

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

21 September 2021
OIM2

Office for the Internal Market

Part of the Competition and Markets Authority

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1. Introduction

- 1.1 Part 4 of the United Kingdom Internal Market Act 2020 (the Act) provides the Competition and Markets Authority (CMA)¹ with reporting, advisory and monitoring functions to support the smooth operation of the UK internal market on an ongoing basis. These functions will be undertaken by the Office for the Internal Market (OIM), which will sit within the CMA.²
- 1.2 Under section 41 of the Act, the OIM has the power to issue a written notice requiring a person to provide information or documents to assist in carrying out its functions of reporting, monitoring and advising under Part 4 of the Act, or to use section 5 of the Enterprise Act 2002 (EA02) for these purposes.
- 1.3 Section 42 of the Act gives the OIM the power, in certain circumstances, to impose penalties in accordance with section 43 of the Act where an information notice is not complied with.

Requirement for a Statement of Policy

- 1.4 Section 42 of the Act also requires the publication of a Statement of Policy (the Statement) setting out how the OIM will undertake the enforcement of its information gathering powers and what factors the OIM will use to decide the nature and amount of any financial penalty imposed.³ This will be done before any action to enforce an information notice is commenced.
- 1.5 This document is the Statement required under the Act. It is not a definitive statement of, nor substitute for, the law itself. Reference should be made to the relevant legislation and guidelines and, if necessary, independent legal advice should be sought.
- 1.6 When reaching decisions regarding enforcement action for failure to comply with an information notice, the OIM must have regard to this Statement.⁴ The OIM will apply this Statement flexibly according to the circumstances of the

¹ The Enterprise and Regulatory Reform Act 2013 established the CMA as the UK's competition authority responsible for ensuring that competition and markets work well for consumers. The CMA is an independent non-ministerial department. Its work is overseen by a Board and led by the Chief Executive and senior team.

² For the remainder of this Statement, we refer to the OIM when referring to the CMA discharging its internal market functions. For further information on the OIM's functions see: OIM, [Guidance on the operation of the CMA's UK internal market functions](#), September 2021.

³ See sections 42(6) and 42(7).

⁴ See section 42(3).

case. Different considerations may be relevant to the assessment of the appropriate penalty, depending on which statutory power the OIM is using.

- 1.7 This Statement reflects the views of the OIM at the time of publication. It draws on the CMA's existing guidance and its experience of using its formal information-gathering powers.⁵ However, because the OIM is a new function, with an advisory rather than a decision-making role, the Statement sets out the broad principles which the OIM expects to apply in enforcing its information-gathering powers and the likely factors that may influence its decisions. The OIM will review this Statement in light of experience after an appropriate period of operation.
- 1.8 The OIM will consult each relevant national authority⁶ and such other persons as it sees fit in the process of putting together or revising its policy approach.⁷ The OIM's webpages will always display the latest version of the Statement.

⁵ Detailed guidance on the CMA's approach to penalties and other sanctions is available in [Administrative Penalties: Statement of policy on the CMA's approach](#) (CMA4).

⁶ 'Relevant national authority' refers to the Secretary of State; the Scottish Ministers; the Welsh Ministers; and a Northern Ireland department, as the case may be (section 45(6) of the Act).

⁷ See sections 42(8) and 42(9) of the Act.

2. Legal Framework

2.1 This Chapter describes the legal framework that applies to the information-gathering powers placed on the OIM by Part 4 of the Act.

The OIM's information-gathering powers

2.2 Under section 41 of the Act, the OIM has the power to send a written notice (hereafter referred to as a '**section 41 notice**') requiring a person to provide information or documents, to assist it to carry out its functions of reporting, monitoring and advising under Part 4 of the Act, or to use section 5 of the EA02 for these purposes.⁸ A section 41 notice can require:

- a person to produce any documents, which are in their custody or control, as specified in the notice;⁹ and/or
- any person who carries on a business to provide estimates, forecasts, returns or other information as specified or described in the notice.¹⁰

2.3 A section 41 notice will specify where, when, how (including the format and means of conveyance) and to whom the documents and/or information must be produced.¹¹ The notice must also state the purpose for which it has been issued, including which of the functions carried out by the OIM is relevant, and include information about the potential consequences of not complying.¹²

2.4 Where the information is not otherwise in a legible form, a section 41 notice may require the provision of a legible and intelligible copy of the information.¹³

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

⁸ In relation to the OIM, the powers conferred under section 5 EA02 relate only to matters considered under the Act.

⁹ See section 41(2).

¹⁰ See section 41(3).

¹¹ See section 41(4).

¹² See section 41(6).

¹³ See section 41(5).

offers to pay their travel expenses.¹⁴ The OIM may copy any document that has been provided to it in accordance with a section 41 notice.¹⁵

Enforcement

2.6 Section 42 of the Act empowers the OIM to impose a penalty in accordance with section 43 where it considers that a person has:

- without reasonable excuse, failed to comply with any requirement of a section 41 notice;¹⁶ or
- intentionally obstructed or delayed any person in the exercise of the power under section 41(7).¹⁷

2.7 Before it can take any action to enforce a section 41 notice, the OIM must have regard to this Statement.¹⁸

2.8 The OIM can use its own discretion to decide whether the request for information has been complied with or not.¹⁹ The OIM cannot impose financial penalties where more than four weeks have expired since it concluded the carrying out of its relevant functions for which the information was requested.²⁰

Penalties

2.9 Section 43 of the Act allows for the application of financial penalties where the notice addressee fails to comply with a section 41 notice. The OIM will be able to choose between a range of possible types of penalties and fix appropriate amounts having regard to this Statement and the facts of the case, as well as the maximum penalty that can be imposed as set by the Secretary of State for the Department for Business, Energy & Industrial Strategy (BEIS).

¹⁴ See sections 41(8) and 41(9).

¹⁵ See section 41(7).

¹⁶ See section 42(1).

¹⁷ See section 42(2).

¹⁸ See section 42(3).

¹⁹ See section 42(1).

²⁰ See section 42(4).

- 2.10 Penalties for failing to comply with a section 41 notice can be a single fixed amount, a daily rate, or both.²¹ Penalties for intentionally obstructing or delaying the provision of information will be a fixed amount.²²
- 2.11 In any of these cases, the Secretary of State must specify maximum amounts through secondary legislation not exceeding £30,000 for a fixed amount and £15,000 for the daily rate.²³ The Secretary of State must consult the CMA, each other relevant national authority and any other relevant persons before deciding on the maximum amounts and daily rates.²⁴
- 2.12 The calculation of the daily rate must not include any days before the OIM served a penalty notice concerning failure to provide information on the person in question.²⁵ The penalty stops accumulating on the day that the requirements under the section 41 notice are satisfied or the day the OIM has concluded the exercise of the relevant function. The OIM can specify an earlier date for the rate to stop accumulating should it wish, whether before or after the penalty imposed.²⁶
- 2.13 A person can appeal a penalty decision in accordance with sections 112 to 115 of the EA02, which set out procedural requirements and provide for appeals to the Competition Appeal Tribunal.²⁷

²¹ See section 43(2).

²² See section 43(3).

²³ See sections 43(4) to 43(6). The fixed amount refers to either a penalty for a breach of a requirement of a notice under section 41 of the Act, or for intentionally obstructing or delaying a person copying documents provided in accordance with an information notice (section 41(7) of the Act)).

²⁴ See section 43(8). The current maxima specified by The United Kingdom Internal Market Act 2020 (Maximum Penalty) Regulations 2021 are: £30,000 fixed amount; £15,000 (daily rate), and £30,000 and £15,000 (fixed amount and daily rate together). See BEIS, Office for the Internal Market: setting the maximum level of penalties for non-compliance with requests for information, September 2021.

²⁵ See section 43(9).

²⁶ See sections 43(9) to 43(10).

²⁷ See section 43(11).

3. Policy Objectives

The OIM's use of information-gathering powers

- 3.1 The OIM may need to gather information from businesses, public authorities, or individuals. The OIM will use this information to enable it to fulfil its reporting, advisory and monitoring functions under Part 4 of the Act.²⁸
- 3.2 The provision of timely, complete and accurate information will be critical to the OIM's effectiveness and ability to fulfil its functions. The OIM has a range of options in how it will gather this information. For instance, it may decide, depending on the circumstances, to obtain information through informal requests, or invite relevant respondents to attend meetings or calls.²⁹
- 3.3 As noted in Chapter 2, under section 41 of the Act, the OIM also has the power to issue a notice requiring a person to provide information or documents, for the purposes of assisting in carrying out its functions of reporting, monitoring and advising under Part 4 of the Act, or to use section 5 of the EA02 for these purposes.

When the OIM will use its information-gathering powers

- 3.4 Where appropriate, the OIM will use its formal information-gathering powers to obtain information from businesses, public authorities, and, as necessary, individuals.³⁰ Before the OIM issues a section 41 notice it will have due regard to the impact of any such request on the addressee.
- 3.5 Section 41 notices are most likely to be used where the OIM considers it necessary to obtain information that is essential for its advice and/or reports and that could not be obtained in a timely manner through other means. For example, the OIM may seek evidence from specific businesses to analyse the likely or actual market impact of regulatory divergence where this information is not readily available from elsewhere.

²⁸ For further information on the OIM's functions see: OIM, Guidance on the operation of the CMA's UK internal market functions, September 2021.

²⁹ The OIM will not need to use its statutory powers when gathering information through informal and voluntary means.

³⁰ The OIM will only use its formal information-gathering powers for the purposes of fulfilling its functions under Part 4 of the Act.

Type of information the OIM may request

- 3.6 The OIM may ask for information or documents under the person's custody or control, as well as information that is not already written down, such as market share estimates based on knowledge or experience. For example, the OIM may ask for internal business reports, strategy documents and other internal data.³¹ The OIM may also require that employees of the business providing any document explain its contents.
- 3.7 The OIM will only ask for documents or information which, in its opinion, are relevant to its functions at the time of the request.

How the OIM will issue section 41 notices

- 3.8 The OIM will aim to be fair and reasonable in its requests for information. It will adopt a flexible approach – the form of its engagement with respondents may differ depending on the individual circumstances.
- 3.9 The OIM will, wherever possible, invite addressees of section 41 notices to comment on the section 41 notice, including the information required and the deadline(s) for providing it. Where it is practical and appropriate to do so, the OIM will send a section 41 notice in draft, so that it can consider comments from the proposed recipient in advance of issuance.
- 3.10 The OIM's section 41 notices will set out their purpose and the relevant OIM function to which the request relates, specify or describe the documents and/or information that the OIM requires, give details of where and when they must be produced and set out the consequences, if any, that may apply if the recipient does not comply.
- 3.11 The OIM will seek to set a reasonable deadline for all section 41 notices. The deadline specified in the section 41 notice will depend on the nature and the amount of information that the OIM has requested.
- 3.12 Addressees should make known any potential difficulties in responding (such as administrative, resourcing, financial, logistical and practical issues) as early as possible within the timeframe set out in the notice, or as soon as they become aware that they may not meet the stipulated deadline. Addressees

³¹ The nature and volume of information requested will vary according to the circumstances. However, as an illustrative and non-exhaustive list, the OIM might for instance request sales volume data; the identity of suppliers and customers; cost, revenue and profitability data; internal estimates of the impact of regulatory change; business planning documents; and submissions made to relevant authorities.

should also raise with the OIM any matters they do not understand as soon as possible after receiving a request.

- 3.13 The OIM will, in particular, take into careful consideration any concerns raised by notice addressees about their ability to provide the information required – including given the nature and the type of the information requested and the resources available to them.
- 3.14 The OIM may send out more than one request to the same addressee during its consideration of the issues. For example, the OIM may ask for additional information after considering material submitted in response to an earlier request.

The importance of the OIM's enforcement powers

- 3.15 Given the importance of information to the OIM's reporting, advisory and monitoring functions, there are a number of possible adverse consequences if an addressee fails to comply with a section 41 notice. If information is delayed, incomplete or unreliable this will impact on the quality of the OIM's advice and reports and thus the decisions based on these outputs, with potential implications for the smooth operation of the UK internal market and for the addressees.
- 3.16 The OIM will expect recipients to comply fully with any section 41 notice within the given deadline and will generally only agree to an extension in exceptional circumstances. This is especially the case where the OIM has engaged with them on the scope and purpose of the request and the proposed deadline for its completion, to help them comply.
- 3.17 The OIM can impose a penalty on a person who fails, without reasonable excuse, to comply with a section 41 notice. We set out in the next Chapter the broad principles the OIM expects to apply in its approach to enforcement.

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

General statement

- 4.1 As set out at paragraph 2.9, the Act empowers the OIM to impose a penalty in accordance with section 43, where a section 41 notice is not complied with.
- 4.2 In developing the Statement, the OIM has drawn on the experience of the CMA in the use of its powers to impose administrative financial penalties for non-compliance with some of the CMA's formal information gathering powers in relation to CA98 investigations, and its mergers and markets cases.³²
- 4.3 When assessing whether and in what amount a penalty should be set, the OIM 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 OIM's functions, the notice addressee's reason for the failure and the size and administrative and financial resources available to the addressee.
- 4.4 In particular, the OIM considers that where penalties are imposed these should help to ensure that the OIM can fulfil its functions and deter future non-compliance, without being disproportionate or excessive.

Factors influencing OIM's decision whether to impose a penalty

- 4.5 The OIM will consider whether to impose an administrative penalty on a case-by-case basis, taking into account all relevant circumstances.
- 4.6 However, the OIM 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 OIM's ability to fulfil its functions and to do so in a timely way;

³² Detailed guidance on the CMA's approach to penalties and other sanctions is available in [Administrative Penalties: Statement of policy on the CMA's approach \(CMA4\)](#).

- the failure to comply is significant (whether committed intentionally or negligently);³³
- the addressee has previously failed to comply with a section 41 notice whether as part of the OIM's current consideration or previously (that is, there is an element of 'recidivism');
- the imposition of a penalty is required to encourage swift compliance by the addressee; and/or
- the addressee sought to obtain an advantage or derive benefit from the failure to comply.

4.7 The procedure used by the OIM when issuing a section 41 notice may also be relevant to the imposition of penalties. The OIM may be more likely to impose a penalty for failure to comply with the section 41 notice where the OIM has provided a draft request or set a deadline for compliance which takes the addressee's comments into account.

Reasonable excuse

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

4.9 The OIM will expect the person to whom the section 41 notice applies to be responsible for ensuring the requirements are fully understood and that the OIM's powers are complied with, even when, for example, using external advisers to assist them with their response.

³³ For the purposes of this Statement a failure is 'intentional' if the addressee must have been aware, or could not have been unaware, that its conduct was of such a nature as to lead to a failure to comply and a failure is 'negligent' if the addressee ought to have known that its conduct would result in a failure to comply with a section 41 notice.

Factors influencing the type of penalty imposed

- 4.10 Penalties for failing to comply with a section 41 notice can be a single fixed amount, a daily rate or both.³⁴ Penalties for intentionally obstructing or delaying the provision of information will be a fixed amount.³⁵
- 4.11 Where the OIM has a choice as to the type of penalty that may be imposed, it will consider a number of factors, in the round, on a case-by-case basis. These may include the factors referred to in this chapter as well as the following non-exhaustive factors:
- **The factual circumstances in which a penalty is being considered.** The assessment of whether to impose a fixed or daily penalty, or a combination of the two, will involve consideration of the need to incentivise timely compliance with the section 41 notice. Daily penalties, for example, may be particularly appropriate in situations where timely compliance is likely to be of utmost importance, for example where the advice or report that the response will inform is considered urgent and/or vital to OIM's fulfilment of its functions.
 - **The deterrent effect of the penalty.** The OIM will consider the level of penalty that is likely to have the requisite deterrent effect, both on the addressee and more generally on those who may be subject to current or future section 41 notices, having regard to the need for the penalty to be proportionate in all the circumstances. This assessment may affect the level of fixed, daily or combined penalty that is set.
 - **Whether the failure to comply has been remedied.** In some cases where an initial failure has been remedied, it may still be appropriate to impose a penalty to reflect the nature and gravity of the failure and/or to achieve deterrence. In those circumstances, only a fixed penalty would be available as daily penalties will only be used for a continuing period of non-compliance after formal notice of the imposition of a penalty. In cases of an extended and unremedied failure to comply with a section 41 notice, the OIM may be more likely to impose a daily penalty for the duration of the failure, together with an additional fixed penalty to underline the seriousness of the failure and/or achieve deterrence, while still ensuring that the penalty is proportionate in all the circumstances.

³⁴ See section 43(2).

³⁵ See section 43(3).

Factors influencing the level of penalty imposed

- 4.12 Under section 43 of the Act, the OIM may impose such administrative penalties as it considers appropriate subject to the statutory maxima specified by order of the Secretary of State.³⁶
- 4.13 The current maxima specified by The United Kingdom Internal Market Act 2020 (Maximum Penalty) Regulations 2021 are:
- £30,000 fixed amount;³⁷
 - £15,000 (daily rate); and
 - £30,000 and £15,000 (fixed amount and daily rate together).
- 4.14 The OIM 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 OIM is likely to set penalties towards the upper end of the relevant statutory maxima for the most serious failures to comply and/or where it is necessary to do so having regard to the addressee's size and financial position. The assessment may include the factors referred to in this chapter as well as the following non-exhaustive factors on a case-by-case basis:
- the scale of the adverse effects on the case (including costs) that will be incurred by the OIM if it has to extend its work;
 - the nature and gravity of the failure, including: whether it was intentional or negligent, whether there was any attempt to conceal the failure and the extent of compliance with other aspects of the OIM's work;
 - the size of the addressee (if they are a business) and the administrative and financial resources available to them;
 - the reasons given for the failure;
 - whether the addressee has derived any advantage from its failure to comply;

³⁶ See sections 43(4) to 43(8).

³⁷ The fixed amount refers to either a penalty for a breach of a requirement of a notice under section 41 of the Act, or for intentionally obstructing or delaying a person copying documents provided in accordance with an information notice (section 41(7) of the Act).

- any steps taken in mitigation to ensure failures do not occur in the future, or to discipline responsible individuals;
- the continuation or cessation of the failure after the addressee became aware of it, or of the OIM's concern that there might have been a failure;
- whether the involvement of senior management contributed to the failure, including whether such individuals made arrangements for suitable resources to be made available to comply with the section 41 notice; and
- whether the addressee has previously failed to comply. The seriousness of any past failure(s), the time that has elapsed since the failure(s) occurred, and any other relevant factors may be taken into account.

The procedures OIM will follow

- 4.15 The OIM will follow the procedures set out below when it proposes to apply an administrative penalty. Notwithstanding the procedures below, for the purposes of assessing duration relevant to a fine, time will start to run from when the failure takes place. However, daily penalties are only incurred from the date of the penalty notice.³⁸
- 4.16 Where it appears that the addressee has failed to comply with a section 41 notice without reasonable excuse, the OIM 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. The addressee will be given a reasonable opportunity to make written representations on the provisional decision to the OIM. The period within which representations must be received will be determined on a case-by-case basis having regard to the nature of the failure to comply and the constraints of the relevant timetable, and in any event will not usually exceed one week.
- 4.17 If the OIM decides to impose a penalty for non-compliance with a section 41 notice, it will notify the addressee of its decision as soon as practicable thereafter and will issue a notice (see paragraph 4.18 below).

³⁸ Section 43(9).

Process

- 4.18 Once the OIM has reached a decision to impose an administrative penalty, the OIM shall give notice of the penalty to the addressee as soon as practicable.³⁹ This notice must specify:
- that the OIM has imposed a penalty on the addressee;
 - whether the penalty is a fixed penalty, calculated by reference to a daily rate, or both;
 - the amount of the penalty, and where calculated by reference to a daily rate, the day on which the amount starts to accumulate and might cease to accumulate;⁴⁰
 - the failure, obstruction or delay which the OIM considers gave it the power to impose a penalty;
 - any other facts which the OIM 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 OIM;
 - 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
 - the details of the addressee's rights to apply to have the dates on which payments are due varied or to appeal the imposition or nature of the penalty, or the amount of the penalty or the specified date or dates of payment.⁴¹
- 4.19 When the OIM has reached a decision to impose an administrative penalty it will publish brief details of the penalty on its webpages, including the addressee, the reason for imposing the penalty, and the nature and size of the penalty.

³⁹ Section 112(1) EA02.

⁴⁰ See sections 43(9) and 43(10) of the Act.

⁴¹ Sections 112(2)(i) and 114(1) EA02.

Interest

- 4.20 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 1838.⁴²

Appeals

- 4.21 Where the addressee is aggrieved by the imposition or the nature of the penalty for failure to comply with a section 41 notice, its amount or the date by which the penalty is required to be paid, the addressee may appeal to the Competition Appeal Tribunal.⁴³
- 4.22 Where an addressee makes an appeal, the OIM will not require a penalty to be paid until the application has been determined, withdrawn or otherwise dealt with by the Tribunal.
- 4.23 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 OIM may recover the penalty and any interest which has not been paid.

⁴² Sections 113(1) EA02.

⁴³ Section 114 EA02.