

Penalty notice under section 174A of the Enterprise Act 2002

Online platforms and digital advertising
market study
Case: MA/50777/19

Addressed to:
AppNexus Europe Limited

10 January 2020

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The Competition and Markets Authority has excluded from this published version of the penalty notice information which it considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [§].

Online platforms and digital advertising market study

Notice of a penalty

1. The Competition and Markets Authority ('**CMA**') gives notice under section 174A of the Enterprise Act 2002 ('**EA02**')¹ of the following:
 - a. On 10 January 2020, the CMA imposed a penalty on AppNexus Europe Limited ('**AppNexus**')² under section 174A EA02 because it failed, without reasonable excuse, to comply with the requirements imposed on it by the notice served on it under section 174 EA02 on 22 August 2019 (the '**Notice**').
 - b. The penalty is a fixed amount of £20,000.
 - c. AppNexus is required to pay the penalty in a single payment, by cheque or bank transfer, to an account specified to AppNexus by the CMA, by close of banking business on the date which is 28 days from the date of service of this notice to AppNexus.³
 - d. AppNexus may pay the penalty earlier than the date by which it is required to be paid.
 - e. Under section 112(3) EA02, AppNexus has the right to apply to the CMA within 14 days of the date on which this notice is served on AppNexus for the CMA to specify a different date by which the penalty is to be paid.
 - f. Under section 114 EA02, AppNexus has the right to apply to the Competition Appeal Tribunal against any decision the CMA reaches in response to an application under section 112(3) of the Act, within the period of 28 days starting with the day on which this penalty notice is served on AppNexus.
 - g. Under section 114 EA02, AppNexus has the right to apply to the Competition Appeal Tribunal within the period of 28 days starting with the day on which this penalty notice is served on AppNexus in relation to:
 - i. the imposition or nature of the penalty;
 - ii. the amount of the penalty; or
 - iii. the date by which the penalty is required to be paid.
 - h. Under section 115 EA02, where a penalty, or any portion of such penalty, has not been paid before the date on which it is required to be paid and there is no pending appeal under section 114 EA02, the CMA may recover the penalty and any interest which has not been paid; in England and Wales and

¹ References in this penalty notice to the EA02 are to the EA02, as amended by the Enterprise and Regulatory Reform Act 2013.

² AppNexus Europe Limited is a subsidiary of Xandr Inc. (renamed from AppNexus Inc. in 2019, post the acquisition by AT&T Inc. ('**AT&T**'), the ultimate parent company).

³ Section 112(2)(f) EA02. Any sums received by the CMA will be paid into the Consolidated Fund (section 113(4) EA02). Section 174D(10) EA02 states that sections 112 – 115 EA02 apply in this situation.

Northern Ireland such penalty and interest may be recovered as a civil debt due to the CMA.

Structure of this document

2. This document is structured as follows:
 - a. section A sets out an executive summary of this notice;
 - b. section B sets out the factual background to this notice;
 - c. section C sets out the legal assessment, considers the statutory requirements for imposing a penalty under section 174A EA02, and sets out the reasons for the CMA's finding that AppNexus has failed to comply with the Notice without reasonable excuse; and
 - d. section D sets out the CMA's reasons for finding that a fixed penalty of £20,000 is appropriate and proportionate in this case.

A. Executive summary

Failure to comply with the Notice

3. AppNexus was served with the Notice, in relation to a market study currently being carried out by the CMA, on 22 August 2019. The CMA finds that AppNexus failed to produce a response to the Notice by the required deadline and has therefore failed to comply with the requirements of this Notice.
4. AppNexus submitted a partial response to the Notice on 7 October 2019, which was more than three weeks beyond the (already extended) deadline prescribed to AppNexus of 11 September 2019. Substantial parts of AppNexus' response followed just over seven further weeks later, *i.e.* over ten weeks beyond the 11 September 2019 deadline.

Without reasonable excuse

5. The CMA finds that AppNexus has no reasonable excuse for its failure to comply with the Notice. The CMA has carefully considered the submissions made by AppNexus as regards the circumstances of its non-compliance. The CMA does not find that such explanations are sufficient to amount to a reasonable excuse for the purpose of section 174A EA02.
6. The CMA finds the situation which led to non-compliance with the Notice was not caused by an event beyond the control of AppNexus, or the result of a significant and genuinely unforeseeable or unusual event.⁴ This view is reinforced by the marked change in compliance observed by the CMA once the parent company of

⁴ Guidance, para. 4.4.

AppNexus, AT&T, took over responsibility for co-ordinating AppNexus' response. Following the involvement of AT&T the outstanding non-compliance with the Notice was resolved within four working days and the deadline of an additional notice served on AppNexus under section 174 EA02 in the meantime was met without issue.

Decision to impose a penalty

7. The CMA finds that it is appropriate and proportionate to impose a penalty on AppNexus for such non-compliance because the failure to comply adversely affected the conduct of the CMA's market study and it is in the interests of deterrence.
8. The CMA finds that a penalty of £20,000 (which is below the statutory maximum of £30,000 for a penalty in a fixed amount) is an appropriate and proportionate penalty.

B. Factual background

9. The CMA is currently carrying out a market study to consider the supply of online platforms in the United Kingdom ('**UK**') which obtain material revenues through digital advertising, and the supply of digital advertising in the UK (the '**Market Study**').
10. Under section 174 EA02 the CMA has the power to issue a notice requiring a person to provide documents and information for the purposes of assisting the CMA in carrying out the Market Study.⁵

The Notice

11. On 24 July 2019 a draft version of the Notice (the '**Draft Notice**') was sent to AppNexus. AppNexus was given the opportunity to comment on the content of the Draft Notice, including whether material was not easily available for certain questions etc., and was provided with an envisaged deadline for responding to the Notice of 23 August 2019. On 25 July 2019 AppNexus contacted the CMA by email confirming that it would use "*best efforts to meet the deadline*" but that it might "*prove extremely challenging*" as "*our team is only made of two lawyers in Europe and it is the holiday season*".⁶

⁵ Using its powers under section 5 EA02 in relation to a matter where it has published a market study notice. The CMA published such notice in relation to the Market Study on 3 July 2019.

⁶ Email from [redacted] ('**AppNexus**' In-house Counsel') to the CMA dated 25 July 2019 at 2.33pm (UK).

12. Following email communications and a call between the CMA and AppNexus regarding, *inter alia*, clarification of the status of the Draft Notice⁷; on 19 August 2019 AppNexus contacted the CMA by email confirming it had “*been waiting for the formal notice to start engaging resources*” on responding to the questions in the Draft Notice, and that it therefore was aiming to “*share a final version of [its] submission by the end of the first week of September*”.⁸
13. On 22 August 2019 AppNexus was served with the Notice, requiring AppNexus to produce documents and supply information in the form specified by 5pm (UK) on 6 September 2019.
14. On 4 September 2019 AppNexus contacted the CMA to request an extension for responding to the Notice until 27 September 2019. The reasons given were the fact that AppNexus are a “*global organisation*” therefore having “*inherently ... several phases of review which we are obliged to undertake in these types of government mandated requests*”, that it was “*the holiday season not only in Europe but in the US too*”, that the “*first draft currently sits with stakeholders in the opposite time zone*”, and the consideration it was giving to the legal and commercial implications of “*not providing a full and accurate response*”.⁹
15. By way of response email on 6 September 2019 the CMA granted AppNexus an extension until 5pm (UK) on 11 September 2019, explaining that AppNexus had been provided “*ample time to respond with any comments, including issues regarding timing, ahead of issuing the formal request*”.¹⁰
16. AppNexus did not respond to the Notice by the extended deadline of 5pm (UK) on 11 September 2019.
17. On 19 September 2019 the CMA asked AppNexus, by close of business on 20 September 2019, to provide reasons for its failure to provide a response to the Notice by the 11 September 2019 deadline and referred to the CMA’s powers to impose an administrative penalty for failure to comply with the Notice without reasonable excuse.
18. On 19 September AppNexus responded to the CMA apologising for the delay and stating that “*the company only has two lawyers to support the entire EMEA region from a legal and regulatory perspective*”, the “*questionnaire contains more than 250*

⁷ In these communications AppNexus clarified that it would not be responding to the data management platforms questions contained in the Draft Notice, as AppNexus does not provide such services. The call referred to at para. 12 occurred on 29 July 2019.

⁸ Email from AppNexus’ In-house Counsel to the CMA dated 19 August 2019 at 10.43am (UK).

⁹ Email from AppNexus’ In-house Counsel to the CMA dated 4 September 2019 at 6.14pm (UK).

¹⁰ Email from the CMA to AppNexus’ In-house Counsel dated 6 September 2019 at 7.55am (UK).

questions, all of which require experts knowledge”, the “questionnaire, coupled with similar questionnaires received from other competition authorities in Europe, has completely disrupted our business and operations”, and that therefore it did not consider a penalty to be necessary. At the same time AppNexus confirmed that it would revert with its responses “early next week”.¹¹ On 24 September 2019 AppNexus emailed the CMA confirming that “they should be able to provide everything by the end of the day tomorrow”.¹²

19. AppNexus did not respond to the Notice by close of business on 25 September 2019, as they had indicated they would. The CMA contacted AppNexus on 30 September 2019 to confirm when AppNexus’ response to the Notice would be submitted, noting that 25 September 2019 had passed.¹³ On the same date AppNexus confirmed that they had received additional comments on the response to the Notice which were being processed and that AppNexus would respond “as soon as possible”.¹⁴

20. The CMA contacted AppNexus on 7 October 2019 noting that:

- a. a response to the Notice was still outstanding;
- b. the CMA was concerned with AppNexus’ compliance with obligations pursuant to section 174 EA02, referring AppNexus to para. 4.4 of *Administrative penalties: Statement of Policy on the CMA’s Approach* (CMA4, the ‘**Guidance**’), which details the CMA’s ability to impose a penalty in the event of non-compliance with a section 174 EA02 notice without a reasonable excuse; and
- c. the CMA was considering whether to impose a penalty on AppNexus for non-compliance with the Notice.

21. AppNexus submitted its response to the Notice on the same day (the ‘**Response**’).¹⁵

¹¹ Email from AppNexus’ In-house Counsel to the CMA dated 19 September 2019 at 11.32am (UK).

¹² Email from AppNexus’ In-house Counsel to the CMA dated 24 September 2019 at 2.01pm (UK).

¹³ Email from the CMA to AppNexus’ In-house Counsel dated 30 September 2019 at 1.58pm (UK).

¹⁴ Email from AppNexus’ In-house Counsel to the CMA dated 30 September 2019 at 4.51pm (UK).

¹⁵ For completeness only, by email on 7 October 2019 AppNexus submitted to the CMA that it had provided its response to the Notice to the CMA on 1 October 2019. However, due to file size restrictions, the 1 October 2019 submission was never received by the CMA. Given that (i) the cover letter to the Draft Notice sent to AppNexus in July 2019 very explicitly stated how submissions to the CMA should be made (including, *inter alia*, reference to file size restrictions); and (ii) the CMA’s email system sent a non-delivery receipt notification to AppNexus’ In-house Counsel indicating that the 1 October 2019 submission had not been received by the CMA and, moreover, in response to such non-delivery receipt notification no further steps were taken by AppNexus to ensure its response to the Notice was submitted until further contact from the CMA; it is the CMA’s finding that the Response was not submitted until 7 October 2019, when the submission was made using the correct process and received by the CMA.

Subsequent interaction between the CMA and AppNexus

Internal documents

22. On 21 October 2019 the CMA responded to AppNexus about documents it failed to provide with its Response. The CMA provided clarifications on the type of internal documents to be provided in response to question 12(d) to publisher ad servers and question 17(d) to demand side platforms of Appendix 1 to the Notice (together the '**Internal Documents**').¹⁶ The CMA requested that the Internal Documents be provided as soon as possible and at the latest by 28 October 2019.
23. On 22 October 2019 AppNexus responded to the CMA stating that it "*genuinely did not know where to start and how to get access to*" the Internal Documents and that gathering said documents was "*likely going to take more than a week*".¹⁷
24. On 29 October 2019 the CMA emailed AppNexus noting that the Internal Documents had still not been received.
25. On a conference call on 14 November 2019 (the '**AppNexus Conference Call**') AppNexus informed the CMA that it was still trying to identify who should be providing the Internal Documents internally. In response the CMA noted once again that it was concerned about AppNexus' ongoing lack of compliance with the Notice.
26. By email on 18 November the CMA reiterated the failure to provide Internal Documents to AppNexus and requested that AppNexus provide the outstanding Internal Documents as soon as possible.

Demand side platform market data

27. On the AppNexus Conference Call the CMA also informed AppNexus that the demand side platform market data ('**DSP Market Data**') requested in question 20 to demand side platforms of Appendix 1 to the Notice had not been submitted with the Response.
28. By email on 18 November the CMA reiterated this failure to AppNexus, re-stating its ability to impose administrative penalties for failure to comply with a section 174 EA02 notice without reasonable excuse and requesting AppNexus to provide the outstanding data as soon as possible.

¹⁶ The former for which AppNexus supplied incorrect documents with its Response ("*sales documents rather than documents that discuss competition*" were provided) and the latter for which AppNexus supplied no documents at all with its Response, instead requesting further details on the types of documents to be provided (Email from the CMA to AppNexus' In-house Counsel dated 21 October 2019 at 10.44am (UK)).

¹⁷ Email from AppNexus' In-house Counsel to the CMA dated 22 October 2019 at 8.51pm (UK).

The second notice

29. A second notice requesting additional information was served on AppNexus under section 174 EA02 on 18 November 2019 (the '**Second Notice**'). The deadline for responding to the Second Notice was 5.00pm (UK) on 26 November 2019.

Subsequent interaction between the CMA and AT&T

30. On the morning of 26 November 2019 (UK), the CMA received an email from legal counsel from AppNexus's parent company AT&T. Legal counsel from AT&T confirmed that they were taking over responsibility for responding to the Notice and the Second Notice on behalf of AppNexus. On a call on the same date (the '**AT&T Conference Call**') AT&T apologised for the non-compliance which had occurred to date and stated that it, including all AT&T group companies, take compliance with government requests very seriously.

31. Following the AT&T Conference Call, the Internal Documents were received by the CMA on 26 November 2019. The DSP Market Data was received by the CMA on 27 November 2019.¹⁸

32. The response to the Second Notice was submitted by AT&T and received by the CMA by the 26 November 2019 deadline.

33. Following the multiple warnings sent to AppNexus¹⁹, on 12 December 2019 the CMA sent AT&T a copy of a provisional decision to impose a penalty on AppNexus under section 174A EA02 (the '**Provisional Decision**').²⁰ On 19 December 2019 AT&T provided its written representations on the Provisional Decision and confirmed that it would "*not contest either the imposition of the penalty or the quantum of the penalty*".²¹

34. In accordance with paras. 5.2 and 5.9 of the Guidance, the CMA consulted with the CMA's General Counsel's Office on the reasons for, and level of, the penalty set out below.

¹⁸ In providing the DSP Market Data AT&T clarified that the DSP Market Data had been collected by the AppNexus team in September and omitted from the Response by error. AT&T explained that they did not understand why the DSP Market Data had not been submitted immediately following the AppNexus Conference Call or the follow-up correspondence on this topic from the CMA dated 18 November 2019 (referred to at para. 28 above).

¹⁹ As set out from para. 11 above, the CMA noted AppNexus' failure to comply with the Notice on 19 September, 7, 21, 29 October and 14 and 18 November 2019.

²⁰ On 11 December 2019 the CMA liaised with legal counsel from AT&T who confirmed they would accept service of the Provisional Decision.

²¹ Letter from Arnold & Porter on behalf of AppNexus and AT&T dated 19 December 2019 (the '**Response to the Provisional Decision**').

C. Legal Assessment

Relevant legislation

35. Section 174A EA02 provides that where the CMA considers that a person has, without reasonable excuse, failed to comply with any requirement of a section 174 EA02 notice, it may impose a penalty of such amount as it considers appropriate (in accordance with section 174D EA02).
36. The CMA concludes that the statutory requirements for imposing a penalty under section 174D EA02 are met and that the imposition of a penalty of £20,000 is appropriate and proportionate in this case.

Statutory requirements for imposing a penalty under section 174A EA02

Failure to comply with the requirements of the Notice

37. The CMA finds that AppNexus is a person within the meaning of section 174 and section 174A EA02 and Schedule 1 of the Interpretation Act 1978 and has failed to comply with a requirement of a notice issued under section 174 EA02, as set out below.
- a. The Notice required AppNexus to provide documents and information for the purposes of assisting the CMA in carrying out the Market Study within an extended deadline of 11 September 2019. AppNexus responded to parts of the Notice on 7 October 2019.²² This was more than three weeks after the extended deadline prescribed by the Notice and so constituted a failure to comply with that Notice.
 - b. The Notice required AppNexus to produce Internal Documents within an extended deadline of 11 September 2019. On 26 November 2019 AppNexus produced 14 Internal Documents in response to the Notice. This was over ten weeks after the extended deadline prescribed by the Notice and so constituted a failure to comply with that Notice.²³
 - c. The Notice required AppNexus to produce DSP Market Data within an extended deadline of 11 September 2019. On 27 November 2019 AppNexus produced the requested DSP Market Data in response to the Notice. This was over ten weeks after the extended deadline prescribed by the Notice and so constituted a failure to comply with that Notice.

²² AppNexus' Response was partial as it excluded the Internal Documents and DSP Market Data requested in the Notice, as dealt with at para. 37 (b) and (c).

²³ For completeness only, the CMA notes that following identification of AppNexus' failure to comply in relation to the provision of Internal Documents with the Response, AppNexus was requested to provide the Internal Documents responsive to the Notice by 28 October 2019 "*at the latest*" (see para. 22 above). The submission of the Internal Documents was in any event over three weeks after this date.

38. For the reasons set out above, the CMA finds that AppNexus has failed to comply with the requirements of the Notice served on it.

Without reasonable excuse

39. Section 174A EA02 provides that penalties can be imposed if a failure to comply is “*without reasonable excuse*”. The Competition Appeal Tribunal has recently considered the concept of without reasonable excuse in the Electro Rent judgment, confirming that an objective test should be applied as to whether any excuse put forward is reasonable.²⁴

40. The Guidance provides that “(t)he 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 [the party’s] control has caused the failure and the failure would not otherwise have taken place”.²⁵

41. The CMA has considered AppNexus’ submissions in the 19 October email communication as to why AppNexus considered it had a reasonable excuse for non-compliance with the Notice. For completeness only the CMA has also considered the reasons put forward by AppNexus in asking for an additional extension to the deadline for responding to the Notice (in the email communication dated 4 September 2019). In these communications AppNexus submitted a number of reasons as to why it was unable to comply with the Notice, including that:

- a. it was a global organisation, meaning that review of the Response would inherently take several phases;
- b. key stakeholders were located in the United States of America;
- c. AppNexus only has two lawyers in the EMEA region;
- d. there were 250 questions requiring expert knowledge;
- e. it was the “*holiday season*”; and
- f. AppNexus was also responding to similar questionnaires from other authorities.²⁶

42. The CMA finds that these factors, neither individually nor collectively, constitute a reasonable excuse for the failure to comply with the Notice.

43. In the CMA’s view it is clear that the circumstances leading to AppNexus’ non-compliance with the Notice were not “*significant and genuinely unforeseeable or*

²⁴ *Electro Rent Corporation v CMA* [2019] CAT 4 at 69.

²⁵ Guidance, para. 4.4.

²⁶ See paras. 11 to 32 above. For completeness only, the CMA notes that 81 questions were contained in Appendix 1 to the Notice.

unusual”, nor were they “*beyond [AppNexus’] control*”. In these circumstances the mere realities of AppNexus’ business structure do not constitute a reasonable excuse for non-compliance.

44. The varying location of relevant staff, number of lawyers available, number of questions to be answered, fact that it was holiday season and that AppNexus also had questionnaires from other competition authorities to respond to; were all eminently clear to AppNexus upon receipt of the Draft Notice.²⁷
45. AppNexus was sent the Draft Notice four weeks before service of the Notice. AppNexus was therefore afforded ample time to consider the requirements of the Notice and arrange for appropriate resources, globally, to ensure a response could be submitted by the original deadline. As also noted by the CMA in its communication dated 6 September 2019, this period also ensured AppNexus had time to discuss issues regarding timing with the CMA ahead of formal issuance of the Notice. Instead it appears AppNexus waited for receipt of the Notice before preparing for or engaging in responding to the Notice and only asked for an almost month-long extension, for the entire Response, two days before the deadline for responding to the Notice.²⁸
46. Moreover, AppNexus was also granted an additional 13 working days to respond to the Notice.²⁹
47. Finally, as demonstrated at paras. 30 to 32 above, once AT&T (AppNexus’ parent company) became involved with co-ordinating the outstanding elements of the Response and the appropriate internal resources were deployed correctly, the Notice was swiftly and effectively complied with. In the CMA’s view this is additional evidence that the descriptions AppNexus put forward as a reasonable excuse for non-compliance with the Notice are not capable of constituting a reasonable excuse. Once AT&T became involved the resourcing issues were quickly resolved and the outstanding elements of the Response were complied with within just four working days.

²⁷ Similarly, the CMA does not consider it to be a reasonable excuse for non-compliance with the Notice that AppNexus “*did not know where to start*” in responding to the request for Internal Documents, as detailed in the 22 October 2019 email communication (see para. 23 above).

²⁸ In any event the CMA notes that the Internal Documents and DSP Market Data were submitted almost eight weeks after the date of the extension requested by AppNexus at this stage (see para. 14 above).

²⁹ On circulation of the Draft Notice the initial deadline for responding was set to be 23 August 2019. After having been granted an initial extension until 6 September 2019, the deadline for AppNexus’ response to the Notice was eventually extended to 11 September 2019 (see paras. 11 to 32 above).

D. Appropriateness of imposing a penalty at the level proposed

Appropriateness of imposing a penalty

48. Having regard to its statutory duties and the Guidance, and having considered all relevant facts, the CMA finds that the imposition of a fixed penalty is appropriate. In reaching this view, the CMA has considered the seriousness of the failure, including the adverse impact of the failure on the Market Study, as well as having regard to the need to achieve general deterrence.
49. The failure was serious. AppNexus' Response was submitted over three weeks after the extended deadline. Moreover, substantial parts of AppNexus' Response (Internal Documents and DSP Market Data) were not submitted until over ten weeks after the extended deadline, and at a relatively advanced stage in the CMA's Market Study (over four months after the CMA had opened its investigation). These delays occurred despite the fact that AppNexus was provided with a Draft Notice by the CMA, the original deadline set by the CMA for responding to the Notice took into account the comment from AppNexus that it was hoping to respond to the CMA "*by the end of the first week of September*", and AppNexus was granted an additional extension for responding to the Notice.^{30,31}
50. Publication of a market study notice³² triggers, for current purposes, the following statutory time limits:
- a. Where the CMA proposes to make a market investigation reference in relation to the subject matter of a market study, it must publish notice of its proposed decision and begin the process of consulting relevant persons within six months of publication of the market study notice;
 - b. Where the CMA does not propose to make a market investigation reference, but has received (non-frivolous) representations in response to a market study notice arguing that a reference should be made, it must, within six months of publication of the market study notice, publish notice of its proposed decision and begin the process of consulting relevant persons; and
 - c. where the CMA does not propose to make a market investigation reference and no representations have been made in response to a market study notice arguing that a reference should be made, it must publish notice of its decision not to make a reference within six months of publication of the market study notice.³³

³⁰ As set out from para. 11 above.

³¹ Guidance, para. 4.3: "*(t)he CMA may be more likely to impose a penalty for failure to comply ... where the CMA has provided a draft request or set a deadline for compliance which takes [the party's] comments into account*".

³² As per Footnote 5 above, for the Market Study this occurred on 3 July 2019.

³³ Section 131B(1) and section 131B(2) EA02.

51. AppNexus' delay led to the CMA being denied the timely opportunity to review and analyse relevant materials which, by its nature, had an adverse impact on the effective running of the Market Study and the CMA's ability to consult on a proposed market investigation reference decision.

52. The CMA requires a wide range of information to discharge its functions. The availability and receipt of complete and accurate information is crucial to enable it to make evidence-based decisions and, more generally, for the quality and effectiveness of its work. Requests for information and documents are therefore a key tool for the CMA to collect the information it needs to carry out the Market Study. The CMA therefore considers it is of utmost importance to its ability to conduct effective investigations that parties have due regard to the requirements imposed on them by, among other things, section 174 EA02. The imposition of an administrative penalty under section 174A EA02 is critical to achieve deterrence, to impress on both AppNexus in this specific case and more widely to those who may be subject to investigatory requirements in future, the seriousness of a failure to comply with a section 174 EA02 notice without a reasonable excuse.

Appropriateness of the amount of the penalty imposed

53. Consistent with its statutory duties and the Guidance, the CMA has assessed all relevant circumstances to determine the appropriate level of penalty in this case.

Aggravating/mitigating factors

54. While the CMA is satisfied that AppNexus made no attempt to conceal the failure from the CMA, nor obtain an advantage / derive benefit from its failure to comply, the CMA's view is that AppNexus' failure to comply with the Notice demonstrated a negligent attitude towards compliance with CMA deadlines. This is in particular the CMA's view in light of the fact that AppNexus' failure to comply with the Notice persisted despite multiple warnings from the CMA. As set out from para. 11 above, the CMA noted AppNexus' failure to comply with the Notice on 19 September, 7, 21, 29 October and 14 and 18 November 2019. It is the CMA's view that no real heed was paid to these warnings by AppNexus.

55. The fact that the CMA saw no additional engagement from AppNexus in responding to the Notice in response to these warnings also meant that, while AppNexus' delay in responding to the majority of the requests in the Notice was three weeks (as set out at para. 37(a) above); the length of delay for substantial parts of the Notice (being Internal Documents and DSP Market Data) was over ten weeks long (as set out at para. 37(b) and (c) above). These significant delays severely disrupted the

CMA's process, in particular its obligation to consult on a decision to make a market investigation reference.³⁴

56. As detailed at paras. 30 to 32 above, once legal counsel from AT&T became involved in providing the Internal Documents and DSP Market Data, the remaining aspects of non-compliance with the Notice were swiftly resolved and the CMA were provided with an apology for the non-compliance which had occurred to date. In the CMA's view the genuine nature of the CMA's interaction with AT&T, and that AT&T expects "*high standards when engaging with government agencies worldwide*"³⁵, is also supported by the fact that the CMA's original deadline for the Second Notice was complied with without issue once AT&T were involved in gathering the response. While the CMA is reassured that the Response to the Notice was appropriately handed once the matter was escalated to AT&T, the fact that resolution could be achieved so swiftly by AT&T also demonstrates the negligent attitude showed by AppNexus, as well as the fact that AppNexus failed to make suitable resources available to comply with the Notice.

57. The CMA also notes that, as detailed in the Response to the Provisional Decision, AppNexus' In-house Counsel, the individual responsible for co-ordinating AppNexus' Response to the Notice, is no longer employed by AppNexus and that important steps have been taken by AppNexus leadership to ensure such non-compliance does not happen again.

Financial resources available to AppNexus

58. Consistent with the Guidance, the CMA has also had regard to certain key indicators relating to the financial resources available to AppNexus. These indicators show that AppNexus has significant resources available in respect of the imposition of a penalty of £20,000 for the failure to comply in question in this case. The CMA also notes that AppNexus has not contested either the imposition or the level of the penalty.³⁶ The CMA has therefore decided it is appropriate to impose a penalty at this level, having regard to AppNexus' size and financial position.

Conclusion on the imposition of a penalty

59. Although the CMA has the power to impose a penalty of up to £30,000 the CMA does not consider that the breach in this case is so serious as to warrant a penalty at the upper end of the scale.

³⁴ See further at para. 50 above.

³⁵ See the Response to the Provisional Decision.

³⁶ As set out at para. 33 above.

60. In all the circumstances, the CMA considers that the imposition of a penalty of £20,000 is appropriate on the basis that it: (i) would reflect the seriousness of the breach and the adverse impact on the CMA's investigation; (ii) would act as a deterrent to AppNexus and other persons in the future; and (iii) is substantially below the statutory maximum of £30,000 for a penalty in a fixed amount and is not disproportionate in this case.

Signature: Andrea Gomes da Silva

Executive Director, Markets and Mergers

Date: 10 January 2020

Competition & Markets Authority