UK Finance

UK Finance consultation response

Administrative penalties: draft statement of policy (CMA4)

September | 2024

Introduction

1. UK Finance is the collective voice for the banking and finance industry. Representing 300 firms, we're a centre of trust, expertise and collaboration at the heart of financial services, championing a thriving sector and building a better society.

2. We are pleased to respond to the Competition and Markets Authority's (CMA) consultation on its draft policy statement: *Administrative penalties: statement of policy* (CMA4).

3. The Digital Markets, Competition and Consumers Act (DMCCA24) 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 a number of other specific breaches. These new powers are reflected in the CMA's updated draft policy statement.

4. Throughout our engagement on DMCCA24, we maintained the belief that the ability for the CMA to levy fines to an upper limit of five per cent of a firm's annual global turnover for breaches of a market investigation remedy is neither necessary nor proportionate to any harm that may be caused. Throughout the Bill's parliamentary stages, we called strongly for a significantly reduced fine cap that should be applied to UK turnover only.

5. However, now that the powers have been passed into law, we want to ensure that these new powers are fit for purpose and utilised in a way that is in keeping with the expectation of regulatory and business certainty, which will support UK competitiveness and encourage greater levels of inward investment into the financial services sector.

6. This consultation response therefore focuses specifically on the design of these new fining powers for breaches of market investigation remedies and urges the CMA and the new Government work together to introduce a regime that provides firms with an appropriate level of business certainty going forward. Below we have set out the key factors that we would like to see the CMA address in the final policy statement.

Retrospectivity of the new penalties regime

7. Throughout our engagement with Government and wider stakeholders during the Bill's passage, we called for ministers to confirm that the new fining powers can only be applied to breaches of obligations and remedies imposed after the Bill has been passed.

8. This would ensure:

a. Procedural fairness, given – before the Bill's introduction – market participants will have given undertakings and made representations on proposed remedies in circumstances where their understanding of the potential consequences of a breach were entirely different. For example, firms might have challenged CMA decisions relating to the market investigation or the remedies, had they known that such significant financial penalties could be imposed.
b. Alignment with the 'proportionality' principle of the Government's **Better Regulation Framework**. As set out in the updated framework, Government commits to letting markets move freely and dynamically where it can, to achieve the best outcomes.
c. Firms have certainty that they will not face the prospect of indefinite potential liability for future breaches of existing remedies. This would also be in line with the new Government's commitment to boosting growth and providing the right regulatory environment to attract inward investment.

9. Following engagement with Government, the previous Secretary of State for Business and Trade wrote to UK Finance stating that the Government did indeed intend that "*the new civil penalties regime to apply only to breaches of remedies that are put in place following the commencement of the relevant provisions in the Bill"*. The Secretary of State went onto say that this position does not require explicit provision in the Bill but would seek to confirm this position in Parliament when possible. We have attached this correspondence, as well as a separate letter echoing this position from the then Minister for Trade as an annex to this consultation response.

10. Since this correspondence, the UK has held a general election leading to a change of Government and a new set of ministers. However, UK Finance sees no practical reason why the new Government would take a different view to its predecessor, particularly given the new administration's stated focus on driving greater competitiveness and growth in the UK economy.

11. The scope of the fining powers can be clarified and confirmed via the forthcoming commencement statutory instruments relating to DMCCA24. Therefore, should the new Government agree with the position set out by the previous administration, it can confirm this via this secondary legislation. However, unless this is explicitly set out by new ministers, we are concerned that the CMA will proceed and apply its fining powers, as set out in the Act, as if those powers applied to pre-existing remedies. As we have set out above, such an outcome would be against procedural fairness (given market participants will have given undertakings or had Orders imposed where their understanding of the potential consequences of a breach was different) and misaligned with the 'proportionality' principle of the Better Regulation Framework.

12. UK Finance will seek this clarification from ministers at the earliest opportunity. We understand, through our engagement with officials following the general election, that ministers will agree on the Government's approach in the coming

weeks. **Assuming the Government takes the same position as the previous administration that the new fining powers will only apply to market investigations started following the commencement of DMCCA24, and set this out in the secondary legislation, we urge the CMA to clarify this point in its final policy statement at the earliest opportunity.** In any event, the CMA must ensure that it uses its new powers in a proportionate and fair manner.

Materiality and Proportionality

13. We note that the CMA has not defined its approach to how it calibrates the materiality of a breach in the new version of the policy statement. We believe this is a mistake.

14. It is important that the CMA's new fining powers are viewed in the context of its existing monitoring and enforcement regime. The CMA already has a whole spectrum of outcomes available to it for breaches of market investigation remedies (e.g., no action, private letters, public letters, directions, or court action). The enforcement tool that the CMA chooses should clearly be proportionate to the level of the breach and the potential consumer harm, and so this should be transparent and unambiguous in the policy statement, with an obligation on the CMA to consider the full suite of potential sanctions. There should not be an assumption that any breach of a market investigation remedy should be potentially subject to a fine, either alone or in conjunction with one of the existing sanctions.

15. As currently drafted, the policy statement does not provide sufficient clarity in terms of the likely levels of fines or the relative weighting of various aggravating and mitigating factors that the CMA will apply to its decisions.

16. Without this clear calibration, minor technical breaches, with no discernible consumer harm, could be deemed as 'material' by the CMA. This also appears to be out of step with the usual supervisory and enforcement approach of sectoral regulators (such as the FCA), who would need to draw on the CMA's final policy statement in competition cases.

17. Related to this, the policy statement's references to 'potential' rather than 'actual' harm is confusing. How will this difference be assessed? It would be better for the CMA to ask itself whether the harmful consequences of a breach have actually come to pass.

18. Finally, though it appears from the CMA's approach that the size of the fines could potentially be very significant, the CMA's procedural safeguards and timings it takes to reach a decision do not appear to reflect this significance. It is important that the CMA reflects on this and adapt its approach accordingly, given the time it might take a firm to analyse the CMA's decision to apply a penalty and take specialist legal advice in the face of significantly increased fines.

19. We urge the CMA to move towards setting a clear – and high – bar for what it constitutes as a breach punishable by fines, given the seriousness of the potential fines it can now apply, and to set this out in the final policy statement.

Other considerations

Definition of 'historic failure'

20. Paragraph 2.2 of the draft policy statement sets out the factors that will influence the CMA's decision whether to impose a penalty. Within this section, footnote 30 makes the following assertion:

> *Note that the CMA may still impose a penalty where appropriate for a historic failure that is not ongoing.*

21. No other information is provided within the document for what is meant by an *historic failure* and whether this is meant to include breaches made before the DMCCA24 was passed into law. Absent of further clarification this statement could be taken at face value and be considered to mean that any breach (from any remedy, including those applied before DMCC24 came into force) would be in scope of the powers – which would be in direct conflict to the stated intentions of the ministers who introduced the legislation to Parliament.

22. It is our understanding that the footnote was not intended to indicate this, however the text is not currently clear enough. If the new Government does set out that historical remedies applied before DMCCA24 are outside the scope of the new powers in the forthcoming secondary legislation, we would be grateful for the CMA to amend this footnote with additional clarifying text.

Timing of the consultation

23. We were disappointed that the consultation window is only six weeks and is taking place over the summer holiday period, which will put pressure on resourcing as and when colleagues take leave. We understand that the CMA is willing to offer flexibility on a case-by-case basis, though we urge the CMA to ensure this is communicated effectively to firms ahead of upcoming deadlines.

Decision making on penalty administration

24. The draft policy statement does not indicate in detail who, within the CMA or Government, will take the decision on what penalty to apply or what oversight there will be from senior CMA officials. We understand the need for increased clarity on decision making was one of the recommendations in the Alison White and Kirstin Baker reviews, and so we urge the CMA to clarify this in its final policy statement.

Application and cross over with CMA11

25. The CMA states that it intends to consult separately on CMA11 (guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders). However, it is unclear when this will be, and how the separate pieces of guidance will interact and influence the other. Given that there is significant overlap between the two sets of guidance, we think it is important for the CMA to consult on both and consider stakeholder input before finalising CMA4. We urge the CMA to clarify its approach.

Recidivism

26. We are concerned that the CMA's proposed approach to recidivism risks being overly simplistic and fails to recognise the way in which large organisations operate in practice. The policy statement implies that a breach of an unrelated requirement will be considered to reflect an element of recidivism. However, in large organisations it is entirely possible that two breaches may relate to completely different business areas and personnel and therefore may not be indicative of wider failings that should be considered an aggravating factor.

27. Similarly, given the CMA's steer to report all breaches (irrespective of materiality and consumer harm), it is not appropriate to treat all breaches as if they had the same gravity. While we recognise the importance of the CMA addressing any issues regarding a firm's overall compliance culture and control environment, we believe it is important to avoid an overly "binary" approach to recidivism.

Mitigating and aggravating factors

28. In support of promoting good compliance cultures, it follows that the CMA should consider the fact that a firm has identified a problem through the operation of its own detective controls as a 'mitigating factor'.

29. On the other side, where there has been a breach of a market investigation remedy that has been in place for a long time, we understand the CMA proposes to treat this length of time as an '*aggravating factor'*. However, we note that it can often be more difficult to comply with long standing requirements. This is because new products, services, and circumstances (including as a result of customer behaviour / preferences) are likely to have emerged that were not envisaged when the requirement was designed, meaning it can often be challenging to determine how an old requirement should be applied in the present day. It also does not square with the CMA's obligations to keep its remedies under review.

30. As such, we would like to see the CMA remove the length of a remedy from its definition of aggravating factors.

31. We also consider it is important for the CMA to reflect on its past approaches to market investigation remedies (as recommended by the Kirstin Baker review). This should include ensuring that future sanctions imposed for breaches take into account the circumstances surrounding the imposition of the

remedy, the changes in the market in the intervening years, any lack of clarity in the obligations and any prior action taken by the CMA.

32. Thank you for considering the points we have set out in this response. If you have any questions relating to this response, please contact [redacted]