

Administrative Penalties: Statement of Policy on the CMA's Approach

CMA4con

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1 INTRODUCTION AND POLICY OBJECTIVES

- 1.1 This document sets out the CMA’s 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 1.2 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 markets competition regime and motor-fuel information gathering functions.¹
- 1.2 ‘Investigatory Requirements’ for the purposes of this statement of policy are requirements imposed on a person under the relevant statute in respect of the CMA’s exercise of its investigative, and where relevant, compliance reporting powers under the CA98, EA02 and the DMCCA24 (for example, a requirement to provide information in response to a notice sent under section 26 CA98 or section 109 EA02) and in respect of requirements in Chapter 5 of Part 1 of the DMCCA24. ‘Remedy Requirements’ for the purposes of this statement of policy 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 section 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). Breaches of Investigatory Requirements and Remedy Requirements for the purposes of this statement of policy are set out in Annex 1. In this statement of policy, Investigatory Requirements and Remedy Requirements are together referred to as ‘Requirements’.

¹ Powers to conduct market studies and make market investigation references under Part 4 of the EA02 and powers to apply the prohibitions on undertakings engaging in anticompetitive agreements or on the abuse of a dominant market position under CA98 are applied concurrently by the sectoral regulators listed below, in relation to their sectors:

- the Civil Aviation Authority (CAA) (air traffic services and airport operation services)
- the Financial Conduct Authority (FCA) (financial services, and claims management services in Great Britain)
- the Northern Ireland Authority for Utility Regulation (NIAUR) (gas, electricity, water and sewerage services in Northern Ireland)
- the Office of Communications (Ofcom) (communications)
- the Office of Gas and Electricity Markets (Ofgem) (gas and electricity markets in Great Britain)
- the Office of Rail and Road (ORR) (railway services in Great Britain)
- the Payment Systems Regulator (PSR) (participation in payment systems), and
- the Water Services Regulation Authority (Ofwat) (water and sewerage markets in England and Wales) (together, the Regulators).

Accordingly, where the Regulators have concurrent powers, references to the CMA in this statement of policy should be taken to include the Regulators in relation to their respective industries. It should be noted that the Regulators may have their own guidance on penalties in relation to the exercise of their regulatory, rather than concurrent, powers.

1.3 In exercising its CA98, markets and mergers, and digital markets competition regime functions, the CMA must have regard to the need for making a decision, or taking action, as soon as reasonably practicable (the duty of expedition).² The duty of expedition applies to the administrative penalties powers exercisable in respect of such functions, as covered by this statement of policy.

Requirement for a statement of policy and scope of this document

1.4 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).³

1.5 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 this statement, includes administrative penalties for breaches of Investigatory Requirements and Remedy Requirements relating to the CMA’s digital markets competition regime functions) and section 311 DMCCA24 (administrative penalties for breaches of Investigatory Requirements relating to the CMA’s motor fuels functions).⁴

1.6 No such statements of policy may be published until approved by the Secretary of State.⁵

1.7 This document is the statement of policy (Statement) prepared and published pursuant to each of the provisions mentioned in paragraphs 1.4—1.5 above.⁶ It was approved by the Secretary of State on [DATE] and reflects the views of the CMA at the time of publication. The CMA may publish a revised Statement from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. It may in due course be supplemented, revised or replaced. When

² Section 25(5) of the Enterprise and Regulatory Reform Act 2013.

³ Sections 35C and 40B of the CA98 and sections 94B, 116, 167C and 174E of the EA02.

⁴ Section 91(1) DMCCA24 and section 314(1) DMCCA24.

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

⁶ 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 is *Digital Markets Competition Regime Guidance (CMAXXX)*.

preparing or revising its Statement the CMA must consult such persons as it considers appropriate and it must consult the Secretary of State.⁷ The CMA's webpages will always display the latest version of the Statement.

- 1.8 Although it covers many of the points likely to be of immediate concern to businesses and their advisers in relation to enforcement action and the imposition of administrative penalties for failure to comply with the Requirements, this document is not exhaustive. It cannot be seen as a substitute for the CA98, EA02 or DMCCA24 and the regulations and orders made under such legislation, nor can it be cited as a definitive interpretation of the law. Anyone in any doubt about whether they may be affected by the legislation should consider seeking legal advice.
- 1.9 When reaching decisions regarding enforcement action for failure to comply with the Requirements described above, the CMA must have regard to this Statement.⁸ The CMA will apply this Statement flexibly according to the circumstances of the case. However, different considerations may be relevant to the assessment of the appropriate administrative penalty, depending on which statutory power the CMA is using.
- 1.10 Where applicable, this document also sets out the considerations relevant to extending the period in which the CMA will carry out its investigations, consider UILs and prepare and publish its reports and/or decisions in mergers and markets as well as extending the period within which it carries out certain functions in digital markets competition regime cases.
- 1.11 You may find it useful to read this document alongside other relevant CMA documents, including *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2); (CMA108); *[updated Markets Guidance]* (CMA3); *Digital Markets Competition Regime Guidance* (CMAXXX); and *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8).
- 1.12 This Statement has effect from date of publication.

⁷ Sections 35C(4) and 40B(4) of the CA98, sections 94B(4), 116(4), 167C(4) and 174E(4) of the EA02, section 91(4) of the DMCCA24 and section 314(4) DMCCA24.

⁸ Sections 35A(2) and 40ZE(3) of the CA98, sections 94AA(3), 110(9), 167A(3) and 174A(8) of the EA02, sections 91(7) and 314(7) of the DMCCA24.

Administrative Penalties for Breaches of Requirements

- 1.13 A person that breaches any Requirement is referred to as **the Relevant Person**. Depending on the context, the Relevant Person may refer to one or more individuals or to corporate or unincorporated entities, or an undertaking.⁹

Maximum penalties for breaches of Requirements

- 1.14 For breaches of Requirements, the CMA may impose such administrative penalty as it considers appropriate, subject to the statutory maxima.¹⁰ The statutory maxima for breaches of Requirements are set out in Annex 1.

Policy Objectives

- 1.15 Given the importance to businesses and consumers of the outcomes of its mergers, markets, digital markets competition regime and CA98 investigations, and the need for such decisions to be taken in accordance with statutory or other timetables, it is vital for the CMA to be able to take such decisions based on information that is accurate and complete, and to gather that information as quickly as possible. This is particularly important given the CMA's duty of expedition, which applies to the CMA's exercise of its CA98, markets and mergers, digital markets competition regime functions.¹¹ Consistent with this, the legislative intention behind the CMA's Investigatory Requirements is to provide the CMA with appropriate investigatory powers during all phases of its investigations to be able to carry out its functions.
- 1.16 The CMA's Investigatory Requirements are therefore intended to:
- ensure that the CMA can expediently gather accurate and reliable information to carry out its functions with the best available evidence in compliance with relevant investigation timetables (in particular but not limited to statutory timetables in mergers and markets cases);
 - prevent action which might prejudice any reference, impede the taking of action following a reference, or cause detrimental and

⁹ The term 'undertaking' is not defined in CA98 or DMCCA24, but its meaning has been set out in EU case law prior to the UK's exit from the European Union (EU Exit), which remains relevant pursuant to section 60A CA98. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, associations of undertakings (for example, trade associations) non profit-making organisations and (in some circumstances) public entities that offer goods or services on a given market. A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of each case.

¹⁰ See section 40ZE CA98, section 110 EA, section 174A EA02, sections 86 and 88 DMCCA24 and section 312 DMCCA24.

¹¹ See paragraph 1.3 above.

- irreversible changes to market dynamics; and
- ensure that the threat of penalties will deter future non-compliance with relevant CMA powers by encouraging all parties to take their compliance responsibilities seriously and take appropriate steps to ensure compliance with Requirements.

1.17 It follows that there are a number of possible adverse consequences for the CMA if a person fails to comply with an Investigatory Requirement including the risk that:

- the costs of the investigation may increase;
- the investigation may be delayed, which could risk harm to businesses and consumers, and again, increase costs for the CMA and parties;
- the accuracy or quality of the CMA's decisions may be reduced;
- the ability of the CMA to take remedial action that may be required in a CMA case may be prejudiced; and/or
- in the most extreme circumstances the CMA could come to a different decision from the one it would have reached if the information had been available or the Requirement had been complied with.

1.18 CMA Remedy Requirements address and, as relevant remedy, or put in place interim requirements to address, concerns the CMA has identified in cases under the CA98 and EA02.

1.19 Breaches of a Remedy Requirement can mean that

- the benefits of the CMA's enforcement work are not realised;
- competition is reduced or distorted and markets do not work as well as they otherwise would;
- consumers suffer unnecessary harm;
- where the Remedy Requirement is an interim measure in a CA98 Case, there might be damage to competition or the public interest that cannot subsequently be remedied;
- where the Remedy Requirement is an interim measure in a merger case, any CMA merger reference might be prejudiced, or the taking of any action might be impeded, that might be necessary following the CMA's investigation;
- where the Remedy Requirement is an interim measure in a Market Investigation Reference, the remedial action that the CMA considers necessary to take might be impeded; and/or
- where the Remedy Requirement is an IEO in a digital markets competition regime case, the effectiveness of other steps the

CMA's may take may be reduced or impeded, or there might be damage to a person or category of person or to the public interest.

- 1.20 The CMA's penalty powers play an important role in incentivising compliance with Requirements and avoiding the potential consequences described above. Therefore, the CMA will take failures to comply seriously and will impose a penalty where appropriate.¹²

Interaction with power to extend investigations

- 1.21 In certain circumstances, the CMA may extend the period within which certain duties to carry out mergers and markets investigations or to consider undertakings in lieu of a reference (UILs) or implement remedies must be discharged. This will apply if the CMA considers that a relevant person has failed (with or without reasonable excuse) to comply with any Investigatory Requirement issued by the CMA in relation to a merger reference or investigation or where any person has failed (with or without reasonable excuse) to comply with an Investigatory Requirement issued by the CMA during the remedies implementation phase of a market investigation.¹³ The CMA may also extend the time limit within which to carry out certain of its digital markets competition regime functions where a person has failed to comply with applicable Investigatory Requirements.¹⁴
- 1.22 The CMA has the power both to extend its statutory timetable as well as to impose an administrative penalty on parties who without reasonable excuse fail to comply with Investigatory Requirements imposed in mergers or markets investigations, as well as in respect of certain of its digital markets competition regime investigations or functions.¹⁵ This is discussed further in Chapter 2 below.

¹² And note that sections 92(2)(a) and 162(2)(a), and Schedule 24, of the EA02 provide that the CMA shall, in particular, from time to time, consider whether an EA02 enforcement undertaking or order has been or is being complied with. See paragraph A.4 of Annex 3 below. Similarly, section 35 DMCCA24 requires the CMA to keep IEOs under review.

¹³ Sections 34ZB(1) and 39(4) EA02 (mergers) and section 138A(3) EA02 (markets). This power is in addition to the power to extend the timetable where there are special reasons to do so (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) and [*updated Markets Guidance*] (CMA3)). And note the power to extend time limits in a merger reference by agreement with the parties: see section 39(2A) EA02.

¹⁴ Section 104(3) DMCCA24. Such an extension comes into force when published by the CMA and continues in force until the day on which the CMA publishes a notice of its decision to end the extension: see section 104(4) DMCCA24. The CMA must publish such a notice to end the extension where the person who failed to comply with the Investigatory Requirement provides the required information, or as the case may be answers questions and provides explanations, to the satisfaction of the CMA: see section 104(5) DMCCA24.

¹⁵ See, for example, section 110(2) EA02 (mergers), section 174A(2) EA02 (markets).

Criminal offences

1.23 Certain criminal offences in relation to interference with the CMA's investigatory powers operate alongside the enforcement powers detailed in this Statement. It is a criminal offence where a person:

- intentionally alters, suppresses or destroys any document which the person has been required to produce by the CMA under its EA02 powers in mergers and markets cases;¹⁶
- knowingly or recklessly provides false or misleading information to the CMA or the Secretary of State in connection with any of their mergers functions under Part 3 of the EA02,¹⁷ or to the CMA, Secretary of State or appropriate minister in connection with any of their markets functions under Part 4 of the EA02;¹⁸
- obstructs the CMA in the exercise of its powers to carry out inspections under sections 27, 28 or 28A of the CA98
- intentionally or recklessly destroys or otherwise disposes of, falsifies or conceals a document which they have been required to produce under the CMA's CA98 powers;
- knowingly or recklessly provides false or misleading information to the CMA or another person in connection with a CA98 investigation;¹⁹
- having been required to give information to the CMA or any other person under a provision of Chapter 6 of Part 1 of the DMCCA24, intentionally or recklessly destroys or otherwise disposes of it, falsifies it or conceals it, or causes or permits its destruction, disposal, falsification or concealment;
- gives information to the CMA in connection with any of the CMA's digital markets competition regime functions that is false or misleading in a material particular, and knows that it is or is reckless as to whether it is false or misleading in a material particular;
- gives information to another person which is false or misleading in a material particular and knows the information to be false or misleading in a material particular, or is reckless as to whether the information is false or misleading in a material particular and knows that the information will be given to the CMA in connection with any of its digital markets competition regime functions;
- intentionally obstructs an officer of the CMA acting in the exercise of the officer's powers under section 74 of the DMCCA24 or a warrant

¹⁶ Section 110(5) EA02 (mergers) and section 174A(4) EA02 (markets).

¹⁷ Section 117 EA02. This provision also applies where such information is provided to OFCOM under Part 3 of EA02.

¹⁸ Section 180 EA02.

¹⁹ Sections 42 to 44 CA98.

issued under section 75 of the DMCCA24;²⁰

- having been required to give information to the CMA under section 310 of the DMCCA24, intentionally or recklessly destroys or otherwise disposes of it, falsifies it or conceals it, or causes or permits its destruction, disposal, falsification or concealment;
- gives information to the CMA in connection with an information notice under section 311 of the DMCCA24 that is false or misleading in a material particular, and knows that it is or is reckless as to whether it is false or misleading in a material particular;
- gives information to another person which is false or misleading in a material particular and either knows the information to be false or misleading in a material particular or is reckless as to whether the information is false or misleading in a material particular and knows that the information will be given to the CMA in connection with an information notice under section 311 DMCCA24.²¹

1.24 In relation to obstructing the exercise of powers under section 27 of the CA98, a person is liable, on summary conviction, to a fine and, on conviction on indictment, to a fine.²² For all the other EA02 and CA98 offences, a person is liable, on summary conviction, to a fine and, on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.²³

1.25 In relation to offences under sections 93, 94, 95 and 315 of DMCCA24, a person is liable, on summary conviction, to a fine (in Northern Ireland or Scotland, a fine not exceeding the statutory maximum) and, on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.²⁴

1.26 Where an act is capable of constituting both (a) a failure warranting an administrative penalty **and** (b) a criminal offence, the CMA cannot impose an administrative penalty if the Relevant Person has been found guilty of the criminal offence.²⁵ Similarly, a criminal offence is not committed by the Relevant Person where the CMA has imposed an administrative penalty in respect of the same act.²⁶

²⁰ Sections 93, 94 and 95 DMCCA24.

²¹ Section 315 DMCCA24.

²² Section 42(6) CA98.

²³ Section 42(7), 43 and 44 CA98 and section 117 EA02.

²⁴ Sections 98 and 315(4) DMCCA24.

²⁵ Section 40ZA(2) CA98 and section 110(8) (mergers) EA02, section 174A(1C) EA02 (markets), section 92(1) DMCCA24 (digital markets competition regime) and 316(1) DMCCA24 (motor fuels) .

²⁶ Sections 42(8), 43(1A) and 44(2A) CA98, sections 110(1C) EA02 and 117(2A) EA02 (mergers), section 180 EA02 (markets), section 92(2) DMCCA24 (digital markets competition regime) and section 316(2) DMCC (motor fuels).

2. STATEMENT OF POLICY ON WHETHER AND IN WHAT AMOUNT ADMINISTRATIVE PENALTIES WILL BE IMPOSED

- 2.1 The CMA considers that penalties imposed on the Relevant Person for breaches of Requirements should, on the one hand, achieve the CMA's policy objectives of incentivising compliance with its Requirements and deterring future failures to comply, while not being disproportionate or excessive in all the circumstances of the case. When assessing whether and in what amount a penalty should be set, the CMA will have regard to the factors referred to in this chapter in the round, including the nature and gravity of the breach, any adverse effects on the CMA's investigation or ability to carry out its functions, any adverse effects on competition or on other businesses or consumers or on the public interest, the Relevant Person's reason for the breach, and the size and administrative and financial resources available to the Relevant Person.

Factors influencing decision to impose a penalty

General

- 2.2 The CMA will consider whether to impose an administrative penalty for breaches of Requirements on a case-by-case basis, taking into account all relevant circumstances, and having regard to the duty of expedition.^{27,28} The CMA will be more likely to impose a penalty where it considers one or more of the following factors are present:
- the breach (whether committed intentionally or negligently)²⁹ had or risked having an adverse impact:
 - on a CMA investigation or on the fulfilment of a CMA function;
 - on consumers, customers or suppliers (either in terms of the number actually or potentially affected or in terms of its impact on specific consumers, customer or suppliers), on competition and/or the public interest;

²⁷ Persistent and repeated unreasonable behaviour that delays the CMA's enforcement action is an aggravating factor under *CMA's Guidance as to the appropriate amount of penalty (CMA73)* for substantive infringements of the prohibitions under CA98 which has been adopted by the CMA. Where necessary and proportionate, the CMA will consider on a case-by-case basis whether any non-compliance with information gathering powers merits both an administrative penalty and the application of the aggravating factor in CMA73. Unreasonable behaviour or attempts to frustrate that delays the CMA's enforcement action is an aggravating factor under *Guidance on the Digital Markets Competition Regime (CMAXXX)*. Where necessary and proportionate, the CMA will consider on a case-by-case basis whether any non-compliance with Requirements merits both an administrative penalty and the application of the aggravating factor in (CMAXXX).

²⁸ See paragraph 1.3 above regarding the duty of expedition.

²⁹ For the purposes of this guidance, a failure is 'intentional' if the Relevant Person 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 Relevant Person ought to have known that its conduct would result in a failure to comply with a Requirement.

- the Relevant Person did not swiftly report the breach to the CMA when it became aware of the breach, in particular where the Relevant Person was required to do so (as for example, might be the case with an Remedy Requirement);
- the Relevant Person has previously failed to comply with a Requirement or decision, whether in the current investigation or previously (that is, there is an element of 'recidivism');
- the breach is ongoing and imposition of a penalty is required to encourage (swift) compliance by the Relevant Person with a Requirement;³⁰ or
- the Relevant Person obtained, or sought to obtain, an advantage or derive benefit from the failure.

2.3 The procedure used by the CMA when imposing Requirements may also be relevant to the imposition of penalties. The CMA may be more likely to impose a penalty for a failure to comply with Requirements where the CMA has provided a draft request or set a deadline for compliance which takes the Relevant Person's comments into account.³¹ Where relevant, parties should raise any potential difficulties in complying as early as possible within the timeframe set out in a Requirement – for example relating to administrative, resourcing, financial, logistical or practical issues – or any matters they do not understand with the case team as soon as possible after receiving a request, or as soon as they become aware that they may not meet the stipulated deadline or otherwise not be in a position to comply with a Requirement.

Reasonable excuse

2.4 Administrative penalties for breaches of Requirements can only be imposed if a failure to comply is 'without reasonable excuse'.³² The EA02, CA98 and DMCCA24 do not define the phrase. The circumstances that constitute a reasonable excuse are not fixed and the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis.³³ The CMA will apply an objective test as to whether an excuse put forward by the Relevant Person is reasonable.³⁴

³⁰ Note that the CMA may still impose a penalty where appropriate for a historic failure that is not ongoing.

³¹ Where practicable and appropriate (having regard to all the circumstances of the case and to CMA's duty of expedition – see paragraph 1.3 above), the CMA may discuss Investigatory Requirements with the intended recipient prior to giving the relevant notice so as to enable requests to be prepared that do not impose unnecessary burdens on recipients. The CMA will also seek to set reasonable deadlines for Investigatory Requirements and where draft Investigatory Requirements have been issued the final Investigatory Requirements will have considered any representations on proposed deadlines. For further details, see for example, *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6).

³² Section 35A(2)(b) and section 40ZE(1) CA98, section 94AA(1) and section 110(1) EA02, section 167A(1) and sections 174A(1) and 174(1A) EA02, and sections 85, 87 and 312 DMCCA24.

³³ *Electro Rent v CMA* at [2019] CAT 4 at para. 191.

³⁴ *Electro Rent v CMA* at [2019] CAT 4 at para. 69.

- 2.5 In doing so, the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or a significant factor or event beyond the Relevant Person's control has caused the failure, without which the failure would not otherwise have occurred. For example, there might be a reasonable excuse, depending upon the circumstances, where a significant and demonstrable IT failure (which could not reasonably have been foreseen or avoided) prevented the Relevant Person from meeting a deadline to produce information.
- 2.6 The CMA will expect the person to whom the Requirement applies to be responsible for ensuring Requirements are fully understood and that the CMA's powers are complied with, even when, for example, using external advisers or parties to assist them with their response. Parties should make known any difficulties and raise any queries as soon as possible. The CMA is unlikely (save in exceptional circumstances) to accept an excuse where the Relevant Person has not made a reasonable effort to meet a deadline in respect of a Requirement, for example because it was forgotten or overlooked.
- 2.7 The fact that the Relevant Person considered there were good commercial reasons for non-compliance with a Requirement is unlikely to constitute a reasonable excuse.³⁵
- 2.8 The CMA will also not accept as a reasonable excuse for non-compliance with a Requirement any claim that such compliance would constitute a breach of a non-disclosure agreement (NDA) to which the Relevant Person is party.³⁶ Nor will the CMA normally view as a reasonable excuse a claim that the Relevant Person cannot comply with a requirement to provide the CMA with information because of the Relevant Person's duties under the Data Protection Act 2018 (DPA18).³⁷

³⁵ *Electro Rent v CMA* at [2019] CAT 4 at para. 114.

³⁶ The CMA considers that such term in an NDA would be unenforceable.

³⁷ The DPA18 allows processing of personal data for the purposes of a legal obligation: para. 3, Schedule 9 of the DPA18.

Foreign law

2.9 The Relevant Person might claim that it has a reasonable excuse for not complying with a Requirement because doing so could put the Relevant Person in breach of a foreign law. The CMA recognises that there may be circumstances in which this will be the case. In order to protect UK consumers and businesses from harmful practices, the CMA's starting position is that it is of the utmost importance that it is able properly to conduct investigations and that Relevant Persons comply with Requirements. Every claim of reasonable excuse will be considered on its facts. Where there is an express legislative barrier in foreign law, this will ordinarily be acceptable as a reasonable excuse, provided the Relevant Person shows:

- a) that the express legislative barrier in question prohibits compliance with the relevant Requirement, and
- b) that there are no steps the Relevant Person could feasibly take to facilitate compliance (such as, for example, the use of redactions or confidentiality rings).

In the case of other potential restrictions which fall short of an express legislative barrier, it should not be assumed that a risk of breaching these will constitute a reasonable excuse for non-compliance with a Requirement. Such claims will be considered on a case-by-case basis.

Decision to extend timetables/deadlines

2.10 In certain circumstances, the CMA may extend the statutory time limit within which certain mergers and markets functions must be discharged if it considers that the Relevant Person has failed (with or without reasonable excuse) to comply with any Investigatory Requirement which is given in relation to the reference or investigation.³⁸
³⁹ The CMA may also extend the time limit within which to carry out certain of its digital markets competition regime functions under the DMCCA24 in certain circumstances where a person has failed to comply with applicable Investigatory Requirements.⁴⁰

³⁸ Sections 34ZB(1), 39(3) and 41A(3) (mergers) of the EA02, provided that the Relevant Person is a relevant person within the meaning of sections 34ZB(2), 39(5) and 41A(4) (mergers) and section 138A(3) (markets) of the EA02 (where the concept of relevant person does not apply). Such an extension comes into force when published by the CMA and continues in force until (a) the person concerned provides the information or documents to the satisfaction of the CMA, or (as the case may be) appears as a witness in accordance with the requirements of the CMA, or (b) the CMA publishes its decision to cancel the extension. See section 107 and sections 34ZB(7), 39(8) and 41A(7)(b) of the EA02 (mergers) and section 138A(5)(b) (markets) of the EA02.

³⁹ See *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) and *[updated Markets Guidance]* (CMA3).

⁴⁰ Section 104(3) DMCCA24. Such an extension comes into force when published by the CMA and continues in force until the day on which the CMA publishes a notice of its decision to end the extension: see section 104(4) DMCCA24. The CMA must publish such a notice to end the extension where the person who failed to comply with the Investigatory Requirement

- 2.11 In reaching a decision on whether to extend the statutory time limit, the CMA will consider all relevant factors on a case-by-case basis. Any decision not to extend the relevant statutory deadline will be kept under review.
- 2.12 In relevant circumstances, when considering whether to impose a penalty for non-compliance, the CMA will have regard to the fact that it may also extend a timetable deadline for non-compliance. Where the CMA may both impose a penalty and extend the timetable in relation to the same failure,⁴¹ there should be no expectation that the CMA will only use one of these powers. For example, where the failure has delayed the timetable the CMA may decide to extend the timetable **and** impose a penalty.⁴²

Factors affecting the type of penalty imposed

- 2.13 Depending on the type of case and the powers concerned, the CMA may impose:
- **a fixed penalty only:** in respect of breaches of certain Investigatory Requirements (see the table in Annex 1); or
 - **a fixed penalty and/or a daily penalty:** for failing without reasonable excuse to comply with all other Requirements.
- 2.14 Where the CMA has a choice as to the type of penalty that may be imposed, it will consider a number of factors, in the round, on a case-by-case basis to come to its decision. These may include the following non-exhaustive factors as well as the factors referred to in paragraphs 2.15--2.27 of this chapter:
- **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 Requirements. Daily penalties, for example (either alone or in combination with a fixed penalty), may create greater incentives for parties to comply swiftly with Requirements since the penalty imposed on the Relevant Person is directly related to the time the Relevant Person takes to comply with the Requirement. It is also likely that daily penalties

provides the required information, or as the case may be answers questions and provides explanations, to the satisfaction of the CMA: see section 104(5) DMCCA24.

⁴¹ Section 110(2) (mergers) of the EA02 provides that the CMA may impose a penalty for failure to comply with requirements imposed under section 109 of the EA02 and extend the timetable under section 39(4) of the EA02. Similarly, section 174A(2) (markets) of the EA02 provides that the CMA may both impose a penalty for failure to comply with requirements imposed under section 174 of the EA02 and extend the timetable under section 138A(3) of the EA02. The CMA may extend the period in respect of certain of its digital markets competition regime functions in certain circumstances where a person has failed to comply with certain requirements (section 104(3) DMCCA24) and also impose administrative penalties for non-compliance with Investigatory Requirements in connection with the digital markets competition regime functions (section 87 DMCCA24).

⁴² See for example *Anticipated acquisition by AL-KO Kober Holdings Limited of Bankside Patterson Limited - Notice of a penalty pursuant to section 112 of the Enterprise Act 2002*, decision of 21 May 2019.

may result in a greater overall penalty than the maximum fixed penalty if the Relevant Person fails to comply promptly. Daily penalties may be particularly appropriate in situations where timely compliance is likely to be of utmost importance, for example where statutory timetables are involved or there is a timetable for implementation of Remedy Requirements, or the failure to comply is with an interim Remedy Requirement (such as an IEO in a digital markets competition regime case or a CA98 or EA02 interim measure) imposed in urgent circumstances.

- **The deterrent effect of the penalty.** The CMA will consider the level of penalty that is likely to have the requisite deterrent effect, both on the Relevant Person and more generally on those who may be subject to Requirements in the present or in future investigations, having regard to the need for the penalty to be proportionate in all the circumstances. This assessment may affect the level of fixed, daily or combined penalty that is set. Further, where it is important to send a strong deterrent message, for example where there is an egregious or persistent failure to comply, it may be important to impose a penalty at a level that can only be reached by the combination of fixed and daily penalties.
- **Whether the failure to comply has been remedied.** Where an initial failure has been remedied, it will often still be appropriate to impose a penalty to reflect the nature and gravity of the failure and/or to achieve deterrence. In those circumstances, only a fixed penalty would be available as daily penalties can only be used for a continuing period of non-compliance after service of a provisional penalty notice.⁴³ In cases of an extended and unremedied failure to comply with Requirements, the CMA may be more likely to impose a daily penalty for the duration of the failure,⁴⁴ 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.

Factors affecting the level of penalty imposed

2.15 The CMA will assess all the relevant circumstances of the case in order to determine a penalty that is reasonable, appropriate and proportionate in the circumstances. In doing so, the CMA will have regard to the seriousness of the breach and the need for

⁴³ See sections 35B(5)(b) and 40A(6)(b) CA98, sections 95AB(5)(b) and 111(5)(b) EA02 (mergers) and sections 167B(5)(b) and 174D(9)(a) EA02 (markets) and section 90(1)(a) and (b) DMCCA24. See paragraph 3.2 below for further information about provisional penalty notices. And see section 312(5) DMCCA24 for road fuels.

⁴⁴ Unless the duration falls within a period after which the CMA cannot impose a penalty. See section 110A(1) EA02 (mergers) and section 174B(1) EA02 (markets).

deterrence. The CMA is not bound by its previous administrative penalty decisions, as each case is decided on its own facts.⁴⁵

- 2.16 A more serious breach (see paragraph 2.20 – 2.24 below for a discussion of aggravating factors that will increase the seriousness of the breach) will attract a higher penalty, other things being equal. The CMA is likely to set very large penalties for the most serious failures to comply, subject to the requirements that a penalty be proportionate and that it does not exceed the relevant statutory cap.
- 2.17 When considering the need for deterrence, the CMA will, among other things, take into account the Relevant Person 's size and the administrative and financial resources available to the Relevant Person, as well as the need to deter the Relevant Person and other businesses from breaching Requirements.
- 2.18 This assessment of seriousness and deterrence may include the factors referred to in sections A and B of this chapter as well as the non-exhaustive factors set out in paras. 2.19 – 2.27 below. Not all of the factors will necessarily be relevant to all cases. For example, some of those relating to harm to consumers arising from the breach might be more applicable to breaches of Remedy Requirements than Investigative Requirements.

Aggravating factors

- 2.19 The CMA is likely to consider the factors discussed in paragraphs 2.20 – 2.24 as aggravating factors increasing the seriousness of a breach and therefore justifying the imposition of a higher penalty.
- 2.20 In relation to the impact, effects and significance of the breach, aggravating factors will include evidence that:
- the breach had, or risked having, a significant adverse impact on a CMA investigation/and or the carrying out a CMA function, including any risk that the breach would impede the ability of the CMA to take effective enforcement action as a result of the investigation, such as making any decision, imposing penalties or taking any remedial action;
 - the breach had a significant and actual or potential detrimental impact on competition, customers, consumers and/or the public interest;
 - the breach was of long duration; or
 - the Relevant Person derived advantage from its breach or might

⁴⁵ See, e.g., in relation to CA98 penalties *Ping v CMA* [2018] CAT 13 [233] and *Kier Group Plc v OFT* [2011] CAT 3 [116]

reasonably be expected to do so, for example financially through avoiding costs of compliance or through competitive gains in a market with respect to other providers.

2.21 In relation to the actions of the Relevant Person in relation to the breach, aggravating factors will include evidence that:

- the breach was committed intentionally, which is to say the Relevant Person knew or must have known that it was acting in breach;
- the Relevant Person continued the breach after the Relevant Person became aware of the breach, or became aware of the CMA's concern that there might have been a contravention or breach;
- the Relevant Person attempted to conceal the breach or its actual or potential impact from the CMA;
- the Relevant Person lacked the appropriate systems, processes and/or controls in place to prevent the breach from occurring;
- the Relevant Person's senior management failed to take reasonable steps to prevent the breach from occurring;
- the Relevant Person failed to take prompt action to remedy the breach, once it became aware of the breach, or became aware of the CMA's concern that there might have been a breach; or,
- the Relevant Person failed promptly to report the breach to the CMA, in particular where it was required to do so.

2.22 In relation to recidivism and other conduct of the Relevant Person, aggravating factors will include evidence that:

- the breach was part of a broader pattern of conduct by the Relevant Person; or
- the Relevant Person has failed to comply with any other Requirement or CMA decision, either in the current investigation or previous CMA investigations (that is, whether there is an element of 'recidivism'). The seriousness of any past failure(s), the time that has elapsed since the failure(s) occurred, and any other factors relevant to the circumstances of the case may be taken into account, as will be any evidence of ongoing compliance problems.

2.23 In relation to need for the CMA to take action to address the breach itself, aggravating factors will include evidence that::

- the breach is ongoing; or
- the Relevant Person is not capable of taking, or willing to take, all the necessary steps voluntarily to prevent future breaches.

2.24 In relation to other contextual factors, aggravating factors will include evidence that:

- the Relevant Person has significant financial and administrative resources available to it to allow it to prevent breaches from occurring; and/or
- the Requirement is long standing and well established, and/or a significant intervention in the market.

Mitigating factors

2.25 The CMA may consider evidence of the following as mitigating factors that may reduce the seriousness of the breach and support the imposition of a lower penalty:

- the Relevant Person promptly reported the breach to the CMA upon becoming aware of it;
- after becoming aware of the breach, or of the CMA's concern that there might have been a breach, the Relevant Person took appropriate and prompt action to end the breach as soon as possible;
- after becoming aware of the breach, the Relevant Person voluntarily provided appropriate compensation to those affected by the breach, including providing full refunds to all consumers affected (where appropriate); or
- after becoming aware of the breach, the Relevant Person took appropriate action to improve relevant systems and processes, and to train staff to seek to prevent further breaches of the Requirement.

Deterrent effect of a penalty

2.26 In addition to the specific factors relating to the circumstances of an individual breach, the CMA will have regard to the need to deter future breaches, both by the Relevant Person and others. When considering the need for deterrence, the CMA will take into account, among other things, the Relevant Person's size and the administrative and financial resources available to the Relevant Person.

2.27 An important part of effective deterrence is that the Relevant Person should not be in a position in which it is able to make a profit from breaching a Requirement, even after having paid any penalty levied in respect of the breach. Nor is it sufficient for any penalty only to neutralise an undertaking's likely gains from a breach. To constitute an effective deterrent in this context, any penalty imposed should also exceed the Relevant Person's likely gains from the breach by a material amount.

Interaction between penalty powers and non-penalty enforcement action

- 2.28 The CMA may take other action, such as civil proceedings, to enforce Remedy Requirements, in addition to, or as an alternative to, imposing administrative penalties in relation to a failure to comply with such Requirements ('non-penalty enforcement').⁴⁶
- 2.29 Annex 3 sets out further guidance on such non-penalty enforcement.
- 2.30 In addition to enforcement by the CMA, any person affected by the contravention of a Remedy Requirement in a markets or mergers case who has sustained loss or damage as a result of such contravention may bring an action against the party bound by the Remedy Requirement.⁴⁷

⁴⁶ See for example section 34 and sections 35(6) and 35(7) CA98, sections 94(6) EA02 (mergers) and 167(6) EA02 (markets).

⁴⁷ See sections 94(4) EA02 (mergers) and 167(4) EA02 (markets).

3. PROCEDURE

- 3.1 The CMA will follow the procedures set out in paragraphs 3.2 -- 3.4 below when imposing an administrative penalty for a breach of a Requirement. It should be noted that, notwithstanding the procedures below, time for the purposes of assessing duration relevant to a penalty will start to run from when the breach takes place, other than in relation to daily penalties where no account is taken of any days before service on the Relevant Person of the provisional penalty notice.⁴⁸
- 3.2 Where it appears that, without reasonable excuse, the Relevant Person has failed to comply with a Requirement, before making a final decision to impose a penalty the CMA must give the Relevant Person a provisional penalty notice.⁴⁹ The provisional penalty notice must
- contain a draft of the final penalty notice the CMA is minded to give the Relevant Person;
 - invite the Relevant Person to make representations about the proposed final penalty notice; and
 - specify the means by which, and the time by which, the Relevant Person must make such representations.⁵⁰
- 3.3 Where a provisional penalty notice relies on material not already held by the parties, which is expected to be rare, the CMA will provide an appropriate opportunity to provide representations on that material.⁵¹ Given the nature of the alleged breaches, the CMA would expect any exculpatory material typically to reside within the party's business. The CMA would therefore not normally expect to have exculpatory material to provide with the provisional penalty notice.
- 3.4 The period within which representations must be received will be determined on a case-by-case basis having regard to the nature of the failure to comply and the constraints of the relevant statutory or administrative timetable, and in any event will not usually exceed two weeks. The CMA must have regard to any representations received.⁵² The CMA may not impose a penalty before the time specified in the provisional notice for making representations has expired.⁵³

⁴⁸ Section 111(5)(a) EA02, section 40A(6)(a) CA98 and section 90(1)(a) DMCCA24 and section 312(5) DMCCA24.

⁴⁹ Section 112(A1) EA02. The provisional penalty notice is given by serving it on the Relevant Person: see section 112(3A) EA02..

⁵⁰ Section 112(A2) EA02. There is no statutory requirement for the CMA to provide the Relevant Person with an opportunity to make oral representations on the provisional penalty notice. Given that most alleged breaches unlikely to raise complex points of fact or law, the CMA will normally be unlikely to agree to a request by the Relevant Person to make oral representations on a provisional penalty notice.

⁵¹ This might involve the use of a confidentiality ring, as appropriate, in respect of commercially sensitive material.

⁵² Section 112(A3) EA02.

⁵³ Ibid.

3.5 If the CMA decides to impose a penalty for non-compliance with a Requirement, it must as soon as practicable give the Relevant Person a final penalty notice.⁵⁴ The final penalty notice must specify:

- that the CMA has imposed a penalty on the Relevant Person;
- 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;
- the act or omission in question which the CMA considers gave it the power to impose a penalty;
- any other facts which the CMA considers justify the imposition of a penalty and the amount of the penalty;
- the manner in which, and the place at which, the penalty is required to be paid to the CMA;
- the date or dates by which the penalty or (as the case may be) different portions of it are required to be paid;
- that the penalty or different portions of it may be paid earlier than the date or dates by which it or they are required to be paid; and
- details of the Relevant Person'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.⁵⁵

Appeals

3.6 Where the Relevant Person is aggrieved by the imposition or the nature of the penalty for failure to comply with Requirements, its amount or the date by which the penalty is required to be paid, the Relevant Person may appeal to the Competition Appeal Tribunal in respect of administrative penalties imposed under CA98, EA02 as well as under the digital markets competition regime provisions of the DMCCA24 and the motor fuels provisions of DMCCA24.⁵⁶

3.7 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 1838.⁵⁷

⁵⁴ Section 112(1) EA02.

⁵⁵ Section 112(2) EA02.

⁵⁶ Section 114 EA02.

⁵⁷ Section 113 EA02.

- 3.8 Where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal against the decision, the CMA may recover the penalty and any interest which has not been paid; in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the CMA.⁵⁸

⁵⁸ Section 115 EA02.

Annex 1

Breaches of Requirements

Competition Act 1998

Breach of Investigatory Requirements	Statutory Maximum
<p>A breach of Investigatory Requirements for the purposes of CA98 refers to where a person without reasonable excuse:</p> <ul style="list-style-type: none"> a) fails to comply with requirements imposed on them under sections 25B, 26, 26A, 27, 28, 28A or 40ZD of the CA98 b) obstructs a CMA officer acting in the exercise of the officer’s powers under section 27 of the CA98 or under a warrant issued under section 28 or 28A of the CA98 c) destroys or otherwise disposes of, falsifies or conceals documents that the CMA has required to be produced under sections 26, 27, 28 or 28A of the CA98; d) provides information that is false or 	<p><u>Where the Relevant Person is an undertaking</u></p> <p>Under CA98, where the Relevant Person is an undertaking, the statutory maxima for breaches of Investigatory Requirements are as follows:</p> <ul style="list-style-type: none"> • 1% of the turnover of the undertaking (fixed amount) • 5% of the daily turnover of the undertaking (daily rate), • 1% of the turnover of the undertaking and 5% of the daily turnover of the undertaking (fixed amount and daily rate together).⁵⁹ <p>Turnover of the undertaking for these purposes will be determined in accordance with [Turnover Order].⁶⁰</p>

⁵⁹ Section 40A(3A) CA98.

⁶⁰ Section 40A(10) CA98.

misleading in a material particular to the CMA in connection any of the CMA's functions under Part 1 of the CA98, or
e) provides information that is false or misleading in a material particular to another person, knowing that the information was to be used for the purpose of supplying information to the CMA in connection with any of the CMA's functions under Part 1 of the CA98.

Where the Relevant Person is not an undertaking

Under CA98, where the Relevant Person is not an undertaking, the statutory maxima for penalties for a breach of Investigatory Requirements are as follows:

- £30,000 (fixed amount)
- £15,000 (daily rate), and
- £30,000 and £15,000 (fixed amount and daily rate).⁶¹

Where the penalty is being imposed in relation to the type of breaches mentioned in c, d or e in the table opposite, the penalty must be fixed amount.⁶²

For other failures, committed without reasonable excuse, the penalty may be:

- a fixed amount
- an amount calculated by reference to a daily rate, or
- a combination of a fixed amount and an amount calculated by reference to a daily rate.⁶³

Where the CMA is entitled to impose both a fixed and a daily penalty for a particular failure to comply, it may simultaneously impose fixed and daily penalties up to the maximum specified for each type of penalty.⁶⁴

⁶¹ Section 40A(3) CA98.

⁶² Section 40(2A) CA98.

⁶³ Sections 40A(3) and (3A) CA98.

⁶⁴ Ibid.

Breach of Remedy Requirements	Maximum Penalty
<p>A breach of Remedy Requirements for the purposes of CA98 refers to where a person, without reasonable excuse fails to:</p> <ul style="list-style-type: none"> a) adhere to commitments accepted by the CMA under section 31A of the CA98, not having been released from such commitment b) comply with a direction of the CMA under section 32, 33 or 35 of the CA98 	<p><u>Where the Relevant Person is an undertaking</u></p> <p>Under CA98, where the Relevant Person is an undertaking, the statutory maxima for breaches of Remedy Requirements are as follows:</p> <ul style="list-style-type: none"> • 5% of the turnover of the undertaking (fixed amount) • 5% of the daily turnover of the undertaking (daily rate), • 5% of the turnover of the undertaking and 5% of the daily turnover of the undertaking (fixed amount and daily rate together).⁶⁵ <p>Turnover of the undertaking for these purposes will be determined in accordance with [Turnover Order].⁶⁶</p> <p><u>Where the Relevant Person is not an undertaking</u></p> <p>Under CA98, where the Relevant Person is not an undertaking, the statutory maxima for breaches of Remedy Requirements are as follows:</p> <ul style="list-style-type: none"> • £30,000 (fixed amount) • £15,000 (daily rate), and • £30,000 and £15,000 (fixed amount and daily rate).⁶⁷

⁶⁵ Section 35B(4) CA98.

⁶⁶ Section 35B(9) CA98.

⁶⁷ Section 35B(3) CA98.

	Where the CMA is entitled to impose both a fixed and a daily penalty for a particular failure to comply, it may simultaneously impose fixed and daily penalties up to the maximum specified for each type of penalty. ⁶⁸
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Enterprise Act 2002 – markets and mergers

Breach of Investigatory Requirements	Statutory Maximum
<p>A breach of Investigatory Requirements for the purposes of the markets and mergers provisions of EA02 refers to where a person without reasonable excuse:</p> <p>a) fails to comply with any requirements imposed on them by notices under sections 109 and 174 of the EA02;</p> <p>b) obstructs or delays another person in the exercise of the other person’s powers under sections 109(6) or 174(7) of the EA02;</p> <p>c) alters, suppresses or destroys any document</p>	<p><u>Where the Relevant Person is a person who owns or controls an enterprise</u></p> <p>Under the EA02, where the Relevant Person is a person who owns or controls an enterprise, the statutory maxima for breaches of Investigatory Requirements are as follows:</p> <ul style="list-style-type: none"> • 1% of the turnover of the enterprises owned or controlled by the Relevant Person (both in and outside of the United Kingdom) (fixed amount) • 5% of the daily turnover of the enterprises owned or controlled by the Relevant Person (both in and outside of the United Kingdom) (daily rate), • 1% of the turnover of the enterprises owned or controlled by the Relevant Person (both in and outside of the United Kingdom) and 5% of the enterprises owned or controlled by the Relevant Person (both in and outside of the United Kingdom) (fixed amount and daily rate together).⁶⁹

⁶⁸ See footnotes 63 and 65 above.

⁶⁹ Section 111(4A) EA02 and section 174A(4A) EA02. Note that the CMA may send notices under section 109 of the EA02 in respect of some of its regulatory reference powers: see, for example section 41EB(1)(a) of the Gas Act 1986 (GA86) and section 14B(1)(a) of the Water Industry Act 1991 (WIA91). Breach of the requirements in section 109 notices sent for the purposes of regulatory references can result in a penalty: see, for example, section 41EB(1)(b) and (c) of the GA86 and section 14B(1)(b) and (c) of the WIA91. However, the turnover-based statutory maxima set out in this table do not apply to such penalties. All such penalties are instead subject to a maximum fixed penalty of

<p>which the person has been required to produce by a notice under sections 109 or 174 of the EA02;</p> <p>d) supplies information that is false or misleading in a material respect</p> <ul style="list-style-type: none"> o to the CMA in connection with any of the CMA's markets or mergers functions under the EA02, or o to another person, knowing that the information was to be used for the purpose of supplying information to the CMA in connection with any of the CMA's markets or mergers functions under the EA02. 	<p>Control and turnover for these purposes will be determined in accordance with [Control and Turnover Order], as will be which enterprises are owned or controlled by the Relevant Person.⁷⁰</p> <p><u>Where the Relevant Person is person who does not own or control and enterprise</u></p> <p>Under the EA02, where the Relevant Person is a person who does not own or control an enterprise, the statutory maxima for penalties for breaches of Investigatory Requirements are as follows:</p> <ul style="list-style-type: none"> • £30,000 (fixed amount) • £15,000 (daily rate), and • £30,000 and £15,000 (fixed amount and daily rate).⁷¹ <p>Where the penalty is being imposed in relation to the type of breaches mentioned in para. b) – d) in the opposite column, the penalty must be a fixed amount.⁷²</p> <p>For other failures, committed without reasonable excuse, the penalty may be:</p>
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£30,000 and/or a maximum daily penalty of £15,000: see for example section 41EB(1) of the GA86 as amended by paragraph 8(2) of Schedule 30 of the DMCCA24 and section 14B(1) of the EA02 as amended by paragraph 10(2) of Schedule 30 of the DMCCA24.

⁷⁰ Section 111(9) EA02 and section 174B(11) EA02.

⁷¹ Section 111(4) EA02 and section 174B(4) EA02.

⁷² Section 111(3) EA02 and section 174D(3) EA02.

	<ul style="list-style-type: none"> • a fixed amount • an amount calculated by reference to a daily rate, or • a combination of a fixed amount and an amount calculated by reference to a daily rate.⁷³ <p>Where the CMA is entitled to impose both a fixed and a daily penalty for a particular failure to comply, it may simultaneously impose fixed and daily penalties up to the maximum specified for each type of penalty.⁷⁴</p>
Breach of Remedy Requirements	Statutory Maximum
<p>A breach of Remedy Requirements for the purposes of the markets and mergers provisions of EA02 refers to where a person, without reasonable excuse fails to:</p> <p>a) comply with a CMA enforcement undertaking⁷⁵ accepted, or enforcement order⁷⁶ made, by the CMA in a merger case under Part 3 of the E02</p> <p>b) comply with a CMA enforcement undertaking⁷⁷ accepted, or enforcement order made,⁷⁸ by the CMA in markets case</p>	<p><u>Where the Relevant Person is a person who owns or controls an enterprise</u></p> <p>Under the EA02, where the Relevant Person is a person who owns or controls an enterprise, the statutory maxima for breaches of Remedy Requirements are as follows:</p> <ul style="list-style-type: none"> • 5% of the turnover of the enterprises owned or controlled by the Relevant Person (both in and outside of the United Kingdom) (fixed amount) • 5% of the daily turnover of the enterprises owned or controlled by the Relevant Person (both in and outside of the United Kingdom) (daily rate), • 5% of the turnover of the enterprises owned or controlled by the Relevant Person (both in and outside of the United Kingdom) and 5% of the enterprises owned or controlled by the Relevant Person (both in and outside of the United Kingdom) (fixed

⁷³ Sections 111(3) EA02 and 111(4) EA02 and sections 174D(3) EA02 and 174B(4) EA02.

⁷⁴ Ibid.

⁷⁵ As defined in section 89(2) EA02.

⁷⁶ As defined in section 86(6) of the EA02.

⁷⁷ As defined in section 162(8) of the EA02.

⁷⁸ Ibid.

under Part 4 of the EA02.

amount and daily rate together).⁷⁹

Control and turnover for these purposes will be determined in accordance with [Control and Turnover Order].

Where the Relevant Person is a person who does not own or control an enterprise

Under the EA02, where the Relevant Person is a person who does not own or control an enterprise, the statutory maxima for breaches of Remedy Requirements are as follows:

- £30,000 (fixed amount)
- £15,000 (daily rate), and
- £30,000 and £15,000 (fixed amount and daily rate).⁸⁰

Where the CMA is entitled to impose both a fixed and a daily penalty for a particular failure to comply, it may simultaneously impose fixed and daily penalties up to the maximum specified for each type of penalty.⁸¹

⁷⁹ Section 94AB(4) EA02 (mergers) and section 167B(4) EA02 (markets).

⁸⁰ Section 94AB(3) EA02 (mergers) and section 167B(3) EA02 (markets).

⁸¹ See footnotes 77 and 79 above.

Digital Markets Competition and Consumers Act 2024 (DMCCA24) – motor fuels

Breach of Investigatory Requirements	Statutory Maximum
<p>A breach of Investigatory Requirements for the purposes of the motor-fuels information gathering provisions of DMCCA24 refers to where the CMA considers that an undertaking has, without reasonable excuse:</p> <p>a) failed to comply with an information notice under section 311 of the DMCCA24</p> <p>b) destroyed, otherwise disposed of, falsified or concealed, or caused or permitted the destruction, disposal, falsification or concealment of, any document which the undertaking has been required to produce by an information notice under that section;</p> <p>c) given the CMA information which is false or misleading in a material particular in connection with an information notice under that section;</p> <p>d) given information which is false or misleading in a material particular to another undertaking knowing that the information was to be used for the purpose of giving information</p>	<p>Under the DMCCA24 motor-fuels provisions, the statutory maxima for breaches of Investigatory Requirements by an undertaking are as follows:</p> <ul style="list-style-type: none"> • 1% of the turnover of the undertaking (both inside and outside of the United Kingdom) (fixed rate) • 5% of the daily turnover of the undertaking (both inside and outside of the United Kingdom) (daily rate), • 1% of the turnover of the undertaking (both inside and outside of the United Kingdom) and 5% of daily turnover of the undertaking (both inside and outside of the United Kingdom) (fixed amount and daily rate together).⁸² <p>Turnover for these purposes will be determined in accordance with [Turnover Order].</p> <p>Where the CMA is entitled to impose both a fixed and a daily penalty for a particular failure to comply, it may simultaneously impose fixed and daily penalties up to the maximum specified for each type of penalty.⁸³</p>

⁸² Section 312(4) DMCCA24.

⁸³ Ibid.

to the CMA in connection with an information notice under that section.

Digital Markets Competition and Consumers Act 2024 (DMCCA24) – digital markets competition regime

Breach of Investigatory Requirements	Statutory Maximum
<p>A breach of Investigatory Requirements for the purposes of the digital markets competition regime provisions of DMCCA24 refers to where the CMA considers that:</p>	
<p>a) a person has, without reasonable excuse</p> <ul style="list-style-type: none"> ○ failed to comply with a requirement imposed by or under Chapter 6 of Part 1 of the DMCCA24, ○ given information which is false or misleading in a material particular in connection with any function of the CMA under 1 Part of the DMCCA24, or ○ given information which is false or misleading in a material particular to another person knowing that the information was 	<p><u>Where the Relevant Person is an undertaking that is not an individual</u></p> <p>Under the DMCCA24 digital markets competition regime provisions, where the Relevant Person is a undertaking that is not an individual, the statutory maxima for breaches of Investigatory Requirements are as follows:</p> <ul style="list-style-type: none"> • 1% of the turnover of the undertaking (both inside and outside of the United Kingdom) (fixed amount) • 5% of the daily turnover of the undertaking (both inside and outside of the United Kingdom) (daily rate), • 1% of the turnover of the undertaking (both inside and outside of the United Kingdom) and 5% of the daily turnover (both inside and outside of the United Kingdom)

to be used for the purpose of giving information to the CMA in connection with any function of the CMA under Part 1 of the DMCCA24

- b) an individual named by an undertaking as a senior manager under section 70 of the DMCCA24
- has failed, without reasonable excuse, to prevent a failure or an action by the undertaking of a sort mentioned in (1) above, and
 - the failure or action relates to an information notice in response to which the individual was named as a senior manager
- c) An individual who is appointed by an undertaking to be a nominated officer under section DMCCA24 in relation to a digital markets competition regime requirement (within the meaning of that section), has failed, without reasonable

Kingdom) of the person (fixed amount and daily rate together).⁸⁴

For these purposes, where a person is an undertaking that is part of a group, references to the person's turnover are to the turnover of that group.⁸⁵

Turnover of the undertaking that is not an individual for these statutory maxima purposes will be determined in accordance with [Turnover Order].

Where the Relevant Person is an individual or a person that is not an undertaking

Under the DMCCA24 digital markets competition regime provisions, where the Relevant Person is an individual or a person that is not an undertaking, the statutory maxima for penalties for a breach of Investigatory Requirements are as follows:

- £30,000 (fixed amount)
- £15,000 (daily rate), and
- £30,000 and £15,000 per day (fixed amount and daily rate respectively).⁸⁶

Where the CMA is entitled to impose both a fixed and a daily penalty for a particular failure to comply, it may simultaneously impose fixed and daily penalties up to the maximum specified for each type of penalty.⁸⁷

⁸⁴ Section 88(3) DMCCA24.

⁸⁵ Section 88(4) DMCCA24.

⁸⁶ Section 88(5) DMCCA24.

⁸⁷ See footnotes 84 and 86 above.

<p>excuse, to prevent the undertaking from failing to comply with a requirement in or under section 84 DMCCA24 (compliance reports) in relation to that digital markets competition regime requirement</p> <p>d) an individual has, without reasonable excuse, obstructed an officer of the CMA acting in the exercise of the officer's powers under section 74 DMCCA24, or a warrant issued under section 75 DMCCA24.</p>	<p>Where the penalty is being imposed in relation to the type of breach mentioned in paragraph a) in the column opposite, the penalty must be fixed amount.⁸⁸</p>
<p>e) an undertaking, or, where the undertaking is part of a group, any member of the group, has failed, without reasonable excuse, to comply with a requirement in Chapter 5 of Part 1 of the DMCCA24.</p>	<p>Under the DMCCA24 digital markets competition regime provisions, the statutory maximum for breaches of the Investigatory Requirements set out in Chapter 5 of Part 1 of the DMCCA24 (where the Relevant Person will always be an undertaking and/or a member of a corporate group) is as follows:</p> <ul style="list-style-type: none"> • 10% of the turnover of the undertaking or where the undertaking is part of a group, the turnover of the group (both inside and outside of the United Kingdom) (fixed amount)⁸⁹

⁸⁸ Section 86(3) DMCCA24.

⁸⁹ Section 86(4) DMCCA24.

Breach of Remedy Requirements	Statutory Maximum
<p>A breach of Remedy Requirements for the purposes of the digital markets competition regime provisions of DMCCA24 refers to where the CMA considers that –</p> <p>an undertaking has failed, without reasonable excuse, to comply with a requirement imposed by virtue of an Interim Enforcement Order under section 32 of the DMCCA24.</p>	<p>Under the DMCCA24 digital markets competition regime provisions, the statutory maximum for breaches of a Remedy Requirement imposed by virtue of an Interim Enforcement Order under section 32 of the DMCCA24 (where the Relevant Person will always be an undertaking and/or a member of a corporate group) is as follows:</p> <ul style="list-style-type: none"> • 10% of the turnover of the undertaking (both inside and outside of the United Kingdom) (fixed amount) • 5% of the daily turnover of the undertaking (both inside and outside of the United Kingdom) (daily rate), • 10% of the turnover of the undertaking and 5% of the daily turnover of the undertaking (fixed amount and daily rate together).⁹⁰ <p>For these purposes, where an undertaking is part of a group, references to the undertaking’s turnover are to the turnover of that group.⁹¹</p> <p>Where the CMA is entitled to impose both a fixed and a daily penalty for a particular failure to comply, it may simultaneously impose fixed and daily penalties up to the maximum specified for each type of penalty.⁹²</p>

⁹⁰ Section 86(4) DMCCA24.

⁹¹ Section 86(4) DMCCA24.

⁹² Section 86(4) DMCCA24.

Annex 2 – practical examples

To assist relevant stakeholders, this annex sets out some non-exhaustive illustrative examples of how the CMA powers described in the Statement might apply in selected potential scenarios. They are without prejudice to the CMA's ability to determine its approach to the imposition of a penalty on a case-by-case basis.

Example 1

Scenario

A is a small enterprise. Two of A's competitors, B and C, have notified their proposed merger to the CMA. In the circumstances of the case, the CMA sends a formal information request under section 109 of the EA02 to A as part of its investigation into the effects of the merger of B and C. The information request is sent to A's Chief Executive, who accidentally misfiles the request and forgets about it. When contacted by the CMA the day after the deadline has passed, the Chief Executive is hugely apologetic and offers to provide the majority of the requested information later that day, with the remainder to follow the next day. A has provided several complete and timely responses to CMA information requests in the past.

Analysis

The CMA would be likely to consider this a minor/mitigated failure committed without reasonable excuse. It is based on an administrative error, which:

- A has taken immediate and satisfactory steps to rectify – A did not seek to benefit in any way from the failure to comply, and
- given the limited delay in providing the information (provided the outstanding information is indeed received promptly) is unlikely to have a material adverse impact on the CMA's investigation.

While the CMA does not consider that the circumstances of this failure to comply constitute a reasonable excuse, in some cases of this nature the CMA may decide not to impose an administrative penalty. However, if A subsequently failed to comply with a different Requirement, this previous failure might be taken into account as an aggravating factor

Example 2

Scenario

D is a major operator in a market with three other key players. The CMA has received numerous complaints that prices in the market have increased exponentially in recent years, and believes there may be features of the market which are producing anti-competitive effects. It therefore decides to conduct a market study, sending information requests under section 174 of the EA02 to D and several of its competitors. D's response to the information request is incomplete and inadequate. Many questions are ignored completely or receive inadequate one-word responses that do not answer the question properly. When asked to estimate its market share and explain its reasoning for the estimate, D states 'around 20%' with no explanation of the basis for its estimate. The responses from D's competitors, however, indicate that D's share is close to 40%. Further investigation reveals a recent presentation to D's Board estimating its market share to be 42% at the relevant time and including data on which the estimate was based that was not provided to the CMA.

Analysis

The CMA would be likely to consider this a serious failure, committed without reasonable excuse, which would certainly warrant a penalty. Inadequate and indeed inaccurate information has been provided to the CMA, in all likelihood in order to prejudice the CMA's investigation to D's benefit. The CMA would likely impose penalties for both non-compliance with the requirement to provide information and for the provision of materially false or misleading information to CMA. In order to reflect the seriousness of the failure to comply and deter future failures of this sort, the CMA would be likely to consider both fixed penalties and daily penalties until D provides complete, adequate and accurate responses to the information request.

Example 3

Scenario

The CMA is investigating a major company, E, in relation to suspected breaches of a dominant position under the CA98. During a dawn raid of E's premises under section 28 of the CA98, a director refuses to provide the combination to unlock a filing cabinet, claiming that the contents are 'personal and confidential'. The director also attempts to prevent the CMA from taking copies of a number of documents, arguing that they are covered by legal professional privilege. It is later revealed that these documents and the contents of the filing cabinet were neither personal nor privileged, but were highly incriminating. The obstructive behaviour caused considerable delays to the CMA's investigation.

Analysis

The CMA would consider this to be a deliberate/aggravated failure, committed without reasonable excuse. The failure constitutes an unjustified obstruction of the CMA's investigation which may prevent the CMA from obtaining important evidence of possible infringements. The director clearly acted intentionally and company E did not take sufficient and/or timely steps to investigate the director's claims in respect of the nature of the documents. In order to mark the seriousness of the failure to comply with its powers and to send a strong deterrent message about such behaviour, the CMA would likely impose a very significant fixed penalty and very significant daily penalty on both company E and the director until the requests were complied with. The director's conduct might also be capable of constituting a criminal offence under section 42(7) of the CA98 and the CMA might consider whether it was appropriate to prosecute the director instead of imposing a financial penalty on that individual.

Example 4

Scenario

The CMA, through its market intelligence functions, has become aware of a recently completed acquisition by company F of its competitor, company G. The CMA has reasonable grounds for suspecting that the two enterprises have ceased to be distinct. In order to prevent the companies from starting integration of their respective businesses, the CMA makes an Interim Enforcement Order

under section 72 of the EA02 to prevent pre-emptive action by the companies, including that:

- the business of company F should be carried on separately and under a separate brand identity from the business of company G, and
- the assets of each of company F and company G are maintained and preserved.

F and G do not own or control any other enterprises. However, shortly thereafter company F begins to market the products produced by company G under the company F brand. The CMA also receives complaints from third parties that company F has been actively seeking to sell the site occupied by company G to a property developer.

In the business year preceding the date when the interim measures came into force, the turnover of company F and all of the enterprises it owned or controlled (including company G) was £10 million.

Analysis

The CMA would be likely to consider this a very serious failure committed without reasonable excuse. The steps taken to integrate the businesses could seriously prejudice the CMA's ability to impose an effective remedy if that was considered justified following its merger investigation. Company F has ignored an express order from the CMA and has not offered any explanation for its actions. Moreover, company F would be profiting from its failure to comply with the interim measures.

Accordingly, the CMA is likely to impose a very significant penalty on company F to encourage swift compliance with the interim measures. The interim measures are also enforceable by civil proceedings (section 94 of the EA02). In the particular circumstances of this case the CMA might also consider seeking an injunction from the High Court to ensure compliance for the duration of its investigation.

Example 5

Scenario

The CMA is conducting a CA98 investigation into a suspected market-sharing agreement. Following inspections without notice under section 27 of the CA98, the CMA is seeking information from a hotel, part of a large chain, at which it

suspects a cartel meeting took place. The CMA requests certain information by notice under section 26 of the CA98. In response to a draft information request proposing to give the hotel a week to respond, the hotel manager says the relevant data is stored on one of many external hard drives stored offsite. He also notes that he and staff are extremely busy preparing for their most important and lucrative conference of the year, to be held in three weeks' time. He therefore requests three weeks rather than one in which to respond. The CMA explains that it needs the information before it conducts a series of interviews that it has lined up in four weeks' time, so although it is prepared to give the hotel the three weeks requested the hotel should take extra care to ensure it responds on time. The CMA sends the formal section 26 notice with the deadline requested by the hotel. The hotel fails to respond to the section 26 notice in the agreed timescale.

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

Analysis

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

Example 6

Scenario

An undertaking has been participating in a cartel. An individual working for the undertaking and who is involved in the cartel on behalf of the undertaking receives an email discussing a rumour that a customer has reported their suspicions of the cartel to the CMA and that the customer has been interviewed by the CMA.

The individual is aware that documents relating to the cartel activity such as records of cartel meetings are held in the individual's folder on the undertaking's server. There are also text messages relating to the cartel activity on the individual's personal mobile phone.

The individual knows that the folder on the server will soon be deleted as part of the undertaking's routine document retention policy. The individual takes no action to stop this. The folder is then deleted.

The individual on hearing of the rumour also immediately deletes all texts, including texts relating to the cartel and personal texts, on their mobile phone.

The CMA subsequently opens an investigation into the cartel. During the course of the investigation, the CMA learns that the folder has been deleted and of the deletion of the texts on the individual's mobile phone. The CMA also finds the email that the individual received discussing the rumour that the customer in question was speaking to the CMA about the customer's concerns about a possible cartel.

The undertaking claims that the deletion of the folder was conducted as a matter of routine under the undertaking's document retention policy. The individual claims that they deleted the texts because they regarded the texts as personal and that the deletion had nothing to do with the rumours that the individual heard about the customer speaking to the CMA.

Analysis

Having regard to the evidence – in particular the timing of the deletions -- the CMA is very likely to consider that the individual and, therefore, the undertaking knew or

suspected that the CMA was carrying out a CA98 investigation into the cartel (or likely to be), and that the deleted documents and texts would be relevant to the investigation.

The fact that the folder was to be deleted as part of a routine document retention programme does not change things. The individual should have taken steps to ensure that the documents in the folder that he knew or suspected would be relevant to the investigation were not deleted. Nor will the CMA regard the individual's claim that he considered all of the texts personal as a reasonable excuse in these circumstances.

The CMA is likely to regard these as serious breaches of the section 25B CA98 duty, and impose severe penalties on both the undertaking and the individual.⁹³

Had the undertaking, on learning of the investigation, alerted the CMA to the deletion of the individual's folder under the document retention policy and used its best endeavours to retrieve the documents, the CMA might have taken that into account as a mitigating factor in reducing the penalty.

Example 7

Scenario

The CMA's market investigation into a sector and subsequent Order requires all suppliers to provide consumers with certain information regarding pricing and other relevant terms and conditions in advance of sale or contract.

One significant business that had initially implemented the requirements of this Order subsequently failed to provide this information for any of its customers for a period of 9 months, with the senior management of the business unaware that systems and processes in the business had been updated and those making these changes were unaware of the reasons for providing this information, and they were looking to save costs for the firm.

The breach was reported to the CMA by customer complaints and the CMA investigated this with the firm concerned.

⁹³ Section 25B CA98 creates a duty where a person knows or suspects that a CMA CA98 investigation is, or is likely to be, carried out. Under that duty, a person must not falsify, conceal, destroy or otherwise dispose of, or cause or permit the falsification, concealment, destruction or disposal of, a document which the person knows or suspects is or would be relevant to the investigation.

Once aware of the breach, the firm restarted the provision of the relevant information for new customers, providing new customers with the information concerned.

Analysis

The CMA would likely regard this as a significant breach, particularly given the length of time for which the breach occurred.

The CMA would take into account the size of the business, the failure of its systems and controls, and the decision made by staff to stop the provision of this information without understanding why it was being provided. It would also note that the breach was not detected by the firm or reported to the CMA, and in rectifying this for future customers, no action was taken in regard to those customers already affected.

All these factors would argue for the imposition of a penalty in this case given the nature of the failure. The penalty may be likely to be fixed in nature as the breach is not ongoing, and the penalty would tend to be larger given the exacerbating factors in relation to the conduct of the firm concerned, and its significance.

In addition to any penalty imposed, the CMA would also consider the need for further enforcement action to ensure that future breaches did not occur and that systems and processes were modified in a suitable manner to prevent such breaches. For example, the CMA might direct the business to take specific actions.

Annex 3 – civil proceedings and other non-penalty enforcement action in respect of breaches of Remedy Requirements

Introduction

- A.1 The CMA may take other action, such as civil proceedings, to enforce Remedy Requirements, in addition to, or as an alternative to, imposing administrative penalties in relation to a failure to comply with such Requirements ('non-penalty enforcement').⁹⁴ In order to meet the aim of incentivising compliance with Remedy Requirements, the CMA will normally consider imposing administrative penalties for breaches of Remedy Requirements. However, the CMA will consider whether to use the power to take non-penalty enforcement, such as bringing civil proceedings, on a case-by-case basis having regard to the nature of the breach. In particular, the CMA will consider whether an administrative penalty will be sufficient to ensure that the failure will not prejudice possible remedial action.⁹⁵ In addition to enforcement by the CMA, any person affected by the contravention of a Remedy Requirement in a markets or mergers case who has sustained loss or damage as a result of such contravention may bring an action against the party bound by the Remedy Requirement.⁹⁶
- A.2 The CMA envisages that in most cases where a breach of Remedy Requirements is concerned, it will consider whether to impose a penalty at the same time as deciding on any non-penalty enforcement action, but in some cases it may be appropriate to separate out these two steps. The CMA might in some cases decide only to impose an administrative penalty and not take parallel non-penalty enforcement action, or not to impose a penalty but nevertheless to take non-penalty enforcement action, in respect of such breaches.
- A.3 Enforcement involving the imposition of administrative penalties in respect of breaches of Remedy Requirements is dealt with in the main body of this Statement.

⁹⁴ See section 34 and sections 35(6) and 35(7) CA98, sections 94(6) EA02 (mergers) and 167(6) EA02 (markets).

⁹⁵ This consideration is most likely to be relevant in respect of breaches of interim measures in CA98 or mergers cases: see section 35 CA98, and sections 72, 80 and 81 EA02 in respect of mergers.

⁹⁶ See sections 94(4) EA02 (mergers) and 167(4) EA02 (markets).

Final mergers and markets remedies

A.4 The CMA has a statutory duty to keep under review undertakings and orders made under the EA02.⁹⁷ Sections 92 and 162 of the EA02 provide that the CMA shall, in particular, from time to time, consider whether an EA02 enforcement undertaking, or order has been or is being complied with.⁹⁸ Collectively, throughout this Annex, such final undertakings and orders are referred to as 'Mergers and Markets Remedies', as they are action taken to remedy the adverse effects found in CMA mergers or markets cases.⁹⁹ The CMA's approach to monitoring, transparency and investigations of breaches of Mergers and Markets Remedies is dealt with in separate guidance, [CMA11]. In addition, and as part of the same statutory duty referred to above, the CMA considers whether undertakings and orders remain appropriate, and whether they should be varied or released/revoked. The CMA's reviews of its orders and undertakings are covered in [CMA11].

Non-penalty enforcement against breaches of Remedy Requirements

A.5 Before taking any non-penalty enforcement action in relation to a breach, the CMA will ensure that the Relevant Person¹⁰⁰ is made aware of why the CMA considers there to have been a breach and has an opportunity to make representations to the CMA about this.

A.6 Where the CMA determines that non-penalty enforcement action is appropriate in relation to a breach, such action could be either formal or informal in nature, as described in more detail in paragraphs A.8 to A.21 below.

A.7 The taking of non-penalty enforcement action does not preclude the CMA from seeking to impose an administrative penalty in respect of a breach of Remedy Requirements. Where the CMA proposes to impose an administrative penalty in addition to taking such non-penalty enforcement action, the steps described in paragraphs A.8 to A.21 below may be carried out in parallel or at a separate time to those set out in Chapter 3 of this

⁹⁷ The CMA has a corresponding duty under the previous legislation, the Fair Trading Act 1973.

⁹⁸ Specifically sections 92(2)(a) and 162(2)(a), and Schedule 24, of the EA02.

⁹⁹ 'Mergers and Markets Remedies' is therefore narrower than 'Remedy Requirements' in the main body of this Statement.

¹⁰⁰ See paragraph 1.13 in the main body of this Statement.

Statement in respect of the administrative penalty process.¹⁰¹ This will depend upon the circumstances of the case.

Informal non-penalty enforcement action

A.8 Informal non-penalty enforcement action describes a response to a breach of Remedy Requirements where the CMA is not engaging its formal non-penalty enforcement powers (such as taking civil proceedings or in the case of Mergers and Markets Remedies issuing directions – see paragraphs A.11 – A.21 below). This can include the CMA agreeing actions with the Relevant Person to end a breach and to improve practices and processes in the future. In these cases, the CMA may decide to publish a letter to businesses on its website which provides detail on the nature of the breach and acknowledges any action taken by the Relevant Person to put things right. This is so that customers and any interested stakeholders are made aware of the action taken.¹⁰²

A.9 While the CMA will take a case-by-case approach, taking into account all relevant circumstances, informal action is more likely for breaches of Remedy Requirements where the following are true:

- (a) this is the first occasion that the Relevant Person has breached the remedy concerned;
- (b) the breach is of limited scale and scope;
- (c) the breach has limited practical impact on suppliers, customers and consumers;
- (d) details of the breach were passed in full to the CMA as soon as was practical in the circumstances;
- (e) the breach has been brought to an end by the Relevant Person taking steps on a voluntary basis, considered as sufficient by the CMA, to resolve the root cause of the breach; and
- (f) the Relevant Person has committed, on a voluntary basis, to take all steps, considered as sufficient and appropriate by the CMA, to prevent future breaches.

¹⁰¹ See paragraph A.1 above.

¹⁰² The CMA's approach to transparency in respect of breaches of Mergers and Markets Remedies is discussed in [CMA11].

The process for informal non-penalty enforcement

A.10 The process for issuing public letters involves the CMA engaging with the Relevant Person as follows:

- (a) Having understood the nature and extent of the breach, if the CMA reaches a provisional view that certain informal action would be appropriate, the CMA will write to the Relevant Person to explain this provisional view and the reasons for it. The CMA shall explain the action it proposes to take and attach any draft public letter where appropriate. The Relevant Person will then have typically two weeks (and possibly more in complex cases) to provide any representations it wishes to provide to the CMA on both the principle and the substance of the action the CMA is proposing.
- (b) The CMA will consider the representations received on both the principle and the substance before reaching a final view on the appropriate action. The CMA will then communicate this to the Relevant Person, and will continue to liaise with the Relevant Person over the timing of any public announcements where relevant.

Formal non-penalty enforcement action

A.11 To ensure compliance with its Remedy Requirements, the CMA has formal non-penalty enforcement tools available to ensure the Relevant Person takes all actions the CMA considers necessary for the Relevant Person to become compliant. Formal non-penalty enforcement tools include:

- (a) Applying to a court for an order to seek compliance with the Remedy Requirement; or
- (b) in the case of Mergers and Markets Remedies that so provide, issuing directions to the Relevant Person.

A.12 These tools are used for more significant breaches, such as those:

- (a) which may have a significant impact in terms of scale, harm caused, scope or the number of customers affected;
- (b) which may have a significant impact on individual customers or consumers;
- (c) which are ongoing, including those still being explored by the Relevant Person concerned, or where the necessary steps to remedy the breach

and prevent future breaches were not identified, volunteered, agreed or taken by the Relevant Person responsible;

- (d) which raise issues of recidivism and ongoing compliance problems; or
- (e) where the CMA has concerns that a Relevant Person is not willing to take all the necessary steps voluntarily to prevent further breaches.

A.13 The CMA will determine which form of formal action to take based on the individual circumstances of the case, including the nature of the breach. A failure to comply with a court order could lead to contempt of court proceedings, potentially resulting in a fine, or imprisonment of individuals for up to two years (or both).

Issuing directions

A.14 In certain circumstances, Mergers and Markets Remedies may provide for the possibility of the CMA issuing directions to the Relevant Person. Such directions can require a Relevant Person to take specific steps to bring to an end a breach of Mergers and Markets Remedies, as well as to improve its practices and procedures to prevent similar problems arising in the future. The CMA can also impose additional, generally more onerous, compliance and reporting obligations to allow for more detailed monitoring activities.¹⁰³

Potential content of directions

A.15 The directions that the CMA issues to a Relevant Person will be specific to the Relevant Person and the particular breach. However, there are a number of types of directions which are commonly used, sometimes individually and at other times in combination with each other and with other relevant obligations. The list of types of directions below is not exhaustive and does not constrain the CMA from considering different directions where they are considered appropriate to a particular breach by a particular Relevant Person. The main categories of directions include:

- (a) **ending a breach** – where a breach is ongoing, the CMA may find it necessary to direct the Relevant Person to take specific steps to end the breach within a certain timeframe;

¹⁰³ See section 87 of the EA02.

- (b) **changes to policies, processes and procedures to prevent further breaches** – depending on the cause of a breach, the CMA may consider it necessary to direct a Relevant Person to make specific changes to its policies, processes and procedures (including staff training where appropriate) to avoid further breaches in the future;
- (c) **auditing internal processes and procedures** – where a number of policies, processes and procedures may have contributed to a breach, or for example where these are complex, the CMA may consider it necessary for the Relevant Person to procure a business independent of the Relevant Person to carry out either a one-off or a regular audit of all its processes and procedures relevant to achieving compliance with an order or undertaking;
- (d) **enhanced compliance measures or new/additional reporting requirements** – in response to a Relevant Person breaching Mergers and Markets Remedies, the CMA may consider it appropriate to introduce compliance monitoring if this were not provided before the breach to understand the specific actions taken by Relevant Persons to ensure and/or maintain compliance. Alternatively, where compliance monitoring was already required by the remedy concerned, the CMA may introduce new reporting obligations or increase the frequency of any existing compliance reporting. This can provide the CMA with valuable visibility of actions taken within the Relevant Person and the likelihood of further breaches; and
- (e) **requiring a Relevant Person to inform affected customers about a breach** – where a breach affects a Relevant Person’s customers, the CMA may direct that Relevant Person to provide certain information to its customers that were affected including informing them of any remediation action.

CMA process for issuing directions

A.16 When the CMA believes it has all the information required to make a provisional decision in respect of directions, the CMA expects to follow these steps:

- (a) the CMA will write to the party concerned, noting that it is minded to issue directions, on the basis of the information available from its investigation into the breach;
- (b) where draft directions are available, these will be provided to the party at the same time as communicating its provisional decision to issue

directions. The CMA may also seek a proposed action plan detailing the timescales within which the tasks directed will be undertaken;

- (c) the CMA will allow the party concerned a reasonable period of time to provide representations that cover the decision that it is minded to issue directions and the specific requirements in the draft directions. The party may also put forward any new information which is relevant to whether or not directions are appropriate. The appropriate time period for representations will be determined by the CMA with regard to the nature and complexities of the issues concerned. Other than in exceptional cases where the CMA considers there to be substantial additional risks from failing to act quickly, the party concerned will have a minimum of two weeks to provide representations;
- (d) where directions are provided to a party subsequently to the communication that the CMA is minded to issue directions, a further reasonable period of time will be allowed for the party to provide representations on the draft directions;
- (e) the CMA will consider all representations and will reach a final decision and, where appropriate, will determine the exact directions to be issued; and
- (f) the CMA will issue directions to the Relevant Person, publishing the action plan and recording this information on its public register of directions, the register of breaches, and relevant webpage for the order or undertakings concerned.¹⁰⁴

A.17 At the time the CMA issues directions to parties, it is normal practice for the CMA to take a number of steps to highlight the breach and any enforcement action publicly. This helps to inform affected customers and potential customers of a Relevant Person of the breach and the action taken. While the CMA will inform the Relevant Person of its intended actions in publicising breaches and enforcement action, the choice of materials, the approach, and their content is not part of the consultation described above.

¹⁰⁴ See [CMA11] for further information about the CMA's approach to transparency in respect of breaches of Mergers and Markets Remedies.

Duration of directions

- A.18 The appropriate duration of directions issued by the CMA will be considered on a case by case basis, and in some instances these directions may place an ongoing restriction on businesses for the duration of the order or undertakings to which they refer. This means that such directions will be expected to remain in place until such time as the parties are released from their commitments by the variation or revocation/release of the underlying undertakings or order.
- A.19 In other cases, the directions given by the CMA may be to carry out a one-off, time-limited or event-limited activity and once this has been completed the directions may have no ongoing obligation or value.
- A.20 For both ongoing and time/event limited directions, it is open to the parties bound by these to apply to the CMA for the directions to be varied or terminated (in whole or in part). Any submission making such a request should be made on the same basis as a request to vary or remove a remedy: see CMA11.
- A.21 It is open to parties to approach the CMA prior to submitting a request in order to discuss what sort of evidence would be expected to be included in any request.

Assessing the need for and nature of appropriate enforcement

- A.22 The CMA will assess what (if any) non-penalty enforcement action in respect of Remedy Requirements is appropriate on a case-by-case basis, taking into account all relevant circumstances, including the factors used to assess the need for, type and magnitude of penalties (discussed in the main body of this Statement).