

Administrative Penalties:

Statement of Policy on the
CMA's Approach
Consultation document

11 July 2024

CMA4con



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1. Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting on draft guidance *Administrative Penalties: Statement of Policy on the CMA's Approach* (Draft CMA4).
- 1.2 The Draft CMA4 sets out the CMA's draft statement of policy regarding its powers to take enforcement action and impose administrative penalties in respect of breaches of Investigatory Requirements and Remedy Requirements (as defined in paragraph 1.3 below) under the Competition Act 1998 (CA98), the provisions of the Enterprise Act 2002 (EA02) relating to markets and mergers, and the provisions of the Digital Markets, Competition and Consumers Act 2024 (DMCCA24) relating to the CMA's digital markets¹ and motor-fuel information gathering functions.²
- 1.3 'Investigatory Requirements' for the purposes of the Draft CMA4 are:
 - (a) requirements arising from the CMA's exercise of its investigative, and where relevant, compliance reporting powers under the CA98, EA02 or the DMCCA24 (for example, a requirement to provide information in response to a notice sent under section 26 CA98 or section 109 EA02), and
 - (b) the merger reporting requirement in Chapter 5 of Part 1 of the DMCCA24.
- 1.4 'Remedy Requirements' for the purposes of the Draft CMA4 are requirements imposed or accepted by the CMA to address, and as relevant, remedy concerns the CMA has identified in cases under the CA98 and EA02 (whether on an interim or final basis) and on an interim basis under the DMCCA24 (for example, an interim measure in a mergers case under sections 72, 80 or 81 or paragraph 2 of Schedule 7 EA02, an order imposed by the CMA under section 161 EA02 following a market investigation, or an Interim Enforcement Order (IEO) imposed under section 32 DMCCA24).
- 1.5 Breaches of Investigatory Requirements and Remedy Requirements for the purposes of this statement of policy are set out in Annex 1 of the Draft CMA4. In the Draft CMA4, Investigatory Requirements and Remedy Requirements are together referred to as 'Requirements'.

¹ See Part 1 of the DMCCA24.

² See sections 311—318 of the DMCCA24.

- 1.6 When approved by the Secretary of State,³ the finalised CMA4 will be published. It will replace current guidance document [CMA4 Administrative penalties: Statement of Policy on the CMA's approach which applies to the CMA's current administrative penalty functions](#) (the Current CMA4).
- 1.7 The CMA is inviting comments on the Draft CMA4 by 5pm on 23 August 2024.

³ See paragraph 2.10 below.

2. Background

Administrative penalties – the DMCCA24

2.1 The DMCCA24 extends the CMA's powers to impose penalties for businesses that breach Investigatory or Remedy Requirements.⁴

2.2 While there are currently administrative penalties for breaches of investigatory requirements under the CA98 and the EA02, they are limited to fixed penalties of £30,000 and daily penalties of £15,000, irrespective of the turnover of the business.⁵ Moreover, at present there are no administrative penalties for breaches of most remedy requirements, other than for breaches of interim measures imposed in merger cases under the EA02.⁶ These existing administrative penalties under the CA98 and the EA02 are addressed in the Current CMA4.

2.3 As a result of changes made by the DMCCA24, where a business fails, without reasonable excuse, to comply with an Investigatory Requirement in a CMA competition, markets, digital markets or merger case (such as a statutory information request, for example, under section 26A of the CA98 or section 109 of the EA02), or

- breaches the new CA98 duty of evidence preservation,
- conceals, falsifies or destroys evidence,
- provides false or misleading information, or
- obstructs a CMA investigation⁷

the CMA will be able to impose fixed penalties of up to 1% of the business's annual worldwide turnover. The CMA will also have the power to impose an additional or alternative daily penalty of up to 5% of daily worldwide turnover while non-compliance with an investigative measure continues.⁸

2.4 Where an individual who has been named a senior manager under the CMA's digital markets functions has failed, without reasonable excuse, to prevent certain failures or actions of the firm (relating to non-compliance with the

⁴ See paragraphs 1.3 and 1.4 above.

⁵ See sections 110 and 111 (mergers) and 174A, 174B and 174D (markets) of the EA02 and section 40A of the CA98.

⁶ Section 94A of the EA02. The CMA can impose a fixed penalty for 5% of global turnover in such cases.

⁷ See Schedule 10 of the DMCCA24 in respect of such penalties in CA98 and markets and mergers cases, and section 87 of the same in respect of digital markets investigatory penalties.

⁸ Ibid.

information notice and/or to the provision of false or misleading information)⁹ the CMA has the power to impose a penalty both on the individual named as a senior manager, as well as on the firm itself.¹⁰

2.5 The DMCCA24 also introduces similar penalties for non-compliance with information notices in respect of the CMA's motor-fuels monitoring functions.¹¹

2.6 The DMCCA24 also introduces powers to impose:

- civil penalties of up to 5% of annual global turnover on businesses that breach (without reasonable excuse) CA98 commitments or mergers and markets undertakings (including mergers interim measures undertakings), CA98 directions (including interim measures decisions), merger or markets orders (including interim measures orders), and
- daily penalties of up to 5% of daily turnover while non-compliance by the business with the relevant enforcement measure continues.¹²

2.7 Also as a result of the DMCCA24, a natural person not acting as a business who commits any of the breaches discussed in paragraphs 2.3, 2.4, and 2.6 above may be required to pay a fixed penalty of up to £30,000, as well as an additional daily penalty of up to £15,000 while non-compliance (as the case may be) continues.¹³ These are the same maximum amounts that currently apply to penalties for breaches of competition investigatory measures under the CA98 and the EA02 that are sanctionable by civil penalties.¹⁴

⁹ Section 87(1) of the DMCCA24.

¹⁰ Section 87(2) of the DMCCA24.

¹¹ See clauses 311-318 of the DMCCA24.

¹² See Schedule 11 of the DMCCA24. The CMA currently has the power to impose fixed administrative penalties of up to 5% of annual global turnover for breaches of merger interim measures in merger investigations: see section 94A EA02. Also relevant to the Draft CMA4 guidance is that the DMCCA24 creates a civil penalty regime for among other things breaches of IEOs imposed under the CMA's digital markets powers and in respect of breaches of digital markets merger reporting requirements under Chapter 5 of Part 1 of the DMCCA24: see sections 85(2)(a) and 85(4) of the DMCCA24. Breaches of such requirements under the digital markets regime can lead to fixed penalties of up to 10% of annual global turnover (for merger reporting requirements) and fixed penalties of up to 10% of annual global turnover and a daily penalty regime of up to 5% of daily turnover (for IEOs). See section 86(4) of the DMCCA24. See also paragraphs 2.12—2.14 below.

¹³ See Schedules 10 and 11 of the DMCCA24.

¹⁴ See, for example, section 40A CA98

Requirement for statement of policy

- 2.8 The CMA is required to prepare and publish a statement of policy in relation to the use of its enforcement powers – administrative penalties and (where applicable) powers to bring civil proceedings – under:
- (a) sections 94, 94AA, 109, 110, 167, 167A, 174, 174A of the EA02 (breaches of Requirements in respect of the CMA’s markets and mergers functions), and
 - (b) sections 31E, 34, 35A and 40ZE of the CA98 (breaches of Requirements in respect of the CMA’s CA98 functions).¹⁵
- 2.9 The CMA must also prepare and publish a statement of policy in relation to the exercise of its powers to impose a penalty under sections 85 and 87 DMCCA24 (which, for the purposes of the Draft CMA4, includes administrative penalties for breaches of Investigatory Requirements and Remedy Requirements relating to the CMA’s digital markets functions) and section 311 DMCCA24 (administrative penalties for breaches of Investigatory Requirements relating to the CMA’s motor fuels functions).¹⁶
- 2.10 No such statements of policy may be published until approved by the Secretary of State.¹⁷ When imposing such administrative penalties, the CMA must have regard to the relevant published statement of policy.¹⁸ When considering what is an appropriate substitute penalty in an appeal against any such penalties, the Competition Appeal Tribunal must have regard to the relevant published statement of policy.¹⁹

The Draft CMA4

- 2.11 For efficiency reasons and for ease of reference, the Draft CMA4 contains the required statement of policy for each of these functions, rather than having separate statements of policy for each administrative penalty function. The Draft CMA4 is therefore the statement of policy prepared and published

¹⁵ Sections 35C and 40B of the CA98 and sections 94B, 116, 167C and 174E of the EA02.

¹⁶ Section 91(1) DMCCA24 and section 314(1) DMCCA24.

¹⁷ Sections 35C(6) and 40B(5A) of the CA98, sections 94B(5), 116(5), 167C(5) and 174E(5) of the EA02, section 91(5) of the DMCCA24 and section 314(5) of the DMCCA24.

¹⁸ *Ibid.*

¹⁹ See section 114(5A) of the EA02.

pursuant to each of the provisions mentioned in paragraphs 2.8—2.9 above.²⁰ The Draft CMA4 is an updated version of the Current CMA4.

Digital markets competition requirements

- 2.12 The Draft CMA4 contains the required statement of policy in relation to the CMA's powers to impose administrative penalties for breaches of Investigatory Requirements imposed under the digital markets regime, created by Part 1 of the DMCCA24.²¹ The Draft CMA4 does not include the statement of policy covering the penalties for breaches of digital markets competition requirements under the DMCCA24,²² save for two exceptions.
- 2.13 The two exceptions are penalties for breaches of merger-reporting requirements²³ and breaches of interim enforcement orders (IEOs),²⁴ under the digital markets competition regime created by Part 1 of the DMCCA24. The CMA considers breaches of these requirements to be more akin to the other breaches covered under in the Draft CMA4, and that they are better addressed in the Draft CMA4.²⁵
- 2.14 The draft *Digital Markets Competition Regime Guidance*, which is also subject to consultation, contains the required statement of policy in respect of all other penalties imposed for breaches of digital markets competition requirements.²⁶

Consumer protection law – direct enforcement regime

- 2.15 The Draft CMA4 also does not cover administrative penalties²⁷ under the new consumer protection law direct enforcement regime created by the DMCCA24.²⁸ Such penalties will be addressed in a separate consumer enforcement guidance document, to be published in due course.

²⁰ The CMA's statement of policy for the purposes of penalties imposed under section 85 of the DMCCA24 that are not covered by this guidance will be *Digital Markets Competition Regime Guidance*. See paragraph 2.14 below.

²¹ See section 87 of the DMCCA24 and section 91(1) of the DMCCA24.

²² See generally section 85 of the DMCCA24 for penalties for breaches of competition requirements in respect of digital markets.

²³ See section 85(4) of the DMCCA24.

²⁴ See sections 32 and 85(2)(a) of the DMCCA24.

²⁵ See section 91(1) of the DMCCA24.

²⁶ See sections 85(2) (excluding IEOs under section 85(2)(a)) and 85(3) of the DMCCA24.

²⁷ Penalties for breach of directions and undertakings, provision of false or misleading information, and non-compliance with information notices

²⁸ See Chapter 4 of Part 3 of the DMCCA24.

References to other guidance

2.16 The Draft CMA4 makes reference to other CMA guidance documents, including some which are either also being consulted on (for example draft [Digital Markets Competition Regime Guidance](#) – see paragraph 2.14 above), or on which the CMA expects to consult (see for example reference to updated markets guidance in paragraph 1.11 of the Draft CMA4 and to an updated CMA11 in Annex 3 of the Draft CMA4 – for the latter, see also paragraph 2.25 below). The final version of CMA4 will as necessary reference any final versions of such expected guidance.

Other functions

2.17 For the avoidance of doubt, the Draft CMA4 also does not cover the CMA's Office for the Internal Market or Subsidy Advice Unit administrative penalties functions. These remain subject to their own guidance.²⁹

The approach taken in the Draft CMA4

'In the Round Approach'

2.18 Under the Current CMA4, administrative penalties are calculated using an 'in the round' approach, rather than a 'stepped' approach.³⁰ In other words, rather than having a series of discrete steps in the process of calculating the penalties, the CMA sets out the factors that it has taken into account in deciding on the penalty, but then decides on the appropriate level of the penalty by assessing these factors in the round. This approach to penalty calculation has been upheld by the Competition Appeal Tribunal (CAT) in previous cases, including where substantial penalties have been imposed.³¹

2.19 The Draft CMA4 retains the 'in the round' approach to penalty calculation from the Current CMA4. The CMA considers that continuation of this approach is appropriate, which has provided a transparent but flexible approach to

²⁹ See [Statement of policy on the enforcement of the SAU's information gathering powers \(publishing.service.gov.uk\)](#) and [Statement of policy on the enforcement of the OIM's Information Gathering Powers \(publishing.service.gov.uk\)](#)

³⁰ The draft [Digital Markets Competition Regime Guidance](#) proposes a stepped approach for penalties imposed for substantive requirements imposed under Part 1 of the DMCCA24. CMA73 [CMA's Guidance as to the Appropriate Amount of the Penalty](#) takes a stepped approach in respect of breaches of the Chapter I and Chapter II prohibitions of the CA98.

³¹ See for example the CAT's judgments in [Electro Rent v CMA](#) and in [Virgin Media v Ofcom \(noting, for example, paragraph 117 of the latter judgment\)](#).

administrative penalty setting for breaches of the type covered by the Draft CMA4, tailored to the circumstances of each case. The CMA has also included detail in the Draft CMA4 making clear which factors are likely to lead to an increase or reduction in the level of the penalty.

- 2.20 The primary focus of administrative penalties addressed in the Draft CMA4 is on the interference with the CMA's investigatory and remedies powers, and intrinsically to the CMA's ability to carry out its work. The context of such administrative penalties is different, for example, from penalties for substantive breaches where there is a greater focus on the penalty reflecting the specific competitive harm arising from the breach and for this to be reflected in the approach to penalty calculation. The CMA considers that a 'stepped' approach to penalty calculation remains appropriate, among other things, in respect of such substantive breaches.³²

Non-penalty enforcement/withdrawal of CMA136

- 2.21 Although the DMCCA24 will give the CMA the power to impose financial penalties for breaches of EA02 and CA98 Remedy Requirements, the CMA will retain the parallel power to commence civil proceedings in respect of such breaches and in the case of breaches of final mergers and markets remedies, to impose directions.³³
- 2.22 In addition to imposing a penalty, the CMA can also take informal non-penalty enforcement action (such as agreeing actions to end a breach and to improve practices and processes in the future).
- 2.23 The existing CMA136 [Merger and market remedies: Guidance on reporting, investigation and enforcement of potential breaches](#) deals among other things with non-penalty enforcement against final markets and mergers remedy breaches.
- 2.24 Having regard to the statutory requirements discussed in paragraph 2.8 above, the CMA has adapted the non-penalty enforcement content from CMA136 to apply to Remedy Requirements (as relevant) and has included it in the Draft CMA4 at Annex 3.
- 2.25 The remainder of CMA136 (which concerns the monitoring and transparency of markets and mergers remedies) is expected to be adapted for inclusion in

³² See for example the draft [Digital Markets Competition Regime Guidance](#) and CMA73 [CMA's Guidance as to the Appropriate Amount of the Penalty](#).

³³ See section 34 of the CA98, and sections 94 and 167 of the EA02.

updated guidance [Variation and termination of undertakings and orders: CMA11](#), on which the CMA plans to consult separately. That expected guidance is referenced in Annex 3 of the Draft CMA4.

Reasonable excuse

2.26 The CMA has provided further guidance in the Draft CMA4 on how it will assess claims for reasonable excuse for non-compliance with the Investigatory and/or Remedy Requirements. Given that the CMA can send compulsory information gathering notice to persons outside the UK,³⁴ the Draft CMA4 includes discussion of how the CMA expects to assess claims that a party has a reasonable excuse for non-compliance on the grounds of a foreign law requirement (see paragraph 2.9 of the Draft CMA4).

Turnover Statutory Instruments (SIs)

2.27 The CMA understands that the Government intends to consult on, and make, Statutory Instruments for the purposes of calculating statutory maxima for the various administrative penalties covered by the Draft CMA4 ('the Turnover SIs').

2.28 Once the Turnover SIs have been finalised, the CMA will reference them in the final CMA4, along with any relevant text where necessary. At this juncture, the CMA anticipates that the Turnover SIs will likely only necessitate descriptive additions to the final version of CMA text, not requiring separate consultation.

³⁴ See for example, Schedule 13 of the DMCCA24.

3. Scope of the consultation

- 3.1 This consultation seeks the views of interested parties on the Draft CMA4 which is published separately on the consultation page.
- 3.2 After the consultation initiated by this consultation document, the CMA will prepare the final CMA4 for submission to the Secretary of State, taking into account the feedback received as part of this consultation.
- 3.3 The final CMA4 will take effect from the date of its publication, subject to the provisions of Statutory Instruments the Government will make with respect to commencement of the administrative penalties powers that the final CMA4 covers.

4. Consultation process

How to respond

- 4.1 The CMA is publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments on the Draft CMA4.
- 4.2 The CMA encourages you to respond to the consultation in writing (by email) using the contact details provided in paragraph 4.5 below. Please provide supporting evidence or examples for your views where possible.
- 4.3 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 4.4 In accordance with the CMA's policy of openness and transparency, the CMA will publish non-confidential versions of responses on its webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential version for publication on the CMA's webpages which omits that material and which explains why you regard it as sensitive.

Duration

- 4.5 The consultation will run for six weeks. Responses should be submitted by email by 5pm on 23 August 2024 and should be sent to:
cma4draft@cma.gov.uk

Compliance with government consultation principles

- 4.6 In preparing this consultation, the CMA has taken into account the published government consultation principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

Statement about how the CMA will use information and personal data that is supplied in consultation responses

- 4.7 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and

the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.

- 4.8 The CMA is processing this personal data for the purposes of its work. This processing is necessary for the performance of its functions and is carried out in the public interest, in order to take consultation responses into account.
- 4.9 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long the CMA retains personal data, see the CMA's Privacy Notice.
- 4.10 The CMA's use of all information and personal data that it receives is also subject to Part 9 of the EA02. The CMA may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, the CMA will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in the CMA's opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 4.11 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, if you have made any representations about the confidentiality of any information contained in your response, the CMA will take such representations into consideration. The CMA will also be mindful of its responsibilities under the data protection legislation referred to above and under Part 9 of the EA02.
- 4.12 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

Next steps

- 4.13 After the consultation and consideration of the responses received, the CMA will prepare a final CMA4 for submission to the Secretary of State.
- 4.14 The CMA will publish the final CMA4 approved by the Secretary of State on its webpages at <http://www.gov.uk/cma>. The CMA will also publish non-confidential versions of the responses received during the consultation.

These documents will be available on the CMA's webpages and respondents will be notified when they are available.