

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

Amazon's response to CMA4con

## Introduction and executive summary

1. Amazon welcomes the opportunity to respond to the Competition and Markets Authority's (CMA's) draft "Administrative Penalties: Statement of Policy on the CMA's Approach" published by the CMA on 11 July 2024 (CMA4con).
2. In this executive summary, we provide our key overarching comments on CMA4con. More detailed responses on sections 2 and 3, as well as the examples in Annex 2 of CMA4con follow in the sections below.

### **Introduction and context to comments on CMA4con**

3. This response is primarily concerned with the provisions of CMA4con which are relevant to the CMA's enforcement of the Digital Markets, Competition and Consumers Act (DMCC Act).<sup>1</sup> We understand from the CMA4con Consultation document that these are: (i) the CMA's powers to impose administrative penalties for breaches of Investigatory Requirements imposed under the digital markets regime; (ii) penalties for breaches of merger reporting requirements; and (iii) breaches of interim enforcement orders.
4. As noted in Amazon's response to the CMA's draft guidance in relation to the "Digital markets competition regime" (the DMCC Guidance) and its draft "Mergers Reporting Guidance" (published by the CMA on 24 May 2024), the DMCC Act represents one of the most radical changes to UK competition regulation in the last thirty years and, in many respects, sets out a markedly different approach to that adopted in other national and international competition regimes. In particular, the DMCC Act affords the CMA with extensive powers to impose bespoke conduct requirements on SMS firms or make pro-competitive interventions, as well as unprecedented powers to require firms to vary their usual conduct and/or perform tests or demonstrations which will directly impact their customers.
5. In this context, it is crucial that any guidance and policy governing the DMCC Act's implementation and enforcement is clear and delivers on the core objectives of transparency, predictability and consistency in terms of both substance and procedure. Indeed, guidance and policy related to the DMCC Act should reflect the CMA's stated intent to "adopt a participative approach" and take "a targeted, evidence-based and proportionate approach to implementing" the new DMCC regime.<sup>2</sup> CMA4con should also reflect the CMA's stated objective of ensuring that appropriate penalties are set in a "fair, consistent, predictable and transparent manner" across the range of cases in its enforcement portfolio.<sup>3</sup>
6. Against this backdrop, our key overarching comments on CMA4con (explained in more detail in the following sections) are as follows:
  - 6.1. Reflective of Amazon's broader comments on the draft DMCC Guidance, CMA4con should be updated to provide further detail regarding key concepts, assessments and procedures. This is necessary to ensure that CMA4con provides a clear framework for relevant aspects of the DMCC's enforcement, and ensure that it delivers on the objectives of transparency, predictability and consistency mentioned above;
  - 6.2. Given the breadth of the CMA's powers under the DMCC Act, CMA4con should include more DMCC-specific content, examples and references;
  - 6.3. In places, the CMA's proposed changes in CMA4con result in significantly less detail in relation to certain concepts as that contained in the current CMA4, without clear reasons why this is warranted. Amazon has set out below some examples of instances where retaining the current wording would be more effective than the proposed changes. We request that the CMA consider these examples, and either reinstate the current level of detail, or explain why the change of approach is appropriate.

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<sup>1</sup> Amazon's comments are mainly focussed on the CMA's proposed additions / deletions to the CMA's current version of the CMA4. However, where appropriate Amazon has also commented on existing provisions, particularly where it believes that the DMCC warrants additional guidance / statements from the CMA to achieve the objectives mentioned above.

<sup>2</sup> See questions 3 and 4 of <https://www.gov.uk/government/speeches/the-cmas-approach-to-digital-markets-regulation>.

<sup>3</sup> Paragraph 1.6 of the [consultation document](#) relating to the CMA's draft guidance as to the appropriate amount of a penalty.

## Section 2 of CMA4con: Statement of policy on whether and in what amount administrative penalties will be imposed

7. **CMA4con does not contain a clear statement as to when CMA4con applies to actions taken under the DMCC Act.** The CMA's Consultation Document, which accompanies CMA4con, includes a clear description of the interplay between CMA4con and the DMCC. This explanation should also be incorporated into both CMA4con and the DMCC Guidance, to ensure clarity and transparency.
8. **CMA4con should include firmer commitments from the CMA to discuss Investigatory Requirements with intended recipients prior to issuing the relevant investigatory notice.** CMA4con gives the CMA wide discretion on whether to discuss Investigatory Requirements with intended recipients before issuing an investigatory notice. Specifically, CMA4con states that the CMA "may" engage in advance discussions "where practicable and appropriate...". CMA4con acknowledges the benefits of engaging in advance discussions and that these "enable requests to be prepared that do not impose unnecessary burdens on recipients". Amazon agrees with the CMA's assessment. Discussing Investigatory Requirements with the intended recipient prior to issuing a relevant notice is imperative to ensure proportionality, feasibility and efficiency and to ensure that all parties are able to clarify issues and avoid wasted resources. CMA4con should therefore be amended to include a more definitive, positive obligation on the CMA to liaise with the intended recipient unless there are exceptional reasons not to do so. This collaborative approach would lead to more efficient and effective outcomes, and would be in line with the approach adopted in other CMA regimes, such as requests for information in both conduct and merger control investigations. As noted in Amazon's response to the wider consultation on the DMCC Guidance, this type of collaboration is particularly important in the context of enforcing a new regime where the CMA is afforded significant discretion.
9. **The CMA should retain the relevant factors contained in CMA4 when considering whether to extend a statutory time limit.** Paragraph 2.11 of CMA4con sets out relevant factors the CMA will consider when deciding to extend a statutory time limit. This paragraph retains the wording from paragraph 4.7 of CMA4, but has not carried over the following: "*These might, for example, include the CMA's assessment of whether the extension is necessary to enable the EA02 Requirements to be complied with and for the CMA to complete its functions, and whether any extension may jeopardise the effectiveness of any remedy the CMA might wish to impose (for example a divestment in the case of a completed merger). [Any decision not to extend the relevant statutory deadline will be kept under review.] The CMA would not usually expect to use isolated minor occurrences of non-compliance, or those with limited impact alone or in aggregate, to justify extensions to statutory timetables. In addition, the fact that a failure to comply is particularly serious (for example a deliberate failure by a recidivist designed to achieve an advantage) will not necessarily make an extension more likely*". It is not clear why this wording has been removed and in the interests of transparency, predictability and consistency this wording should be retained (and adapted accordingly).
10. **The CMA should consider its previous administrative penalty decisions when determining the appropriate level of penalty.** At paragraph 2.15 of CMA4con, when compared with CM4, the CMA has proposed to add that "*The CMA is not bound by its previous administrative penalty decisions, as each case is decided on its own facts*". Whilst Amazon agrees that each case should be decided on its own facts, cognisance of previous penalty decisions is both informative and helpful in ensuring the CMA is able to achieve its stated aim of ensuring appropriate penalties are set in a "*fair, consistent, predictable and transparent manner*" across the range of cases in its enforcement portfolio.<sup>4</sup> Firms subject to penalty decisions need a fair and transparent process, where the CMA is consistent in its approach. However, having no regard to previous penalty decisions risks inconsistency and unpredictability. CMA4con should therefore be amended to clarify that whilst the CMA is not bound by its previous administrative penalty decisions, and notwithstanding that each case is decided on its own facts, the CMA will have regard to its previous decisions when determining administrative penalties.

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<sup>4</sup> Paragraph 1.6 of the [consultation document](#) relating to the CMA's draft guidance as to the appropriate amount of a penalty.

11. **The simple fact that an undertaking is large / well-resourced should not be an aggravating factor for penalties.** At paragraph 2.24 of CMA4con, the CMA has proposed to add that 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”*. Simply being a large undertaking should not be an aggravating factor. If the large undertaking has taken reasonable steps to ensure compliance, then the fact that it could, in theory, have taken more steps (by virtue of its financial resources) should not be considered an aggravating factor. This wording should be removed.
12. **The CMA should consider other mitigating circumstances.** Whilst Amazon recognises the list in paragraph 2.25 of CMA4con is non-exhaustive, the list of mitigating factors is significantly shorter than the aggravating circumstances taken into account by the CMA. The CMA should expand the list of mitigating factors to include, for example:
  - 12.1. meaningful cooperation, which is taken into account by the CMA in other guidance notes, for example in the draft DMCC Guidance and the CMA’s guidance as to the appropriate amount of a penalty;
  - 12.2. previous, longstanding compliance with the Requirement;
  - 12.3. the undertaking’s submissions on the Requirements, e.g., whether it was flagged at any stage that the Requirements may be difficult to meet (either in time or substance) as envisaged in paragraphs 2.3 and 2.6 of CMA4con;
  - 12.4. that a large proportion of the Requirements have been met;
  - 12.5. what policies and procedures have been put in place to ensure the Requirements are met, and whether these were consulted on with the CMA.

### Section 3 of CMA4con: Procedure

13. **The CMA must make a provisional finding that there has been no “reasonable excuse”.** Paragraph 3.2 states that *“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”*. The CMA should take this opportunity to substitute *“Where it appears that...”* with *“Where the CMA has provisionally found that”*, so that it is clear that the CMA will only give a penalty notice where it has investigated and concluded, at least provisionally, that there has been a failure to comply.

### Annex 2: Examples

14. **The CMA should provide additional illustrative / worked examples which are DMCC related and these examples should be carried into the body of CMA4con.** We understand that it is difficult to provide examples that capture all nuances of a policy statement that is intended to apply across very different firms and in different situations, but illustrative examples are helpful and do not remove the CMA’s ability to consider issues on a case-by-case basis. The CMA should therefore provide a number of DMCC-specific illustrative / worked examples. These examples should be carried into the body of CMA4con to allow the reader to consider the text and examples together.