



Department
for Business
Innovation & Skills

COMPETITION REGIME

Response to Consultation on
Draft Secondary Legislation –
Part One

MARCH 2014

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Introduction

This is a supplementary response to the Government Response of 1st October 2013 to the Consultation on the Statement of Strategic Priorities for the CMA published on 15th July 2013. It covers the Government's consultation on the first tranche of draft secondary legislation implementing the reformed statutory competition framework introduced by the Enterprise and Regulatory Reform Act 2013.

The draft statutory instruments on which the Government has consulted can be found at Annexes 2 to 5 of the 15th July consultation document by following:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212271/Tranche_1_consultation_document_FINAL.pdf

The Government received 18 formal responses to the consultation – ten of which commented on at least one of the draft statutory instruments.

Type of Organisation	Responses
Business Representative Group	4
Large Business	4
Legal Representative Group	2
Legal Advisors	6
UK Government Body	2
Total	18

A full list of respondents to the consultation is published in Annex 2 of the 1st October Government response to its consultation on the statement of strategic priorities for the CMA at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245607/bis-13-1210-competition-regime-response-to-consultation-on-statement-of-strategic-priorities-for-the-cma.pdf

The consultation responses are published in full at:

<http://www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation>

Markets, Mergers and Antitrust – Competition and Markets Authority (Penalties) Order 2014

The Order specifies the maximum amounts that the CMA may impose as a penalty where a person has failed, without reasonable excuse, to comply with investigations powers under the Enterprise Act 2002 (EA 02) relating to mergers and markets investigations; and relating to antitrust investigations under the Competition Act 1998 (CA 98).

In all cases, the maximum amounts specified are the statutory maxima of £30,000 in relation to a fixed penalty; and £15,000 in relation to a daily penalty.

The Order revokes the Competition Commission (Penalties) Order 2003 (SI 2003/1371) which sets the maxima that may be imposed under Phase 2 of the merger and markets regime at £20,000 for a fixed penalty and £5,000 for a daily penalty.

The Consultation summarised the arguments in favour of increasing the maxima:

- current amounts are relatively low when compared to the turnovers of many businesses; and in comparison to the penalties that can be imposed under the EU competition regime.
- Inflation has significantly eroded the value of the maxima since 2003.
- Where civil penalties have replaced criminal sanctions, it is appropriate to compensate for the dilution of the enforcement regime by raising the maxima.
- The ERRA13 regime is based on more efficient decision-making and therefore relies on prompt and complete provision of information. Non-compliance therefore needs to be effectively deterred by meaningful penalties.

The Consultation acknowledged, however, that no penalties had been imposed under the 2003 Order with its lower maxima; and that by not increasing the cap in the ERRA 13 on the Secretary of State's discretion to set the maxima under these order-making powers, Parliament had not indicated a general need to raise penalty levels.

The Consultation stated that the Government would be particularly interested in views on the level of maximum penalties to be set; and specifically asked the following questions:

Question 2: What is your view on the proposed maximum penalty levels?

Question 3: Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?

Question 4: Do you have any other comments on the draft Order?

Consultation Responses

There were seven substantive responses to the question on the increases to the penalty maxima.

Three respondents – while recognising the role of penalties in the compliance regime – highlighted the importance of a proportionate and reasonable approach and for administrative clarity in their imposition; in particular in their application to smaller firms. One of these argued that having no maxima at all would allow greater flexibility to impose appropriate penalties in respect of the most serious cases and the largest businesses.

A further four respondents raised objections in principle to the raising of the statutory maxima – all four in respect of the daily maximum; and three in respect of the overall maximum. They argued that the new maxima would be disproportionate (especially for small firms); and are out of line with EU regulations. They also pointed out that the absence of any reference to an increase during the passage of the ERRRA – and the fact that the existing powers have never been fully used – means that the case for an increase has not been demonstrated.

Six respondents answered the question on applying the same maxima across all elements of the competition regime. All were supportive in principle – it was thought that this would deliver greater certainty; and that it was appropriate for similar behaviour to be penalised consistently.

Government's Decisions

The Government has considered the concerns raised by respondents over proportionality in relation to the imposition of penalties – in particular on smaller enterprises. To address these concerns, principles governing the proportionate application of the penalties will be set out in the CMA guidance, which together with the SIs, will constitute the CMA's operational powers.

In light of this, the Government considers that there is no reason why the Secretary of State should not exercise his power to increase the maxima up to statutory limits. It remains of the view that inflation has significantly eroded the value of the maxima since 2003; that the maxima is relatively low in comparison to the turnovers of many businesses; and that meaningful penalties are essential to deter non-compliance with investigation powers.

Mergers – the Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014

The Order establishes legal rules to determine when an enterprise is to be treated as controlled by a person, and the turnover of an enterprise, for the purpose of imposing the new administrative penalty for failure to comply with interim measures created by the ERRA 13.

Section 31 (interim measures: financial penalties: mergers) adds new sections 94A and 94B to the EA02. This creates a new administrative sanction under which the CMA (or the Secretary of State in respect of public interest cases) may impose a penalty of a fixed amount that it considers appropriate on a person who – without reasonable excuse – fails to comply with either a Phase 1 or Phase 2 interim measure. The penalty will be capped at 5 percent of the aggregate worldwide turnover of the enterprises owned or controlled by the person subject to the penalty; and will exist alongside the existing civil enforcement procedures in Part 3 of EA02.

The Secretary of State is therefore empowered to make an Order establishing the legal rules for determining:

- when an enterprise is to be treated as controlled by a person; and
- the turnover of an enterprise – including what is and is not to be included in the calculation; and the date(s) by reference to which turnover is to be determined.

Under new section 94B of the EA02, the CMA is required to prepare and publish (following the approval of the Secretary of State) a statement of policy on the use of these powers; and in particular on the considerations relevant to determining the amount of any penalty.

The Consultation asked the following questions:

Question 5: Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?

Question 6: Do you have any further comments on the draft Order?

Consultation Responses

There were eight substantive responses to the question on defining control and turnover – all of which focused on the inclusion of a test of ‘material influence’ to define control of an enterprise.

Six respondents opposed the inclusion of the turnover of enterprises controlled by means of ‘material influence’. They argued that this was not a sufficiently high standard on which to base fines; that it would lead to uncertainty and complexity; would be time consuming; and would encourage (not reduce) conflicts, contrary to the stated ambitions of the ERRA regime. One respondent argued that the proposed approach failed to meet principles of legal certainty in EU law.

A further two respondents – while supporting in principle the proposed approach to defining control – stressed the importance of clarity on how the provisions are to be applied to avoid uncertainty and retain business confidence.

The Government’s Decisions

While sensitive to the concerns over legal certainty raised by respondents, we are not persuaded by the objections raised in consultation responses to the way in which the proposed Order includes the turnover of enterprises controlled by means of ‘material influence’; and we therefore consider that the ‘material influence’ test should be retained in the Interim Measures Order.

It is vital for the breach of interim measures to carry strong, deterrent penalties which work in all circumstances; and we consider that the combination of the way in which the legislation is framed; the detail provided in published guidance; and procedural safeguards such as the right of appeal to the Competition Appeal Tribunal will provide sufficient certainty for those potentially affected.

We accept, however, that guidance will need to be published by the CMA (indeed there is a statutory requirement for the CMA to do so) to provide an appropriate level of detail about how the ‘material influence’ test will be applied. We propose also to publish similar guidance about how the Secretary of State will assess these matters in cases where the Secretary of State has the power to impose such penalties.

We have considered whether the CMA and Secretary of State should always calculate fines on the basis of the turnover of enterprises controlled in the widest sense (i.e. including ‘material influence’)..

We fear that this would in practice prejudice swift compliance with the interim mergers regime; and would divert significant resources from substantive merger assessment.

The Government has therefore decided that the CMA (and SoS) guidance should provide that the CMA / Secretary of State will include the turnover of enterprises subject to ‘material influence’ control only in exceptional circumstances; and that the guidance should explain how the test will be applied to give effect to the wider ERRA policy goal of matching the penalty to the nature of the control on a case by case basis. To deliver as

much certainty as possible for business, the guidance will include a principles-based approach to describing the situations in which 'material influence' will be applied; and in explaining how material influence will be determined for these purposes, the guidance will cross-refer to the existing EA Guidance on Jurisdiction and Procedure.

Mergers – the Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014

The Order amends the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 to make consequential amendments to the arrangements for dealing with public interest concerns in ‘European relevant merger situations’ to reflect the wider amendments made by ERA13 to the mergers regime.

The Consultation asked the following question:

Question 7: Do you have any comments on the draft Order?

Consultation Responses

There were no substantive comments on the draft Order.

Mergers – the Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014

The Order simplifies the merger fees timetable by requiring the fee to be paid in all cases once the CMA has made a decision following a 'Phase 1' investigation. It reflects the removal by the ERRA 13 of the existing dual route for the voluntary notification of a merger (statutory merger notice and informal notification) and its replacement by a single voluntary merger notice process for all merger cases subject to statutory deadlines.

Other elements of the wider merger fees policy – relating to the circumstances in which certain fees are not payable; the amount of fees; the person by whom fees are payable; and the current limited exemption for acquisitions for SMEs – are not affected.

The Consultation asked the following question:

Question 8: Do you have any comments on the draft Order?

Consultation Responses

There were four substantive responses – all in support of the proposed simplification of the merger fees timetable. Respondents welcomed harmonisation and the associated reduction in the complexity of the arrangements; in particular, eliminating the possibility of having to make repayments was highlighted as a benefit by three respondents.

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