Ashurst

Consultation: Administrative penalties: statement of policy - Response of Ashurst LLP

23 August 2024

1. Introduction

Ashurst LLP welcomes the opportunity to respond to the consultation opened by the Competition and Markets Authority (**CMA**) on the updated draft version of administrative penalties: statement of policy on the CMA's approach (11 July 2024) (**Draft CMA4**). This response contains our own views, based on our experience of advising and representing clients on the application of the Competition Act 1998 and the Enterprise Act 2002, and is not made on behalf of any of our clients.

We confirm that nothing in this response is confidential. We also confirm that we would be happy to be contacted by the CMA in relation to our responses.

As set out in more detail below, our comments relate to:

a) The CMA's proposal to assess the appropriateness of the level of penalty in relation to both Investigatory Requirements and Remedy Requirements on the same basis, namely by applying an 'in the round' approach. We do not consider that the proposed approach properly reflects the varied nature of the types of infringement that now fall within the scope of Remedy Requirements, following the expansion of the CMA's powers in the Digital Markets, Competition and Consumers Act (**DMCC Act**). In particular, instruments such as orders and undertakings (e.g. final orders following a market investigation) have substantive objectives and requirements, such that penalties for breaches should more appropriately be assessed by reference to a 'stepped' approach; and

b) the scope of the new penalty powers, and in particular whether the powers are intended to have retrospective application.

2. Administrative penalties vs substantive penalties

The Draft CMA4 proposes to apply an 'in the round' approach to the assessment of the appropriate level of penalty in relation to both Investigative Requirements and Remedy Requirements.[1] In that context, the Draft CMA4 categorises penalties imposed for breaches of undertakings following merger or market investigations as administrative penalties, subject to a maximum fine of 5% of worldwide turnover. We do not consider that such breaches should be categorised as being "administrative" in nature, such that it is appropriate for penalties to be assessed by reference to an 'in the round' approach. For the purposes of assessing the appropriate amount of the penalty, such breaches should be assessed on the basis that they are more akin to substantive breaches, with penalties being calculated by reference to a 'stepped' approach. This is for the following reasons:

- The DMCC Act applies a different maximum level of fine for breaches of remedies (5% of worldwide turnover) compared to breaches of investigatory requirements (1% of worldwide turnover). This confirms the different nature of the underlying requirements.
- Breaches of remedies are not merely procedural or technical breaches, but effectively breach a requirement put in place to remedy a substantive actual or potential harm to competition that has been identified by the CMA (in its merger or market investigation as applicable). It is therefore appropriate to follow a similar approach to the one used to determine penalties for substantive infringements under the Competition Act 1998 or the Enterprise Act 2002, i.e. using a stepped approach. This would ensure consistency, proportionality and legal certainty in the application of the CMA's penalty powers. It would also align with the practice of the European Commission, which applies a stepped approach to fines for non-compliance with remedies under EU competition law.[2]
- The CMA's Consultation Document notes that the 'in the round' approach to penalty calculation has been upheld by the CAT in previous cases, including in cases where substantial penalties have been imposed.[3] In relation to CMA enforcement, it refers in particular to the *Electro Rent v CMA* case, which concerned breaches of an IEO and Interim Order. While penalties for breaches of IEO have historically been assessed on the basis of the 'in the round' approach, this does not provide a justification for treating all forms of 'administrative penalties' on the same

[1] Consultation Document, para 2.18.

[2] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02).

[3] Consultation Document, para 2.18.

basis as proposed by the Draft CMA4. IEO breaches are properly considered as breaches of administrative requirements, as IEOs are imposed to prevent pre-emptive action during a merger investigation and do not relate to the substantive assessment of the merger. We do not consider breaches of remedies or remedy requirements to fall within the same category.[4]

- The CMA's Consultation Document also expressly notes that the context of 'administrative penalties' is "*different, for example, from penalties for substantive breaches where there is a greater focus on the penalty reflecting the specific competitive harm from the breach and for this to be reflected in the approach to the penalty calculation*".[5] As a result, the consultation document notes that "*a 'stepped' approach to penalty calculation remains appropriate … in respect of such substantive breaches*". We would agree with this assessment but would note that, in order to accommodate breaches of Remedy Requirements within the Draft CMA4, the CMA has added as a potential aggravating factor evidence that "*the breach had a significant and actual or potential detrimental impact on competition, customers, consumers and/or the public interest*". The guidance notes this factor may be more applicable to breaches of Remedy Requirements than Investigative Requirements. This confirms our view above that Remedy Requirements are more akin to substantive breaches than Investigative Requirements and that an in the round approach to assessing the level of the penalty is more appropriate.

By treating breaches of Remedy Requirements as being equivalent to administrative breaches, and assessing resulting penalties on that basis, the CMA is also creating inconsistency across its various other penalty statements/guidance. For example, the draft guidance on penalties for breaches of the digital markets regime adopts a stepped approach for calculating penalties for breaches of conduct requirements and pro-competitive interventions (**PCIs**) which have clear parallels with market investigation orders and undertakings.[6] Similarly, the draft guidance on penalties for breaches of consumer protection law, which also involves assessing the impact on consumers, uses a stepped approach with a table of factors to determine the seriousness of the breach,

[4] The CMA's Consultation Document also refers to the CAT decision in *Virgin Media v Ofcom* however we note this refers to a penalty made under the Ofcom's ex-ante regulatory framework under the Communications Act 2003, rather than a penalty imposed under the Competition rules.

[5] Consultation Document, para 2.20.

[6] Digital markets competition regime draft guidance (CMA194con), para 8.19.

including in relation to breaches of undertakings and directions (as well as administrative infringements).[7]

We are concerned that the Draft CMA4 does not adequately reflect this distinction in relation to breaches of remedies imposed by the CMA following merger and market investigations. We consider that such breaches should not be treated as administrative penalties, but rather in the same way as a substantive infringements, warranting a more rigorous and transparent approach to penalty setting than the proposed 'in the round' approach.

3. **Retrospectivity**

We are also concerned that Draft CMA4 does not clearly resolve the issue of whether the new penalty powers are intended to apply only to market investigation orders that are made (or undertakings that are given) after the DMCC Act enters into force, or if they may also be applied retrospectively to existing orders or undertakings. The failure to clarify this position creates uncertainty and potentially prejudices businesses that are subject to existing orders or undertakings, which were not made with the intention that breaches would be subject to potentially significant fines. We note that the Draft CMA4 states that the CMA will not impose a penalty for a breach that occurred before the DMCC Act enters into force, but it does not specify whether the relevant date is the date of the breach or the date of the order or undertaking.

We therefore suggest the CMA clarify its position in the final revised CMA4 (or elsewhere if more appropriate) and confirm that new penalty powers will only apply to market investigation orders that are made (or undertakings that are given) after the DMCC Act enters into force, and not to breaches of existing orders or undertakings (that were never drafted or structured on the basis that any breach might be subject to substantial penalties). This would be consistent with the principle of legal certainty and the presumption against retrospective legislation.

We also suggest that the CMA include a statement to explain how it will deal with any ongoing or pending cases of breaches of remedies that may fall within any transitional period.

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[7] Direct consumer enforcement draft guidance (CMA200con), para 7.45.