Linklaters

Draft statement of policy on the CMA's approach to administrative penalties (CMA4)

Linklaters' Response

23 August 2024

1 Introduction

(1) Linklaters welcomes the opportunity to respond to the Competition and Markets Authority's ("**CMA**") consultation on its draft statement of policy on the CMA's approach to administrative penalties ("**Draft CMA4**").

(2) By way of general comment, we welcome the additional clarity on the CMA's approach to enforcing and imposing administrative penalties.

(3) However, as we set out in this response, there remain some sections of the Draft CMA4 that we consider would benefit from greater clarity and / or detail, specifically in relation to the application of the new enforcement powers to existing or historic orders or undertakings (i.e. remedies that were implemented prior to the commencement of the Digital Markets, Competition and Consumers Act 2024 ("**DMCCA24**")) and the approach to determining penalties "in the round". Bearing in mind the potential for significant penalties, which represents a significant departure from prior practice, the need for legal certainty is extremely important for a wide range of industry participants who, in our experience, take their compliance obligations with such remedies extremely seriously.

2 Remedy requirements

(4) 'Remedy Requirements' for the purpose of Draft CMA4 are defined broadly as requirements imposed or accepted by the CMA to address, as relevant, remedy concerns the CMA has identified in cases under the Competition Act 1998 ("**CA98**") and Enterprise Act 2002 ("**EA02**") (whether on an interim or final basis) and on an interim basis under the DMCCA24. However, it is not clear whether Remedy Requirements would include those interim or final remedies ordered or accepted under CA98 or EA02 which pre-date the DMCCA24 and the updated CMA4, and if so, what the CMA's policy will be in respect of applying its new powers to those historic remedies.

(5) It is our view that CMA4 should clearly delineate between historic remedies, and those that are implemented (whether via acceptance of undertakings or the making of orders) after the DMCCA24 comes into force, and that penalties should only be contemplated for breaches of remedies in the latter category, for the reasons set out below.

2.1 Compliance with the DMCCA24

(6) First, application of the CMA's new enforcement powers - including those pertaining to penalties - to historic remedies would, in our view, be inconsistent with, the DMCCA24.

(7) In particular, the DMCCA24 provides (through an amended section 31A of CA98) that informed consent with respect to the consequences of failing to comply with voluntary commitments or undertakings is an express pre-requisite to such commitments being accepted:

> *"(2A) But the CMA may not accept commitments from a person unless it has provided the person with information about the possible consequences of failing to adhere to the commitments." (emphasis added)*

(8) Similarly, section 89 of EA02 has been amended by the DMCCA24 to read:

> *"(A1) An appropriate authority may not accept an enforcement undertaking from a person unless it has provided the person with information about the possible consequences of failing to comply with the undertaking." (emphasis added)*

(9) This indicates a clear intent of Parliament to ensure that parties offering commitments and agreeing to remedies are aware of the CMA's enforcement powers, and the scope and nature of potential fines for a failure to comply prior to making those commitments.

(10) The imposition of financial penalties for non-compliance with historic undertakings / commitments (which do not explicitly provide for the possibility of such penalties) was unforeseeable by firms at the time they entered into these historic commitments. It would therefore be contrary to both the intent and the specific provisions of the DMCCA24 to have the CMA's new enforcement powers apply to those historic remedies where informed consent regarding the application of administrative penalties was not, and could not have been, given in advance.

2.2 Compliance with public law principles

(11) More generally, to impose financial penalties for a breach of a remedy that pre-dated the DMCCA24 would – regardless of whether such remedy was implemented by way of undertaking/commitment or order – be contrary to the principles of legitimate expectation and legal certainty, including the presumption against the retroactive operation of legislation. This approach would also be contrary to the CMA's duty to consult. In some cases, applying financial penalties for non-compliance with historic commitments may also be disproportionate.

Legal certainty and presumption against the retroactive operation of legislation

(12) The principle of legal certainty is well-established and has historically been recognised not only in public law, but also in private law, as a "*traditional strength and major selling point of English commercial law*".[1] Indeed, the first of Lord Bingham's eight principles of the rule of law provides that the law "*must be accessible and in so far as possible intelligible, clear and predictable.*"[2]

(13) As a corollary to the above, it is a "*fundamental rule of English law that no statute shall be construed to have retrospective operation unless such construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication*".[3]

(14) These principles must apply to the consequences for breach of historic remedies or commitments. Remedies that pre-dated the DMCCA24 will have been subject to public consultation (in line with legislative requirements for such consultation, discussed further below) on their form and content, including as to the consequences of breaching those remedies, which would not have included financial penalties (as the EA02 and the CA98

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[1] *Golden Straight Corporation v Nippon YKK (The "Golden Victory")* [2007] UKHL 12, para 1, Lord Bingham. See also *Vallejo v Wheeler* (1774) 1 Cowp 143, 153

[2] Lord Bingham, The Rule of Law (Allen Lane, 2010)

[3] *Maxwell on The Interpretation of Statutes,* 12th ed (1969), p 215; see also the judgment of Dickson J in *Gustavson Drilling* [1977] 1 SCR 271

made no provision for financial penalties for any form of final remedy).[4] When making representations, parties would not therefore have had any expectation prior to the DMCCA24 that such remedies might in future be subject to financial penalties (and certainly not of the magnitude now set out in the DMCCA24). Had this been in contemplation, their representations, and the resulting remedies, might have been quite different. Effectively "writing in" a penalty clause to such remedies by implication has the effect of substantially changing the substance of those remedies, well after the statutory timeframe in which the CMA was required to discharge its duty to remedy the concerns identified, without any new substantive concerns having been identified or any fresh consultation having taken place,

(15) As discussed above, such an approach would also be inconsistent with the statutory provisions in the new CA98 section 31A and EA02 section 89, introduced by the DMCCA24 and, for example, the CMA's information gathering powers, notably EA02 section 109(4) and CA98 sections 26(3) and 26A(5) which provide that, for a statutory notice to be valid, it must specify the potential consequences of a failure to comply.

(16) We understand that the previous Secretary of State (who was responsible for the introduction and passing of the DMCC bill) had made clear to stakeholders that financial penalties introduced by the DMCCA were not intended to apply to historic remedies – presumably on the basis of these legal principles. On this basis, it cannot be said that retroactive application of penalty powers to historic remedies is a "necessary and distinct implication" of the DMCCA24 – rather the opposite is true.

(17) In addition, if applied to historic commitments, CA98, section 31A is likely to result in duplicative enforcement, and inconsistencies in the imposition of penalties, especially given that some historic commitments include within them details of penalties for non-compliance by means of secondary legislation.[5]

Duty to consult

(18) The CMA is under a public sector duty to consult on commitments it accepts or imposes, which is a fundamental procedural right.[6] Whilst DMCC124 provides that "*a duty to consult under or by virtue to this Act may be satisfied by consultation that took place wholly or partly before the passing of this Act*"[7], this cannot feasibly apply in relation to prior consultations on undertakings and remedies where the consequences of non-compliance will increase exponentially under the DMCCA24, and where such consequences were not in contemplation at the time of the prior consultation.

(19) Even absent an express requirement in legislation to consult, as a public body, the CMA is bound by the principle of fairness in the exercise of its functions. The imposition of penalties in these circumstances would not be aligned with this principle.

Proportionality

(20) We note for good order that it may not always be necessary or proportionate to impose a remedy for purely administrative or technical breaches of remedies.

[4] CA98, s31E, s34; EA167

[5] For example, Groceries (Supply Chain Practices) Market Investigation Order; The Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order 2015

[6] EA02, section 169

[7] DMCCA24, section 333

(21) Many market investigation orders, for example, contain behavioural remedies (for example requiring the provision of information to customers) that are extremely broad in scope and duration, have a strict liability standard of compliance, lack detailed guidance, and have not always been applied consistently. For an unintentional, immaterial breach to now be punishable by (potentially significant) financial penalties, without any requirement to conduct an assessment of the effects of such a breach, would be disproportionate.

(22) This is particularly the case in those situations where circumstances may have changed since the pre-DMCCA24 remedy was agreed or imposed, making compliance with certain aspects of a remedy much less relevant to achieving the aim of the remedy than might have been the case five or ten years prior. Imposing financial penalties in such a situation for accidental and minor breaches would be particularly disproportionate, and cannot have been contemplated by the DMCCA24.

3 Penalty determination "in the round"

(23) The Consultation Guidance refers to the CMA making decisions on whether to impose a financial penalty and, if so, the level of the penalty, based in both cases on factors taken in the round.[8] While we note the CMA's reasoning for this approach, imposing (potentially significant) penalties on this basis does raise the risk of the CMA failing to discharge its duty to provide reasons.[9]

(24) As provided in well-established precedent, "[t]*he reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues, disclosing how any issue of law or fact was resolved.*"[10]

(25) In light of the above, it is important, within the context of the 'in the round' principle, for the CMA's provisional and final enforcement decisions to outline in sufficient detail its reasoning, the facts relevant to its conclusions, and the weight assigned to different factors. This will also help to ensure that the CMA's consultations are robust and that its final decisions respect parties' rights of defence.

(26) The current proposal comes in stark contrast to the stepped approach taken for substantive infringements under CA98 and we would urge the Department and the CMA to ensure that there is a clear methodology and reasoning for the establishment of administrative penalties in CMA4 which is communicated to parties as part of any penalty notice.

Parties' rights of defence and appeal

(27) We would submit that the current proposal in the Consultation Guidelines falls short of the information required to satisfy parties' rights of defence. In taking the commercial decision as to whether to appeal a penalty, parties should be provided with a comprehensive understanding of the CMA's rationale for establishing the amount of a penalty. Whilst this does not necessarily need to mirror the stepped process for substantive penalties, we would propose that a more formulaic approach is taken to allow parties to fully exercise their rights of defence and appeal.

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[8] Paras 2.15 to 2.18 of CMA4con. The CMA shall consider seriousness of breach, the need for deterrence, aggravating factors, mitigating factors and the deterrent effect of the remedy (i.e. size and financial resources of the undertaking concerned) when imposing an administrative penalty.

[9] EA02, section 104(3)

[10] *South Bucks District Council and another v Porter* [2004] 1 WLR 1953 at paragraph 36

CMA's duty to consult, reason and act proportionately

(28) As explained in paragraph (17) above, the CMA is under a public duty to consult parties on its decision. It is also under a duty to, insofar as is practicable, to give reasons for the proposed decision.[11] Neither of these duties would be satisfied absent clear reasoning from the CMA on the calculation of penalties.

(29) More broadly, the CMA is bound to act within its powers in a way which is proportionate. Whilst a broad-stroke "in the round" penalty calculation does not necessarily run contrary to this principle of proportionality, failure to justify penalties may provide a catalyst for appeals on the basis that the CMA has not acted proportionality in calculating penalties.

Linklaters LLP – 23 August 2024

[11] EA02, section 104(3)