September 2024

CMA Administrative Penalties: Statement of Policy Consultation

NWG Response

NatWest Group ("**NWG**") welcomes the opportunity to respond to the Competition and Markets Authority's (CMA) consultation on its draft policy statement: Administrative penalties: statement of policy (CMA4, or "the draft policy statement").

The Digital Markets, Competition and Consumers Act (the DMCCA Act) provides new powers to the CMA to impose fixed penalties of up to five per cent of a business's annual worldwide turnover, and an additional or alternative daily penalty of up to five per cent of daily worldwide turnover, for a business's failure to comply with a market investigation remedy, as well as other specific breaches. These new powers are reflected in the CMA's updated draft policy statement.

NWG's submission is focused on the CMA's proposed approach to penalties for breaches of market investigation remedies. NWG is subject to the 2017 Retail Banking Order and the 2002 SME Undertakings. In the past, it has been subject to the 2011 Payment Protection Order and 2008 NI PCA Order.

We also refer the CMA to (i) our submission to the Public Bills committee in June 2023,[1] and (ii) our submission to the CMA in July this year,[2] shortly before it launched this consultation. This submission draws on and should be considered alongside these previous submissions.

Executive summary

It would be procedurally unfair for the CMA's new fining powers to apply retrospectively to existing market investigation orders and undertakings, such as the 2017 Retail Banking Order and the 2002 SME Undertakings. As we explain below, parties would have engaged very differently in the consultation process for these remedies at the time, had fines for breaches been viewed as a possibility.

As NWG has stated in previous submissions, the CMA's current approach to market investigation remedies enforcement is disproportionate. The CMA appears to take the view that only 100% compliance with remedies is acceptable. This misunderstands how compliance with detailed and prescriptive regulatory requirements works in practice. The CMA approach is out of line with the approach of other regulators, such as the PRA, FCA and ICO, who establish materiality thresholds for when breaches of rules need to be reported. We are therefore particularly concerned that the CMA has sought to retain a significant element of discretion over when it will impose financial penalties, through its proposed "in the round" approach. We are concerned that fines will be imposed for breaches that have a low (or no) impact on consumers or competition.

This concern is borne out in the one example (example 7) that the CMA provides of breaches of a market investigation remedy that would attract a financial penalty. Except in exceptional cases where a firm has ignored and not implemented a remedy, fines should be a last resort, after other interventions (public letters and directions) have been shown to have substantively failed. This should

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[1] https://publications.parliament.uk/pa/cm5803/cmpublic/DigitalMarketsCompetitionConsumers/memo/DMCCB02.htm.

[2] *A Concurrency lacuna? The need for more alignment between CMA market investigation remedies and FCA conduct regulation.* Sent to the CMA on 4 July 2024.

be made clear in the draft policy statement. As 100% compliance is neither practicable nor desirable (for the friction it would introduce in customer journeys), we urge the CMA to adopt a more proportionate approach to enforcement in general, and its proposed penalties regime in particular. Imposing fines for breaches of discrete elements of remedy requirements where firms are making good faith efforts to ensure substantive compliance would be unjust and unlikely to lead to better outcomes for consumers or competition.

Retrospective application of the new penalties regime

NWG submits that it is not appropriate or procedurally fair for the CMA's new fining powers to apply to existing market investigation remedies. Had fines been a possibility when the draft 2017 Retail Banking Order was consulted on, this likely would have affected the nature of NWG's engagement with the CMA over the drafting of the Order.

Parties who are subject to market investigation remedy proposals in future will be able to consider the CMA's stated approach to fines during the consultation process. Parties will be able to seek clarity from the CMA on the types of breaches that may attract fines as part of that process. They can determine whether to challenge Orders through the Courts at the time they are made.

NWG understands that the previous Secretary of State for Business and Trade took the view (in a letter to UK Finance) that the drafting of the legislation was clear that the regime should apply only to breaches of remedies put in place after the commencement of the relevant provisions in the Act.

As regards the 2002 SME Undertakings, NWG considers that these fall outside the scope of the new fining powers, for two additional, very clear, reasons.

First, the provisions of Part 3 of Schedule 11 of the DMCC Act only apply to undertakings and orders under part 4 of the Enterprise Act 2002. The statutory basis for SME Undertakings is stated as section 88 of the Fair Trading Act 1973. It therefore appears that the SME Undertakings are outside the scope of the CMA's fining powers.

Second, paragraph 16 of Schedule 11 inserts a new section 161A into the Enterprise Act, which states the following:

> *161A Acceptance of enforcement undertakings: Part 4*
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> *(1) The relevant authority may not accept an enforcement undertaking from a person <u>unless it has provided the person with information about the possible consequences of failing to comply with the undertaking</u>….* [underlining added]

Paragraph 820 of the explanatory notes to the DMCC Act explains that this provision ensures that "*those who offer undertakings are made aware of the financial penalties which may be imposed for non-compliance without reasonable excuse before the undertaking is accepted and the obligation crystallises.*"

For the purposes of legal certainty, we invite the CMA to make it clear in its final guidance which market investigation remedies it considers are caught by its new fining powers.

Proportionality of the CMA's current approach remedies compliance, and what this implies for the CMA's use of its fining powers

The draft policy statement seeks to cover breaches of a wide range of requirements (both investigatory and remedy requirements) across all sectors of the economy. Perhaps as a result, the "in the round" guidance for companies subject to market investigation remedies is very broad-based and leaves extensive amounts of discretion for the CMA. The CMA appears to have reserved to itself maximum flexibility to impose fines at any levels that it sees fit up to the maximum caps, with minimal constraints. When set against the CMA's current approach to enforcement of remedies compliance, this raises concerns.

The CMA already has a range of tools available to it to deal with breaches of existing market investigation remedies (e.g. no action private letters, public letters, directions or court action). Many market investigation remedies (including the 2017 Retail Banking Order) set down very prescriptive requirements, which are very challenging for banks to comply with 100% of the time.

The CMA's existing guidance on enforcement of market investigation remedies,[3] states that "*any instance in which a firm fails to comply with any obligation… regardless of any effect on competition or customers*", will be viewed as a breach, "*irrespective of how they occurred, including whether deliberate, accidental or through ignorance of the obligations*". All breaches must be reported to the CMA within 14 days of discovery, no matter how small. The CMA sets a low threshold for what it considers to be a material breach: for example, in respect of information remedies, it states that a breach that affects more than 50 customers of a mass market product would be material. This is a very low threshold for markets in which there are millions of customers (for example, NWG has 16m retail customers). It puts pressure on resources for both firms and regulators, when the outcome for customers and the market will not be significant.

NWG, likely along with other banks, has devoted considerable time and resources to compliance with its market investigation remedy obligations. Effective compliance involves both prevention and detection. There is an extensive and ongoing history of banks (including NWG) self-reporting breaches – in line with the CMA's requirement that all breaches must be reported - that have been successfully detected, the vast majority of which have no or very minimal impact on consumers or competition.

The approach of NWG to CMA remedies compliance is aligned to NWG's approach to compliance with other obligations overseen by other regulators, including the PRA, FCA and ICO. There is a general acknowledgement that not all breaches can be prevented, and that effective detective controls are essential to avoid compliance breaches becoming serious. For example:

- FCA SUP 15.3[4] provides rules and guidance on when matters should be notified to the FCA, including any significant failure in the firm's systems and controls and a significant breach of any requirement imposed by the CCA or legislation made under the CCA. This enables minor issues to be dealt with efficiently and proportionately.

[3] https://www.gov.uk/government/publications/merger-and-market-remedies-guidance-on-reporting-investigation-and-enforcement-of-potential-breaches/merger-and-market-remedies-guidance-on-reporting-investigation-and-enforcement-of-potential-breaches

[4] https://www.handbook.fca.org.uk/handbook/SUP/15/3.html

- There is no requirement to notify the ICO of every breach of data protection law. It is up to data controllers to determine materiality and report only material security breaches to the ICO.
- The PRA and HMT are considering a de-minimis threshold to be applied before an activity is considered a breach of the ringfencing rules. This will relieve some of the resource pressure on the regulator when there is no significant customer impact.

In contrast to the approach of other regulators, the CMA sets no threshold below which breaches do not need to be reported. It appears to treat minor breaches that are detected early and self-reported by firms as problematic. The CMA will often send a public letter of censure in respect of such breaches. An alternative way to view early detection and reporting of breaches would be that it signifies that a firm has effective compliance processes in place, and that no further action is required. Natwest is concerned that the low thresholds that the CMA sets for issuing public letters indicates that the CMA may correspondingly set too low a threshold for the imposition of fines. The draft policy statement exacerbates this concern.

The CMA may believe that the reason for the ongoing stream of self-reported breaches of market investigation remedies in financial services is due to the lack of deterrent effect of public letters and/or directions. For NWG at least, such a belief would be misplaced. The achievement of 100% compliance with prescriptive, detailed obligations is not possible, without a disproportionate allocation of resources that would slow down business processes, add friction to customer journeys, and harm innovation.

The CMA's statements on recidivism[5] are sufficiently broad that there is a risk the CMA uses evidence of previous breaches, no matter how minor, as grounds for a decision to impose a penalty, or to increase the amount of a penalty. We are very concerned that good faith efforts to implement effective compliance programmes will nonetheless lead to fines being imposed for breaches that have minimal impact on competition or consumers.

When should the CMA impose fines for breaches of market investigation remedies?

Fines for breaches of market investigation remedies should only be necessary where a company fails to implement the remedy requirements at all, or substantively fails to implement requirements laid down in Directions that the CMA has given to the firm (whether directly, or through recommended steps set down after an independent review of a firm's compliance programme). The CMA should first make use of its existing tools (particularly public letters and directions), before imposing fines. Fines should be seen very much as a last resort.

Applying these principles to example 7 in annex 2, we believe it would be wholly inappropriate to impose fines in this scenario. The firm has implemented the remedies in good faith, but a subsequent change to its systems has led to a breach that has lasted for nine months. In this case, the CMA should impose Directions on the firm, and this should ensure the firm enhances the robustness of its controls to ensure that such a breach does not recur. The CMA can note when it issues Directions that any subsequent failures effectively to implement the recommendations that come out of the independent review process may then lead the CMA to consider the imposition of fines. This would be a very

[5] See for example, paras 2.2 and 2.22 of the draft guidance

effective means by which to ensure the firm puts in place appropriate controls and does not suffer a breach that affects all customers in the same way again.

Annex 3 of the draft policy statement sets out the circumstances in which the CMA may take non-penalty enforcement action. The CMA should be clearer in this annex that – except in cases where a firm has failed to implement a remedy requirement at all – the CMA will first look to its other enforcement tools, and will only consider fines where these other enforcement tools have failed to help ensure substantive compliance (noting that more minor breaches are likely to occur on an ongoing basis, and should be dealt with appropriately).

NWG believes such an approach would more adequately reflect the intention of Government when the DMCC Act was drafted.

Should the CMA change its approach to the reporting of breaches?

As stated above, the CMA currently requires all breaches to be notified to it, no matter how immaterial. NWG encourages the CMA to reconsider this requirement, which is disproportionate for both the CMA and the firms that are subject to remedy requirements. It is out of line with the approach taken by other regulators, including the PRA, FCA and ICO.