DENTONS

Response to consultation: Draft Statement of Policy regarding the CMA's approach to administrative penalties

1 Introduction

1.1 Dentons welcomes this opportunity to provide its views on the draft Statement of Policy on Administrative Penalties (CMA4con) (the **Draft CMA4**). This response sets out our views on what we consider to be the most significant issues arising from the Draft CMA4.

1.2 The Digital Markets, Competition and Consumers Act 2024 (the **DMCC**) significantly enhances the CMA's toolkit for responding to breaches of Investigatory Requirements and Remedy Requirements. We recognise the importance of these powers to ensure the CMA can take appropriate action in response to breaches of either type of Requirement. However, as the CMA has a dual-role of imposing penalties for matters it has investigated and determined, it is essential that the CMA holds itself to stringent standards and creates clear and certain expectations on its conduct for businesses. We are concerned that this is not currently the case for all aspects of the Draft CMA4.

1.3 Unless otherwise set out in this response, we adopt the defined terms used throughout the Draft CMA4 or the consultation document published on 11 July 2024. References to paragraph numbers refer to the Draft CMA4 unless otherwise stated.

1.4 We would be pleased to discuss any part of our response further with the CMA.

2 Response to Draft CMA4

Greater guidance on "in the round" approach required

2.1 Paragraph 2.1 makes clear that the CMA has retained the "in the round" approach to penalty calculation from the current CMA4.[1] Given the CMA's broadened fining powers under the DMCC, this approach will now be applied to substantive infringements and affords the CMA considerable discretion in imposing potentially significant penalties. Whilst the Draft CMA4 includes some guidance on how it will apply the "in the round" approach, in general greater guidance would be welcomed. For example, the practical examples at Annex 2 could include indicative fining ranges that the CMA may seek to impose. Further, as discussed below at 2.12, some of the examples the CMA has provided indicate a concerning and disproportionate approach to an "in the round" assessment.

Breaches that "risked having" adverse impact on public interest – lacks clarity

2.2 Paragraph 2.2 states that the CMA will be more likely to impose a penalty where it considers the breach had (or risked having) an adverse impact on the public interest (amongst other factors). Two points arise from this:

(a) First, the CMA must provide greater clarity on the meaning of a breach that "risked having" an adverse impact. As drafted, this is unnecessarily broad and captures

[1] Paragraph 2.1, Draft CMA4.

purely theoretical or improbable risks, which should not properly be used by the CMA as a basis to impose a penalty.

(b) Second, reference to "public interest" is very broad and ambiguous, and absent further clarity may permit consideration of factors outside of the CMA's regulatory remit.

"Reasonable excuse" threshold is too high

2.3 Paragraph 2.4 explains that administrative penalties for breaches of Requirements can only be imposed if a failure to comply is without "reasonable excuse". The following paragraphs explain that what constitutes a "reasonable excuse" requires a "*significant and genuinely unforeseeable or unusual event and/or significant factor or event beyond the Relevant Person's control*". This is a very high threshold to meet. Whilst we acknowledge the CMA needs to retain its discretion to assess each case on its facts, in practice, ensuring robust compliance with Requirements can present a significant challenge to businesses. There may be very reasonable grounds for minor or unintentional deviations from Requirements at times, which cannot be readily or practically monitored, but which would not be considered a "reasonable excuse" as described in the Draft CMA4. We encourage the CMA to revise the Draft CMA4 in this respect to take into account the practicalities of ensuring compliance with some Requirements.

Aggravating factors of the Relevant Person – clarification needed

2.4 Several points require clarification in the Draft CMA4's description of aggravating factors in relation to the Relevant Person. (These factors are important as they are used to assess the level of penalty imposed):

(a) Paragraph 2.21, second bullet point states that it will be an aggravating factor if the Relevant Person "*continued the breach after the Relevant Person… became aware of the CMA's concern that there might have been a contravention or breach*". The CMA should clarify the meaning of "concern" here. We assume that this is not intended to capture situations in which a Relevant Person continues an action which in good faith it does not consider to be a breach, but which the CMA ultimately takes a different view on. Otherwise, there is a risk that the Relevant Person's rights of defence are unnecessarily curtailed.

(b) Paragraph 2.22 (in relation to recidivism), first bullet states that it will be an aggravating factor if "*the breach was part of a broader pattern of conduct by the Relevant Person*". This concept is too broad. The pattern of conduct should be narrowly defined to the Relevant Person's conduct in relation to the Requirements only.

(c) Paragraph 2.24, first bullet point states that it will be an aggravating factor if "*the Relevant Person has significant financial and administrative resources available to it to allow it to prevent breaches from occurring*". We consider that this should not be a

factor relevant to the imposition of fines. For example, compliance with Remedy Requirements may be even more challenging for larger organisations with many employees and business areas, as there is greater scope for minor deviations and irregularities. (Similar arguments apply to paragraph 2.17, regarding the relevance of the Relevant Person's resources in setting the level of penalty).

Mitigating factors – reason for breach should be a factor

2.5 Paragraph 2.25 provides a list of mitigating factors that may reduce the seriousness of the breach and therefore result in a lower penalty being imposed. These factors should include the reasons for the breach taking place. This is an important consideration for assessing the severity of the breach and is listed in paragraph 2.1 as a factor that the CMA will have regard to.

Penalty notices – CMA's detailed reasoning to be provided

2.6 Paragraph 3.2 discusses the content of provisional penalty notices. We encourage the CMA to include with its provisional penalty notices detailed reasons for the proposed penalty and its amount, by reference to the application of its "in the round" approach. We note that final penalty notices will include "*any other facts which the CMA considers justify the imposition of a penalty and the amount of penalty"* (Paragraph 3.5, fifth bullet point). However, this does not give sufficient comfort that the CMA's conclusions regarding penalties will be explained in sufficient detail for them to be comprehensively reviewed by the affected party.

Fining powers for breaches of pre-existing Orders

2.7 Annex 1 sets out the statutory maxima for penalties for breaches of various Requirements. The Draft CMA4 does not clarify whether the CMA's new fining powers can be applied to breaches of Market Investigation Orders which pre-date the DMCC[2]. Although not expressly addressed in the DMCC itself, notably the DMCC does not provide any indication of an intention that it should apply with any degree of retrospectivity (including Orders and Remedies created and put into effective without any risk of financial penalties). The CMA will be aware that many parties are particularly interested in receiving clarity on this issue.[3] This uncertainty is surprising, given assurances from the previous government, which introduced the DMCC Bill, that it did not intend the new penalties regime to apply to breaches of pre-existing orders.

2.8 By way of background, the DMCC grants the CMA powers to impose a fixed penalty of up to 5% of an undertaking's global annual turnover and/or a daily amount of up to 5% of an

[2] We note that the CMA's enforcement powers (and the Draft CMA4) applies also to breaches of Requirements in respect of the CMA's mergers and CA98 functions. The issues discussed in paragraphs 2.7-2.11 of this response in relation to Orders apply equally to those Requirements.
[3] Including, for example, the evidence submitted by NatWest Group plc to the Public Bill Committee on the Digital Markets, Competition and Consumers Bill (DMCCB02), prepared on 14 June 2023, available at: https://publications.parliament.uk/pa/cm5803/cmpublic/DigitalMarketsCompetitionConsumers/memo/DMCCB02.htm.

undertaking's global daily turnover (the **New Fining Powers**) for breaches of certain orders, including any orders made under Section 161 of EA02 (**Orders**).

2.9 Many Orders were drafted and agreed between the CMA and addressees at a time when the CMA lacked the ability to impose fines for breaches. These would include, amongst others, *The Retail Banking Market Investigation Order 2017* and *The Groceries Market Investigation (Controlled Land) Order 2010 (**CLO**)*[4].

2.10 Dentons considers it would be inappropriate for the CMA to apply its New Fining Powers to breaches of pre-existing Orders, for the following reasons:

(a) many addressees accepted strict liability provisions for pre-existing Orders that would not have been appropriate if fines for breaches were envisaged at the time of drafting. (By way of example, the wording of the CLO Explanatory Note makes clear that the only possible consequences of not complying with the Order are private actions being brought by injured parties or by the competition authority bringing an injunction or equivalent relief[5]). Had the possibility of fines been in contemplation, it is highly likely that a number of these pre-existing Orders would have been drafted differently (for example, by reference to reasonable endeavour provisions in place of strict liability provisions or by seeking greater clarity in the relevant Order as to how its provisions were intended to apply);

(b) if the CMA's New Fining Powers were to apply to pre-existing Orders, addressees of Orders may face undue and disproportionate consequences for minor infringements that previously would have been resolved quickly and without significant CMA resource; and

(c) use of the New Fining Powers in these circumstances would be contrary to the principle of legal certainty. Addressees were not aware of possible fines in consequence of a breach when they were consulted on the form of the pre-existing Orders. Responses would have been different and as such it is procedurally unfair to now leave open this possibility at a time when addressees can no longer comment or advocate for reasonable amendments.

2.11 In light of the above, Dentons invites the CMA to include express wording in the final CMA4 clarifying that their New Fining Powers will not be applied in relation to breaches of pre-existing Orders (and would only apply to Orders coming into force after the coming into force of the DMCC).

[4] We understand the CMA is aware of this issue. In particular, we note that Example 7 at page 42 of the Draft CMA4 bears similarities with the obligations contained in the Retail Banking Market Investigation Order 2017.
[5] See paragraphs 3 and 4, Explanatory Note, available at: https://assets.publishing.service.gov.uk/media/5f2040dad3bf7f1b0fa79fa7/controlled_land_order_explanatory_note_300710_PDF_A.pdf

Annex 2 – practical examples

2.12 We welcome the CMA providing worked examples of how it will apply its Policy in practice. We have the following feedback on these practical examples:

(a) **Example 5 (CA98 investigation deadlines)**: We consider that this example demonstrates a lack of appreciation by the CMA regarding the burden a CMA request places on businesses, particularly for firms which are not staffed with excess capacity to pick up urgent requests (which is nearly all businesses we work with). It is our view that it is not proportionate for such a breach to merit a moderate to severe penalty. We also consider the timetable in this example to be unreasonable, given that this is a CA98 investigation with no statutory timeframe (meaning the case team could simply have moved its interviews back). We invite the CMA to reconsider their analysis in this example.

(b) **Example 6 (evidence preservation)**: This example highlights the difficulty of determining when an individual (or undertaking) may have "suspected" that the CMA was carrying out a CA98 investigation (or was likely to be). We consider that it is unreasonable for individuals to incur penalties on the basis of a rumour only and that a higher evidential threshold as to certainty of a CMA investigation should be applied before penalties can be introduced (for example, they must be put on notice by the CMA). We invite the CMA to consider the practical implications of this example and reconsider their analysis[6].

(c) **Example 7 (market investigation orders)**: We are very concerned by the CMA's view that the described behaviour amounts to a significant breach. The scenario highlights routine control and monitoring issues in large organisations, where innocent mistakes regrettably do happen. Instead of imposing fixed penalties, a more proportionate and appropriate approach would be to work with the organisation to help improve and strengthen its compliance behaviours. Additionally, we would appreciate the CMA re-phrasing / clarifying the meaning of the following sentence, which is perhaps not as clear as it ideally would be: "… *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*."

Dentons UK and Middle East LLP

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[6] We would also welcome greater guidance on how the CMA will assess when an individual is acting on their own behalf or acting on behalf of an undertaking.