sup> These documents are available at [www.gov.uk/cma/](http://www.gov.uk/cma/).

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

and CA98 investigations, please see *Transitional Arrangements: Guidance on the CMA's proposed approach to transitional arrangements – Part 1* (CMA 14).

## 2 LEGAL FRAMEWORK

### Penalties for failure to comply with Investigatory Requirements<sup>13</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>14</sup> These include 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>15</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>16</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>17</sup>

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<sup>13</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.

<sup>14</sup> Sections 110(1) and 174A(1) of the EA02.

<sup>15</sup> Sections 110(1) and (3) EA02 (mergers) and 174A(1) and (3) of the EA02 (markets).

<sup>16</sup> Section 40A(1) of the CA98.

<sup>17</sup> Section 110(5) of the EA02 (mergers) and section 174A(4) of the EA02 (markets).



- 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>18</sup>
- 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>19</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>20</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>21</sup>

2.4 For mergers and markets investigatory 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>22</sup> Similarly, a criminal offence is not

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<sup>18</sup> Section 117 of the EA02. This provision also applies where such information is provided to OFCOM or Monitor under Part 3 of the EA02.

<sup>19</sup> Sections 42 to 44 of the CA98.

<sup>20</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>21</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>22</sup> Sections 110(8) and 174A(7) of the EA02.

committed by P where the CMA has imposed an administrative penalty in respect of the same act.<sup>23</sup>

### ***Amount of penalty***

2.5 The CMA may impose such administrative penalty as it considers appropriate,<sup>24</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:

- £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>25</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>26</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>27</sup>

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<sup>23</sup> Sections 110(6) and 174A(5) of the EA02.

<sup>24</sup> Section 111(1) of the EA02 (mergers) and section 174D(1) of the EA02 (markets) and section 40A(1) of the CA98.

<sup>25</sup> Sections 111(3) (mergers) and 174D(3) (markets) of the EA02.

<sup>26</sup> Sections 111(2) and (3) (mergers) and 174D(2) and (3) (markets) of the EA02 and section 40A(2) of the CA98.

<sup>27</sup> Section 111(7)(c) (mergers) and section 174D(6)(c) (markets) of the EA02 and section 40A(3)(c) of the CA98.

## Interaction with power to extend mergers and markets investigations

2.7 In certain circumstances, the CMA may extend the period within which certain duties to carry out mergers and markets investigations or to consider UILs or implement remedies must be discharged. This will apply if it considers that a relevant person has failed (with or without reasonable excuse) to comply with any EA02 Requirement issued by the CMA in relation to a merger reference or investigation or where any person has failed (with or without reasonable excuse) to comply with a EA02 requirement issued by the CMA during the remedies implementation phase of a market investigation.<sup>28</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 EA02 Requirements.<sup>29</sup> This is discussed further in chapter 4 below.

## Penalties for failure to comply with Merger IM powers<sup>30</sup>

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 by P.<sup>32, 33</sup> The maximum 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

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<sup>28</sup> Sections 34ZB(1) and 39(3) (mergers) and section 138A(3) (markets) of the EA02. 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)* and *Market studies and market investigations: Supplemental guidance on the CMA's approach (CMA3)*).

<sup>29</sup> Section 110(2) (mergers) and section 174A(2) (markets) of the EA02.

<sup>30</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>31</sup> Section 94A(1) (mergers) of the EA02. Pursuant to section 94A(8) (mergers) 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) (mergers) of the EA02.

<sup>33</sup> The Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014 provides for the circumstances in which an enterprise is to be treated as 'controlled' by P and contains the rules for determining the turnover of an enterprise.

have sustained loss or damage.<sup>34</sup> The CMA is also able to bring such civil proceedings to enforce interim measures. The interaction between these two powers is explained further in paragraph 4.21 below.

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<sup>34</sup> Section 94(4) (mergers) of the EA02. See also *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2).

### 3 POLICY OBJECTIVES

3.1 Given the importance to businesses and consumers of substantive decisions in mergers, markets and CA98 investigations, and the need for such decisions to be taken in accordance with statutory or other timetables, it is vital for the CMA to be able to take such decisions based on information that is accurate and complete, and to gather that information as quickly as possible. Consistent with this, the legislative intention behind the enhanced investigatory powers available to the CMA is to provide appropriate investigatory powers during all phases of its investigations to be able to carry out its functions. Use of the CMA's investigatory and interim measures powers is therefore 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 or Merger IMs:

- 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 Merger IMs and avoiding the adverse consequences described above. Therefore, the CMA will take failures to comply very seriously and will not hesitate to impose a penalty where appropriate.

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

4.1 The CMA considers that penalties imposed on P should, on the one hand, achieve the CMA's policy objectives of incentivising compliance with its investigatory and interim measures powers and deterring future failures to comply, while not being disproportionate or excessive in all the circumstances of the case. When assessing whether and in what amount a penalty should be set, the CMA will have regard to the factors referred to in this chapter in the round, including the nature and gravity of the failure, any adverse effects on the CMA's investigation, P's reason for the failure and the size and administrative and financial resources available to P.

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

#### *General*

4.2 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 (whether committed intentionally or negligently)<sup>36</sup>

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<sup>35</sup> Persistent and repeated unreasonable behaviour that delays the OFT's enforcement action is an aggravating factor under *the OFT's Guidance as to the appropriate amount of penalty* for substantive infringements of competition law (OFT 423, September 2012), which has been adopted by the CMA. Where necessary and proportionate, 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 OFT423.

<sup>36</sup> For the purposes of this guidance, a failure is 'intentional' if P must have been aware, or could not have been unaware, that its conduct was of such a nature as to lead to a failure to comply and a failure is 'negligent' if P ought to have known that its conduct would result in a failure to comply with an Investigatory Requirement or Merger IM.

- 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.

4.3 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.<sup>37</sup> Parties should raise any potential difficulties in responding as early as possible within the timeframe set out in an Investigatory Requirement – for example relating to administrative, resourcing, financial, logistical and practical issues – or any matters they do not understand with the case team as soon as possible after receiving a request, or as soon as they become aware that they may not meet the stipulated deadline.

### **Reasonable excuse**

4.4 For the majority of the CMA's Investigatory Requirements and for Merger IMs, penalties can only be imposed if a failure to comply is 'without reasonable excuse'.<sup>38</sup> The EA02 and CA98 do not define the phrase. The circumstances that constitute a reasonable excuse are not fixed and 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 will consider whether a significant and genuinely unforeseeable or unusual event and/or an 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

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<sup>37</sup> Where practicable and appropriate, the CMA will discuss Investigatory Requirements with the intended recipient prior to giving the relevant notice so as to enable requests to be prepared that do not impose unnecessary burdens on recipients. The CMA will also seek to set reasonable deadlines for Investigatory Requirements and where draft Investigatory Requirements have been issued the final Investigatory Requirements will have considered any representations on proposed deadlines. For further details, see for example, *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6).

<sup>38</sup> Sections 94A(1) and 110(1) (mergers) and 174A(1) (markets) of the EA02 and section 40A(1) of the CA98.



avoided) which prevented P from meeting a deadline might, depending on the circumstances, amount to a reasonable excuse.

- 4.5 The CMA will expect the person to whom the Investigatory Requirement or Merger IM applies to be responsible for ensuring Investigatory Requirements and Merger IMs are fully understood and that the CMA's powers are complied with, even when, for example, using external advisers to assist them with their response. As noted in paragraph 4.3 above, parties should make known any difficulties and raise any queries in relation to an information request as soon as possible. The CMA is unlikely (save in exceptional circumstances) to accept an excuse where P has not made a reasonable effort to meet the deadline in respect of an Investigatory Requirement, for example because it was forgotten.

### ***Decision to extend timetables/deadlines***

- 4.6 In certain circumstances, the CMA may extend the time limit within which certain duties to carry out merger and markets investigations and to consider UILs or impose remedies must be discharged if it considers that P has failed (with or without reasonable excuse) to comply with any EA02 Requirement which is given in relation to the reference or investigation.<sup>39, 40</sup>
- 4.7 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 EA02 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. The CMA would not usually expect to use isolated minor occurrences of non-compliance, or those with limited impact alone or in aggregate, to justify extensions to

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<sup>39</sup> Sections 34ZB(1), 39(3) and 41A(3) (mergers) of the EA02, provided that P is a relevant person within the meaning of sections 34ZB(2), 39(5) and 41A(4) (mergers) and section 138A(3) (markets) of the EA02 (where the concept of relevant person does not apply). 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 and sections 34ZB(7), 39(8) and 41A(7)(b) of the EA02 (mergers) and section 138A(5)(b) (markets) of the EA02.

<sup>40</sup> See *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) and *Market studies and market investigations: Supplemental guidance on the CMA's approach* (CMA3).

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.

4.8 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>41</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**

4.9 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>42</sup> and for intentionally obstructing or delaying another person in copying documents produced to them,<sup>43</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>44</sup>

4.10 Where the CMA has a choice as to the type of penalty that may be imposed, it will consider a number of factors, in the round, on a case-by-case basis. These may include the factors referred to in sections A and C of this chapter. The CMA may also consider the following non-exhaustive factors:

- **The factual circumstances in which a penalty is being considered.** The assessment of whether to impose a fixed or daily penalty, or a

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<sup>41</sup> Section 110(2) (mergers) 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) (markets) 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>42</sup> Section 94A(1) (mergers) of the EA02.

<sup>43</sup> Sections 111(3) (mergers) and 174D(3) (markets) of the EA02.

<sup>44</sup> Sections 111(2) and (3) (mergers) and 174D(2) and (3) (markets) of the EA02 and section 40A(2) 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.

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 or Merger IMs in the present or in future investigations, having regard to the need for the penalty to be proportionate in all the circumstances. 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>45</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 the duration of the failure,<sup>46</sup> together with an additional fixed penalty to underline the seriousness of the failure and/or achieve

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<sup>45</sup> See sections 111(5)(b) (mergers) and 174D(9)(a) (markets) of the EA02 and section 40A(6)(b) of the CA98.

<sup>46</sup> Unless the duration falls in a period after which the CMA cannot impose a fine. See sections 110A(1) (mergers) and 174B(1) (markets) of the EA02 and section 40A(7)(b) and (c) of the CA98.

deterrence, while still ensuring that the penalty is proportionate in all the circumstances.

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

4.11 The CMA will assess all the relevant circumstances of the case in the round in order to determine a penalty that is reasonable, appropriate and thus proportionate in the circumstances. The CMA is likely to set penalties towards the upper end of the relevant statutory maxima for the most serious failures to comply and/or where it is necessary to do so having regard to P's size and financial position. The assessment 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 any 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, the extent of any negligence involved in the failure, whether there was any attempt to conceal the failure from the CMA and the extent, if any, to which P complied with other aspects of the Investigatory Requirements or Merger IMs
- the reasons given by P for the failure to comply with the Investigatory Requirements or Merger IMs
- whether P derived any advantage from its failure or might reasonably be expected to do so
- any steps taken in mitigation by P to avoid the failure and/or ensure that failures do not occur in the future, or to discipline responsible individuals
- continuation or cessation of the 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 suitable resources to be made available to comply with the Investigatory Requirements or Merger IMs

- the size of, and administrative and financial resources available to, P,<sup>47</sup> and
- whether P has ever failed to comply with an Investigatory Requirement, Merger IM 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**

4.12 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. For these purposes the Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014 (the Interim Measures Order) makes provision for determining:

- when an enterprise is to be treated as controlled by P, and
- the turnover (both in and outside of the UK) of an enterprise.<sup>48</sup>

### **Control**

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

- the ability materially to influence the policy of the entity carrying on the enterprise (known as 'material influence')

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<sup>47</sup> As noted at paragraph 1.1 above, P refers to individuals and to both bodies corporate and unincorporated.

<sup>48</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 sections 94A(2) and (3) (mergers) of the EA02.

- the ability to directly or indirectly control the policy of the entity carrying on the enterprise (known as ‘de facto’ control), and
- having a ‘controlling interest’ in a body corporate carrying on the enterprise.<sup>49</sup>

4.14 The CMA considers that penalties should be applied fairly and proportionately in all scenarios and to all kinds of business structures to ensure they act as a meaningful deterrent. The CMA will consider the enterprises that P controls (that is, that it has de facto control over, a controlling interest in or – exceptionally – a material interest in, as detailed in the Interim Measures Order) on a case-by-case basis.

4.15 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>50</sup> The CMA will generally rely on de facto control or controlling interest for determining turnover. It will only exceptionally rely also on material influence. This will be where relying only on de facto control and/or controlling interest would lead to a perverse or unfair outcome, for example because a party would receive a disproportionately low penalty because of their particular business structure.

4.16 Exceptional circumstances in which the CMA will include material influence turnover principally include, but are not limited to, the following:

- when reliance only on controlling interest and de facto control produces a very low figure for turnover in the relevant financial year for penalty-setting (and therefore a disproportionately low penalty), or
- where the business structure of the entity failing to comply has a number of interests that are not under its legal or de facto control, such that turnover assessed on a controlling interest or de facto control basis cannot accurately reflect that entity’s true financial position and/or would lead to a penalty that would not achieve the CMA’s objectives of incentivising compliance with its investigatory powers and deterring future failures to comply.

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<sup>49</sup> See Article 2(1) of the Interim Measures Order.

<sup>50</sup> See Article 2(4) of the Interim Measures Order.

- 4.17 **Assessing material influence** – Where it assesses material influence, the CMA will do so on a case-by-case basis, focusing on the overall relationship between P and the entity carrying on 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 expects to follow the detailed factors and approach to assessing material influence contained in paragraphs 4.14 to 4.27 of the CMA document *Mergers: Guidance on the CMA’s jurisdiction and procedure* (CMA2),<sup>51</sup> used when considering material influence for jurisdictional purposes.
- 4.18 **Assessing de facto control** – The CMA will consider whether, in all the circumstances, P has de facto control of an entity carrying on an enterprise, notwithstanding that 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). As with assessing material influence, the CMA expects to follow the approach in the CMA document *Mergers: Guidance on the CMA’s jurisdiction and procedure* (CMA2).
- 4.19 **Assessing controlling interest** – 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 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>52</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.

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<sup>51</sup> See also paragraphs 3.2.8 to 3.2.12 of the publication *Merger Assessment Guidelines* (OFT1254/CC2).

<sup>52</sup> See Article 2(2) of the Interim Measures Order.

## **Turnover**

4.20 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>53</sup> Generally, the CMA will take the turnover<sup>54</sup> figure 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***

4.21 As noted at paragraph 2.9 above, the CMA may bring civil proceedings to enforce Merger IMs in addition to imposing administrative penalties in relation to a failure to comply with Merger IMs. The CMA does not generally expect to bring civil proceedings. However, it will consider whether to use the power on a case-by-case basis having regard to the nature of the failure, and in particular whether an administrative penalty will be sufficient to ensure that the failure will not prejudice possible remedial action if the CMA were to conclude that there was a substantial lessening of competition. In addition to enforcement by the CMA, any person affected by the contravention of Merger IMs who has sustained loss or damage as a result of such contravention may bring an action against the party bound by the Merger IMs.

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<sup>53</sup> See Article 3 of the Interim Measures Order.

<sup>54</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 In addition to the statutory procedural requirements noted at paragraphs 5.4 to 5.7 below, the CMA will follow the procedures set out in paragraphs 5.2 and 5.3 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, other than in relation to daily penalties in relation to EA02 Requirements where no account is taken of any days before service of the notice imposing the penalty.
- 5.2 Where it appears that P has failed to comply with an Investigatory Requirement or Merger IM without reasonable excuse, before making a final decision to impose a penalty the CMA will issue a provisional decision setting out the reasons for its proposed action, the approach that it proposes to take in imposing a penalty and the proposed nature and level of penalty. 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. The CMA will consider any representations received and consult with the General Counsel's Office on its reasons for the proposed approach to and level of the penalty.
- 5.3 If the CMA decides to impose a penalty for non-compliance with an Investigatory Requirement or Merger IM, it will notify P of its decision as soon as practicable thereafter and will issue a notice (see paragraph 5.4 below).

### Statutory procedural points

- 5.4 The following statutory 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>55</sup> This notice must specify:
- that the CMA has imposed a penalty on P

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<sup>55</sup> Sections 94A(7), 112(1) (mergers) and section 174D(10) (markets) of the EA02 and section 40A(9) of the CA98.

- 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<sup>56</sup>
- 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 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>57</sup>

## Appeals

5.5 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 Competition Appeal Tribunal.<sup>58</sup> Similarly, 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>59</sup>

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<sup>56</sup> No account is taken of any days before service of the notice imposing the penalty.

<sup>57</sup> Section 112(2) (mergers) and 174D(10) (markets) of the EA02.

<sup>58</sup> Sections 114 (mergers) and 174D(10) (markets) of the EA02 and section 40A(9) of the CA98.

<sup>59</sup> Section 94A(7) (mergers) of the EA02, which provides that the right to appeal against the imposition of a penalty in section 114 (mergers) of the EA02 applies to penalties imposed for failure to comply with interim measures.

- 5.6 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>60</sup>
- 5.7 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>61</sup>

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

- 5.8 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 *Competition Act 1998: Guidance on the CMA's investigation procedures (CMA8)*.
- 5.9 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. As noted at paragraph 5.2 above, the decision-maker will consult the General Counsel's Office on its reasons for, and proposed approach to, imposing any penalty. Broadly speaking, administrative penalty decisions will be made as follows:
- **Mergers investigations** (in relation to penalties for failure to comply with mergers investigatory or interim measures powers):
    - Phase 1 (investigation before a decision to refer a merger has been made): the Phase 1 decision maker (either the Senior Director of Mergers or another senior member of CMA staff) and
    - Phase 2 (investigation after a decision to refer a merger has been made): the CMA inquiry group.

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<sup>60</sup> Sections 113 (mergers) and 174D(10) (markets) of the EA02.

<sup>61</sup> Sections 115 (mergers) and 174D(10) (markets) of the EA02.

- **Market investigations:**
  - Phase 1 (investigation before a decision to make a market investigation reference has been made): generally 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 Responsible Officer, who has overall charge of the investigation, and
  - ‘Phase 2’ (after a Statement of Objections has been issued): the Case Decision Group.

## ANNEXE(S)

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## A. Practical examples

A.1 To assist relevant stakeholders, this annexe sets out some non-exhaustive illustrative examples of how the CMA powers described in the Statement might apply in selected potential scenarios. They do not form part of the Statement 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.

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### Example 1

#### Scenario

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 Chief Executive 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 complete and timely responses to CMA information requests in the past.

#### Analysis

The CMA would be likely to consider this a minor/mitigated failure committed without reasonable excuse. 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.

While the CMA does not consider that the circumstances of this failure to comply constitute a reasonable excuse, 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 incomplete and inadequate. Many questions are ignored completely or receive inadequate one-word responses that do not answer the question properly. When asked to estimate its market share and explain its reasoning for the estimate, D states 'around 20%' with no explanation of the basis for its estimate. The responses from D's competitors, however, indicate that D's share is close to 40%. Further investigation reveals a recent presentation to D's Board estimating its market share to be 42% at the relevant time and including data on which the estimate was based that was not provided to the CMA.

### **Analysis**

The CMA would be likely to consider this a serious failure, committed without reasonable excuse, 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 of 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 caused considerable delays to the CMA's investigation.

## **Analysis**

The CMA would consider this a deliberate/aggravated failure, committed without reasonable excuse. The failure constitutes an unjustified obstruction of the CMA's investigation which may prevent the CMA from obtaining important evidence of possible further infringements. The director clearly acted intentionally and company E did not take sufficient and/or timely steps to investigate the director's claims in respect of the nature of the documents. 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 on company E until the requests were complied with. The director's conduct might also be capable of constituting a criminal offence under section 42(7) of the CA98 and the CMA might consider whether it was appropriate to prosecute the director. 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.

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 committed without reasonable excuse. 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.

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## **Example 5**

### **Scenario**

The CMA is conducting a CA98 investigation into a suspected market-sharing agreement. Following inspections without notice under section 27 of the CA98, the CMA is seeking information from a hotel, part of a large chain, at which it suspects a cartel meeting took place. The CMA requests certain information by notice under section 26 of the CA98. In response to a draft information request proposing to give the hotel a week to respond, the hotel manager says the relevant data is stored on one of many external hard drives stored offsite. He also notes that he and staff are extremely busy preparing for their most important and lucrative conference of the year, to be held in three weeks' time. He therefore requests three weeks rather than one in which to respond. The CMA explains that it needs the information before it conducts a series of interviews that it has lined up for four weeks time, so although it is prepared to give the hotel the three weeks requested the hotel should take extra care to ensure it responds on time. The CMA sends the formal section 26 notice with

the deadline requested by the hotel. The hotel fails to respond to the section 26 notice in the agreed timescale.

When contacted by the CMA following expiry of the agreed deadline, the hotel manager apologises but says that the IT expert he left to deal with the matter has been off sick for two weeks and is still off sick. The manager says that he does not know when the IT expert will be back and that he and his other staff are either too busy or do not have sufficient IT skills to obtain the information required. He says he will prioritise the CMA's request straight after the conference.

### **Analysis**

The CMA would be likely to consider that there was no reasonable excuse for the failure to comply and that the failure merited a moderate to severe penalty. While the CMA understands that staffing difficulties may arise unexpectedly, in this case the IT expert had been sick for two weeks, during which time it would have become apparent to the manager that he would likely have problems meeting the CMA's deadline. The manager did not, however, discuss this with the CMA. Also, he was already aware of the work relating to the conference and was granted an additional week to respond taking that into account. The interviews that the CMA had scheduled will need to be postponed if the information is not received quickly, adding significant time to the investigation as the relevant individuals are on pre-booked overseas trips for six weeks after the scheduled interview dates. Finally, the manager has not made appropriate efforts to remedy the failure in a timely fashion, for example getting additional resources to help with the conference preparation and/or obtain the data required by the CMA. The CMA would likely impose a fixed penalty as well as a daily penalty to incentivise compliance with the investigatory requirement and to ensure that a deterrent (but proportionate) penalty was set.

## B. Summary table of CMA investigatory and Mergers IM powers and penalties for failure to comply

CMA power	Penalty for failure to comply	Further information
<b>Mergers investigatory powers</b>		
Section 109 EA02 – powers to require evidence, documents and/or attendance at interviews/meetings	Fixed penalty of up to £30,000 and/or daily penalty of up to £15,000	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 Penalties may be imposed where there is no reasonable excuse for the failure to comply
	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)	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 Obstruction or delay must be intentional

<b>CMA power</b>	<b>Penalty for failure to comply</b>	<b>Further information</b>
	<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, a criminal offence is not committed where the CMA has imposed an administrative penalty in relation to the same act.</p>
<b>Markets investigatory powers</b>		
<p>Section 174 EA02 - powers to require evidence, documents and/or attendance at interviews/meetings</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>

<b>CMA power</b>	<b>Penalty for failure to comply</b>	<b>Further information</b>
	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)	Obstruction or delay must be intentional.
	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(6) of the EA02) 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)	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. Equally, a criminal offence is not committed where the CMA has imposed an administrative penalty in respect of the same act.
<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	Financial penalties may be imposed where there is no reasonable excuse for the failure to comply

<b>CMA power</b>	<b>Penalty for failure to comply</b>	<b>Further information</b>
Section 26A CA98 – power to require questions to be answered by notice	<p data-bbox="842 276 1234 308">daily penalty of up to £15,000</p> <p data-bbox="842 352 1350 691">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)</p> <p data-bbox="842 730 1350 994">In relation to obstructing the exercise of powers under section 27, a person is liable, on conviction on 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</p>	
Section 27 CA98 – power to enter business premises without a warrant		
Section 28 CA98 – power to enter business premises under a warrant		
Section 28A CA98 – power to enter domestic premises under a warrant		
<b>Mergers interim measures powers</b>		
Section 94A EA02 – power to impose penalty for failure to comply with an interim measure (without reasonable excuse)	Fixed penalty of up to 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	This power is available to the CMA at both Phase 1 and Phase 2 of a merger review process Penalties may be imposed where there is no reasonable excuse for the failure to comply

## C. Status of OFT and CC publications

C.1 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> The OFT and the CC publications listed in this column have, with effect from 1 April 2014, been replaced, or rendered obsolete, by the 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). They are available at [www.gov.uk/cma/](http://www.gov.uk/cma/).

C.2 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 mergers and markets guidance documents *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)* and *Market studies and market investigations: Supplemental guidance on the CMA's approach (CMA3)*
- 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 the '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 the 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 [www.gov.uk/cma](http://www.gov.uk/cma), and
  - parties should check any contact details against those listed on [www.gov.uk/cma](http://www.gov.uk/cma), which will be the most up to date.