# Administrative Penalties: Statement of Policy on the CMA's Approach

## Summary of Reponses to the Consultation

CMA4conresp

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# 1. Introduction

## Administrative penalties – the DMCCA24

1.1 The Digital Markets, Competition and Consumers Act 2024 (DMCCA24) extends the Competition and Markets Authority (CMA)'s powers to impose penalties for businesses that breach Investigatory or Remedy Requirements.

1.2 'Investigatory Requirements' for these purposes are defined as:

*(a)* requirements arising from the CMA's exercise of its investigative, and where relevant, compliance reporting powers under the Competition Act 1998 (CA98), Enterprise Act 2002 (EA02) and the DMCCA24 (for example, a requirement to provide information in response to a notice sent under section 26 CA98 or section 109 EA02), and

*(b)* the digital markets competition regime merger-reporting requirement in Chapter 5 of Part 1 of the DMCCA24.

1.3 The DMCCA24 also introduces similar penalties for non-compliance with information notices in respect of the CMA's motor-fuels monitoring functions.[1]

1.4 'Remedy Requirements' for these purposes are defined as requirements imposed or accepted by the CMA to address, and as relevant, remedy concerns the CMA has identified in cases under the CA98 and EA02 (whether on an interim or final basis) and on an interim basis under the DMCCA24 (for example, an interim measure in a mergers case under sections 72, 80 or 81 or paragraph 2 of Schedule 7 EA02, an order imposed by the CMA under section 161 EA02 following a market investigation, or an interim enforcement order (IEO) imposed under section 32 DMCCA24).

1.5 As a result of changes made by the DMCCA24, where a business fails, without reasonable excuse, to comply with an Investigatory Requirement in a CMA competition, markets, digital markets competition regime or merger case (such as a statutory information request, for example, under section 26 of the CA98 or section 109 of the EA02), or

- breaches the new CA98 duty of evidence preservation,
- conceals, falsifies or destroys evidence,
- provides false or misleading information, or

[1] See sections 311-318 of the DMCCA24.

- obstructs a CMA investigation[2]

the CMA will be able to impose fixed penalties of up to 1% of the business's annual worldwide turnover. The CMA will also have the power to impose an additional or alternative daily penalty of up to 5% of daily worldwide turnover while non-compliance with an investigative measure continues.[3]

1.6 The DMCCA24 also introduces powers to impose:

- fixed penalties of up to 5% of annual global turnover on businesses that breach (without reasonable excuse) Remedy Requirements imposed by the CMA, and
- daily penalties of up to 5% of daily turnover while such non-compliance by businesses with the Remedy Requirement continues.[4]

1.7 In addition, as a result of the DMCCA24, a natural person not acting as a business who commits any of the breaches discussed in paragraphs above may be required to pay a fixed penalty of up to £30,000, as well as an additional daily penalty of up to £15,000 while non-compliance (as the case may be) continues.[5] These are the same maximum amounts that currently apply to penalties for breaches of competition investigatory measures under the CA98 and the EA02 that are sanctionable by civil penalties.[6]

1.8 While there are currently administrative penalties for breaches of investigatory requirements under the CA98 and the EA02, they are limited to fixed penalties of £30,000 and daily penalties of £15,000, irrespective of the turnover of the business.[7] Moreover, at present there are no administrative penalties for

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[2] See Schedule 10 of the DMCCA24 in respect of such penalties in CA98 and markets and mergers cases, and section 87 of the same in respect of digital markets investigatory penalties.
[3] Ibid.
[4] See Schedule 11 of the DMCCA24. Prior to commencement of the amendments made by the DMCAA24, the CMA has the power to impose fixed penalties of up to 5% of annual global turnover and daily penalties of 5% of daily turnover for breaches of merger interim measures in merger investigations: see section 94A EA02. Also relevant to the Draft CMA4 guidance is that the DMCCA24 creates a civil penalty regime for among other things breaches of IEOs imposed under the CMA's digital markets powers and in respect of breaches of digital markets merger reporting requirements under Chapter 5 of Part 1 of the DMCCA24: see sections 85(2)(a) and 85(4) of the DMCCA24. Breaches of such requirements under the digital markets regime can lead to fixed penalties of up to 10% of annual global turnover (for merger reporting requirements) and fixed penalties of up to 10% of annual global turnover and a daily penalty regime of up to 5% of daily turnover (for IEOs). See section 86(4) of the DMCCA24.
[5] See Schedules 10 and 11 of the DMCCA24.
[6] See, for example, section 40A CA98
[7] See sections 110 and 111 (mergers) and 174A, 174B and 174D (markets) of the EA02 and section 40A of the CA98.

breaches of most Remedy Requirements (as defined above in paragraph 1.4), other than for breaches of interim measures imposed in merger cases under the EA02.[8] These existing administrative penalties under the CA98 and the EA02 are addressed in the current CMA guidance *Administrative penalties: Statement of Policy on the CMA's approach,* which was published in 2014 (the 2014 CMA4).

## Requirement for statement of policy

1.9 The CMA is required to prepare and publish a statement of policy in relation to the use of its enforcement powers – administrative penalties and (where applicable) powers to bring civil proceedings – under:

*(a)* sections 94, 94AA, 109, 110, 167, 167A, 174, 174A of the EA02 (breaches of Requirements in respect of the CMA's markets and mergers functions), and

*(b)* sections 31E, 34, 35A and 40ZE of the CA98 (breaches of Requirements in respect of the CMA's CA98 functions)**.**[9]

1.10 The CMA must also prepare and publish a statement of policy in relation to the exercise of its powers to impose a penalty under sections 85 and 87 DMCCA24 (which, for these purposes includes administrative penalties for breaches of Investigatory Requirements and Remedy Requirements relating to the CMA's digital markets functions) and section 311 DMCCA24 (administrative penalties for breaches of Investigatory Requirements relating to the CMA's motor fuels functions).[10]

1.11 No such statements of policy may be published until approved by the Secretary of State.[11] When imposing such administrative penalties, the CMA must have regard to the relevant published statement of policy.[12] When considering what is an appropriate substitute penalty in an appeal against any such penalties, the Competition Appeal Tribunal (CAT) must have regard to the relevant published statement of policy.[13]

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[8] Section 94A of the EA02. The CMA can impose a fixed penalty for 5% of global turnover and/or a daily penalty of 5% of daily turnover in such cases.
[9] Sections 35C and 40B of the CA98 and sections 94B, 116, 167C and 174E of the EA02.
[10] Section 91(1) DMCCA24 and section 314(1) DMCCA24.
[11] Sections 35C(6) and 40B(5A) of the CA98, sections 94B(5), 116(5), 167C(5) and 174E(5) of the EA02, section 91(5) of the DMCCA24 and section 314(5) of the DMCCA24.
[12] Ibid.
[13] See section 114(5A) of the EA02.

## The consultation

1.12 The CMA consulted from 11 July – 23 August 2024 on draft guidance *Administrative Penalties: Statement of Policy on the CMA's Approach* (the Draft CMA4).

1.13 The Draft CMA4 set out the CMA's draft statement of policy regarding its powers to take enforcement action and impose administrative penalties in respect of breaches of Investigatory Requirements and Remedy Requirements under the CA98, the provisions of the EA02 relating to markets and mergers, and the provisions of the DMCCA24 relating to certain of the CMA's digital markets[14] (see paragraph 1.14 below) and motor-fuel information gathering functions.[15]

1.14 The Draft CMA4 contained the draft required statement of policy in relation to the CMA's powers to impose administrative penalties for breaches of Investigatory Requirements imposed under the digital markets competition regime, created by Part 1 of the DMCCA24. The Draft CMA4 did not include the statement of policy covering the penalties for breaches of digital markets competition requirements under the DMCCA24, save for two exceptions. The two exceptions are penalties for breaches of merger-reporting requirements (see paragraph 1.2 above) and breaches of IEOs (see paragraph 1.4 above), under the digital markets competition regime created by Part 1 of the DMCCA24. The CMA considered breaches of these requirements to be more akin to the other breaches covered in the Draft CMA4, and that they were therefore better addressed in the Draft CMA4.

1.15 Breaches of Investigatory Requirements and Remedy Requirements for the purposes of this statement of policy were set out in Annex 1 of the Draft CMA4. In the Draft CMA4, Investigatory Requirements and Remedy Requirements were together referred to as 'Requirements'.

### *Responses received*

1.16 The CMA received 14 responses to the consultation, one of which was confidential. Respondents included private practice law firms, stakeholder organisations and businesses. The CMA would like to thank all those who engaged with the consultation on the Draft CMA4.

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[14] See Part 1 of the DMCCA24.

[15] See sections 311—318 of the DMCCA24.

### *The final guidance*

1.17 A summary of the CMA's response to the feedback received is set out in this document which also explains the key changes the CMA has made in the Final CMA4 in comparison to the Draft CMA4. The CMA has published the Final CMA4 alongside this document. The Final CMA4 takes effect from 1 January 2025 and will apply, subject to the transitional provisions in The Digital Markets, Competition and Consumers Act 2024 (Commencement No.1 and Savings and Transitional Provisions) Regulations 2024 (SI 2024/1226) (the Commencement Regulations), to breaches of Requirements committed on or after 1 January 2025.[16]

1.18 This document is not intended to be a comprehensive record of all views expressed, nor to be a comprehensive response to all individual views, however it does set out the key general views received and the CMA's response to the most pertinent points raised. Furthermore, some respondents suggested minor corrections and technical drafting improvements, many of which have been reflected in the Final CMA4, but which are not recorded in this document. All non-confidential responses to the consultation are available on the consultation webpage.

1.19 The Final CMA4 was approved by the Secretary of State on 17 December 2024.

### *Statutory Instruments*

1.20 As noted in paragraphs 2.27 and 2.28 of the covering Consultation Document for the Draft CMA4, the CMA anticipated the fact the Government would consult on, and make, Statutory Instruments for the purposes of calculating statutory maxima for the various administrative penalties covered by the Draft CMA4 (the Turnover SIs). The covering Consultation Document stated that once the Turnover SIs were finalised, the CMA would reference them in the Final CMA4, along with any relevant text where necessary. The CMA

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[16] Please note that the 2014 CMA4 (see paragraph 1.8 above) applies in respect of failures to comply with

- notices requiring the attendance of witnesses or production of documents or information in phase 1 and phase 2 mergers and markets investigations
- requirements to provide information in CA98 investigations
- interim measures in mergers cases

committed before 1 January 2025.

anticipated that the Turnover SIs would likely only necessitate descriptive additions to the final version of CMA text, not requiring separate consultation.

1.21 On 30 July 2024, the government published the following draft Turnover SIs for consultation:

*(a)* The draft Competition Act 1998 (Determination of Turnover for Penalties) Regulations 2024

*(b)* The draft Enterprise Act 2002 (Mergers and Market Investigations) (Determination of Control and Turnover for Penalties) Regulations 2024, and

*(c)* The Digital Markets, Competition and Consumers Act 2024 and Consumer Rights Act 2015 (Turnover and Control) Regulations 2024.

1.22 The consultation on the draft Turnover SIs closed on 10 September 2024. The final versions of the Turnover SIs were made on 25 November 2024 and laid before Parliament on 29 November 2024.[17] Accordingly, the Final CMA4 has been updated to reference the Turnovers SIs, as necessary.

[17] The Competition Act 1998 (Determination of Turnover for Penalties) Regulations 2024 (SI 2024/1235) and The Enterprise Act 2002 (Mergers and Markets Investigations) (Determination of Control and Turnover for Penalties) Regulations 2024 (SI 2024/1236) enter into force on 1 January 2025. The parts of The Digital Markets, Competition and Consumers Act 2024 and Consumer Rights Act 2015 (Turnover and Control) Regulations 2024 (2024/1243) dealing with penalties covered by the Final CMA4 also enter into force on 1 January 2025: see Regulation 1(2) of those Regulations.

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# 2. Summary of responses to the consultation and the CMA's views

## Key points in responses

2.1 The key points made by respondents are summarised below. As noted above at paragraph 1.18, this document is not intended to be a comprehensive record of all views expressed by respondents, nor to be a comprehensive response to all individual views expressed.

***Existing Remedy Requirements and retrospectivity***

2.2 A major focus of respondent comment was on whether the new administrative penalty powers and CMA4 would apply to breaches of Remedy Requirements (and in particular, markets remedies) already in place when the new powers commence. Most respondents said that it would be unfair and unlawful for the CMA to penalise post-commencement breaches of Remedy Requirements in place at commencement of the new penalties powers, arguing among other things that this would involve the retrospective application of penal sanctions. Some respondents also suggested that many existing markets remedies had not been designed with the prospect of penalties for breaches in mind. They suggested that had that been the case, there would have needed to be additional rigour around the content of the remedies, and impacted firms may have taken a different approach in how they addressed the remedies during the remedies consultation and/or in relation to subsequent CMA decisions. Some such respondents also suggested that many long-standing market remedies should be subject to review and that imposing penalties for breaches of what were claimed to be outdated remedies would be unfair and very problematic.

2.3 One respondent expressed concern that reference to 'historic failure' in footnote 21 of Draft CMA4 suggested that the CMA might seek to penalise remedy breaches that occurred prior to commencement of the administrative penalties provisions.

*CMA views*

2.4 The CMA notes that in the covering Consultation Document at paragraph 3.3, the CMA said that the Final CMA4 would take effect from the date of its publication, subject to the provisions of Statutory Instruments (SIs) the Government would make with respect to commencement of the administrative penalties powers that the Final CMA4 covers.

2.5 The CMA also notes that the Commencement Regulations among other things provide that the relevant administrative penalties powers do not apply to breaches of Remedy Requirements that were put into place prior to the commencement of those powers on 1 January 2025.[18] The Final CMA4, and the administrative penalties powers it covers, will therefore not apply to post-commencement breaches of Remedy Requirements that were in place prior to the commencement of the penalties powers in 1 January 2025. The CMA has made this clear in the Final CMA4 (see for example, footnotes 10, 69 and 78 of the Final CMA4).

2.6 The CMA has also removed 'historic' from what is now footnote 34 in the Final CMA4 to avoid any confusion. This footnote merely refers to where a breach has ceased and is not ongoing, not to breaches committed prior to commencement of the relevant provisions.

2.7 With respect to reviews of remedies, the CMA plans in early 2025 to publish updated guidance *Remedies: Guidance on the CMA's approach to the monitoring of compliance with, and the variation, supersession and termination of merger, monopoly and market undertakings and orders* (CMA11).[19]

***'In the round' approach/overall approach to penalty calculation***

2.8 Two respondents objected in principle to the 'in the round' approach taken in the Draft CMA4 in respect of penalties for breaches of Remedy Requirements. They suggested that Remedy Requirements breaches were more in the nature of a substantive breach, and similar to breaches of the CA98 prohibitions and noted that breaches of Digital Markets Pro-Competition Interventions (PCIs) under the digital markets competition regime established by Part 1 of the DMCAA24 would also be subject to a 'stepped' approach for penalties. They called for a stepped approach for Remedy Requirements breaches and said that administrative penalties for breaches of market remedies should be covered in a separate guidance document dedicated to markets remedies, and not in CMA4.

2.9 Some respondents, without objecting to the in round the approach as such, suggested that CMA4 should give indications of tariffs applicable to certain breaches or of likely scales of penalties (either in the main body of the

[18] See paragraph 16 of the Schedule to the Commencement Regulations.
[19] The CMA consulted on a draft of an updated version of CMA11 from 5 November to 3 December 2024.

guidance or in the examples in Annex 2) in the absence of a stepped approach.

2.10 Some others suggested that in view of the 'in the round' approach, it would be necessary for the penalty decisions to set out a clear methodology and reasoning for penalty calculation that is communicated to parties in any penalty notice. They also said while a stepped approach mirroring that used for substantive penalties was unnecessary, they proposed that a more formulaic approach should be taken to allow parties fully to exercise their rights of defence and appeal.

2.11 There were concerns expressed by a number of commentators that penalties might be applied disproportionately (including with respect to small businesses), with very large penalties being imposed for minor breaches.

2.12 One respondent objected to the wording in paragraph 2.2 of the Draft CMA4 which referred to the CMA among other things considering whether the breach 'risked having an adverse impact'. They suggested that this was unnecessarily broad and captured purely theoretical or improbable risks. The same respondent also objected to reference in the same paragraph to 'public interest', saying that it was very broad and ambiguous, and that absent further clarity may permit consideration of factors outside of the CMA's regulatory remit.

2.13 One respondent suggested that businesses should be given an opportunity to remedy any issues before penalties are imposed and that the CMA should exercise leniency by not imposing penalties in cases of first-time breaches, particularly where the breach is minor or unintentional.

2.14 Two respondents suggested more detail on the process and considerations for transitioning from administrative penalties to non-penalty enforcement actions.

2.15 One respondent suggested that proportionality should be expressly included as a relevant factor in the assessment of whether (and at what level) a daily penalty should be imposed, particularly in circumstances where any issue resulting in non-compliance with a Requirement may take time to resolve.

2.16 In respect of paragraph 2.15 of the Draft CMA4, two respondents said that the CMA should consider its previous administrative penalty decisions when determining the appropriate level of penalty.

2.17 One respondent completely supported the proposed 'in the round' approach and noted that a major part of the administrative penalties calculation would focus on the specific deterrence of the firm in question. They also said that a

quick and agile process was required in order to ensure that the CMA could adequately prevent obstruction and tackle unfair behaviour. They said that this was different from breaches of competition requirements, which would often be investigated after the event.

*CMA views*

2.18 While the CMA has carefully considered the various points made by respondents, the CMA has decided to retain the 'in the round' approach in the Final CMA4, including in respect of remedy breaches, notwithstanding some respondents' arguments to the contrary. The CMA remains of the view that continuation of this approach is appropriate. This approach provides a transparent but flexible approach to penalty setting for breaches of the type covered by the Final CMA4, tailored to the circumstances of each case. With respect to Remedy Requirements, the Final CMA4 will apply to a wide array of breaches of Remedy Requirements, ranging from interim measures in CA98 and mergers cases, to CA98 directions and to markets and mergers breaches. A stepped approach (such as that taken in CMA73 *Guidance as to the Appropriate Amount of the Penalty*, applicable to CA98 substantive breaches) across such a wide range of different breaches could become very complicated and difficult to apply in practice. The 'in the round' approach is flexible to apply, which will be important for the range of breaches of Investigatory and Remedy Requirements covered by the Final CMA4.

2.19 The 'in the round' approach to penalty calculation, which is used in the 2014 CMA4, has been upheld by the CAT in previous cases, including where substantial penalties have been imposed.[20] As the CMA gains more experience with the new penalties regime, the CMA may in future editions of CMA4 add more detail, where it considers that it may be helpful, to explain the factors that the CMA takes into account and how it weights them when making an 'in the round' calculation. Moreover, CMA administrative penalties decisions will be clear as to how the penalty in the case has been determined and as to the factors taken into consideration.[21]

2.20 The factors for penalty determination set out in the Final CMA4 will be taken into account on a case-by-case basis.

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[20] See for example the CAT's judgments in *Electro Rent v CMA* and in *Virgin Media v Ofcom* (noting, for example, paragraph 117 of the latter judgment)

[21] See paragraph 3.5 of the Final CMA4 for a discussion of what an administrative penalties decision must include.

2.21 The CMA does not consider that it will be helpful to suggest sample tariffs on the face of the guidance, especially at an early stage of the new administrative penalties regime. The assessment of penalty will be very fact and case dependent and explicit tariffs for certain categories of breaches do not lend themselves to such a case-by-case analysis. Moreover, the *Digital Markets Competition Regime Guidance* (CMA194) – which uses a stepped approach for breaches of Conduct Requirements and PCIs under the digital markets competition regime established by Part 1 of the DMCCA24 – explicitly states that there is no pre-set 'tariff' of percentage starting points for different types of failure given the range of conduct that will be encountered in different cases and to which the CMA will have regard in setting an appropriate penalty amount.[22]

2.22 Similarly, the CMA does not agree with one respondent's concerns that considering whether the breach 'risked having an adverse impact' is inappropriate. This language at paragraph 2.2 of the Final CMA4 is consistent with the CAT judgment in the *Electro Rent* case and reflects entirely appropriate consideration when considering an administrative penalty for the purposes of incentivising compliance with, and deterring breaches of, Requirements.[23] Moreover, as regards inclusion of the 'public interest' as a factor in paragraph 2.2, the CMA notes that the 'public interest' is a factor relevant to interim measures directions under the CA98 and IEOs under the digital markets competition regime established by Part 1 of the DMCCA24[24] and CMA4 applies to breaches of such Requirements and therefore considers that its inclusion is appropriate.

2.23 The CMA also disagrees that the overall penalty determination approach proposed in the Draft CMA4 would lead to disproportionate penalties being imposed, in particular since the CMA was clear in the Draft CMA4 that it will consider factors such as the impact of the breach and will seek to set a deterrent but proportionate penalty. The CMA has nevertheless added a new

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[22] See for example paragraph 8.30 of the draft Digital markets competition regime guidance

[23] See footnote 20 above. At paragraph 199-200 of that judgment, the CAT said 'Electro Rent's conduct in this case ran precisely the risks that interim orders are designed to avoid...[w]e consider that the CMA was correct in its view that service of the Break Notice had a potentially adverse effect on the merger investigation and remedies and that, in the context of the public importance of a clear and enforced merger control process, that effect was material… It is a matter of public importance that the merger control process, and the duties that it creates, are strictly, and conscientiously, observed. We do not accept the criticism that the CMA ignored the fact that there were no actual adverse effects and was wrong to focus only on potential adverse effects. The CMA did not suggest that there were in fact adverse effects and as we observe above we consider that its view that there was a risk of adverse effects was correct.' (emphasis added).

[24] See respectively section 35(2)(b) of the CA98 and section 32(1)(b)(iii) of the DMCCA24.

paragraph 2.29 to the Final CMA4 that explicitly refers to a proportionality assessment (including, as suggested by one respondent, in respect of daily penalties) and the factors it may consider when assessing proportionality, including the size of the business and its financial resources. The CMA considers that these are helpful additions that can help to address concerns about the CMA imposing disproportionate penalties. The new Example 9 that has been added to Annex 2 is also intended to provide further assistance in this regard.

2.24 The CMA is concerned that it would undermine deterrence for the Final CMA4 to state on the face of the guidance that a party should have an opportunity to put a breach right before a penalty is imposed and takes a similar view of the suggestion that no penalty be imposed for a first-time breach. The CMA has however amended paragraph 2.2 in the Final CMA4 to make it even clearer that, among other things, it will consider the nature and impact of the breach when deciding whether to impose an administrative penalty. Furthermore, Example 9 that has been added to Annex 2 shows that the CMA will take a reasonable approach in assessing breaches.

2.25 Noting suggestions from some respondents that the CMA4 should consider its previous administrative penalty decisions when determining the amount of the penalty, the CMA has also added wording to paragraph 2.16 of the Final CMA4 making it clear that while the CMA is not bound by its previous administrative penalty decisions, as each case is decided on its own facts, the CMA should ensure there is broad consistency in its approach. For the avoidance of doubt, when considering consistency of approach in this regard the CMA will have regard to any relevant differences between the applicable guidance at the time the penalties were imposed.

2.26 Following on from a suggestion from one respondent, the CMA has at paragraph 1.12 of the Final CMA4 added a sentence to say that CMA4 will continue to be kept under review in the light of experience in its application. This shows that the CMA may consider it appropriate provide more detail in due course as it gains more experience with the penalties regime.

2.27 In respect of a suggestion that CMA4 should set out considerations for in deciding whether to move from non-penalty enforcement actions to administrative penalties, the CMA notes that the Final CMA4 is clear at paragraphs 2.30 and A.1 that the CMA may take other action, such as civil proceedings, to enforce remedy requirements, in addition to, or as an alternative to, imposing administrative penalties in relation to a failure to comply with such requirements (non-penalty enforcement). There is no continuum starting with non-penalty enforcement and then leading on to penalty enforcement. Taking such a continuum approach could risk

undermining deterrence and, moreover, both penalty and non-penalty enforcement may be appropriate in a particular case.

2.28 However, in response to a suggestion from a respondent, the CMA has added text to Annex 3 (on civil proceedings and non-penalty enforcement) of the Final CMA4 discussing how a party can challenge the CMA's approach to non-penalty enforcement. This is taken from the CMA's existing guidance document *Merger and Market remedies – guidance on reporting, investigation and enforcement of potential breaches* (CMA136).

***Reasonable excuse***

2.29 Two respondents welcomed the fact that the Draft CMA4 proposed an objective test for the assessment of reasonable excuse, in line with the CAT's judgment in the *Electro Rent* case. [25] However, there were various calls from a number of respondents for the CMA to widen the 'reasonable excuse' for non-compliance with a Requirement formulation to cover various scenarios, and to make it less strict. Two respondents argued that an honest error made in good faith whilst trying to comply with Requirements constitutes a reasonable excuse and imposing a fine would not achieve a deterrent effect in such situations.

2.30 With respect to the discussion in paragraph 2.9 of the Draft CMA4 of when foreign law requirements might constitute a reasonable excuse in this context, one respondent suggested that while foreign laws might not expressly prohibit a Relevant Person from complying with a CMA information request, foreign laws (including data protection laws) might prevent a Relevant Person from complying with such a request in practice and/or within the timeframe that the CMA may seek to impose. That respondent suggested that the CMA should also recognise that barriers to compliance could be executive rather than legislative and that undertakings otherwise risk being penalised by foreign authorities, through no fault of their own, if they are made to meet a Requirement by the CMA in breach of contradictory foreign law requirements.

2.31 On the foreign law as reasonable excuse issue, another respondent said that CMA4 was correct to state that a potential breach of a foreign law could be considered as a valid 'reasonable excuse', as mentioned in paragraph 2.9 of the Draft CMA4, and that it believed that the CMA should not accept an overly cautious interpretation of a foreign law as a reasonable excuse. The

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[25] Where the CMA considers that a party has a reasonable excuse for non-compliance with a requirement, it cannot impose an administrative penalty. See footnote 20 above for the *Electro Rent* case.

respondent said that the CMA should only accept reasonable interpretations of foreign laws, to ensure that this excuse is not unfairly taken advantage of by those wishing to avoid penalties. The respondent said that the burden to prove a reasonable excuse on an objective basis should rest with the company seeking to rely on it.

*CMA views*

2.32 The CMA has not widened the reasonable excuse formulation in the Final CMA4. Since a reasonable excuse will mean that a party is not liable for a penalty at all, the CMA considers it appropriate that reasonable excuse should constitute a significant and genuinely unforeseeable or unusual event and/or a significant factor beyond the party's control (see paragraph 2.5 of the Final CMA4). Moreover, CMA4 is already clear that the CMA will apply, on a case-by-case basis, an objective test as to whether an excuse put forward by a party is reasonable (see paragraph 2.4 of the Final CMA4). The CMA is also clear the circumstances that constitute a reasonable excuse are not fixed (see paragraph 2.4 of the Final CMA4).

2.33 The CMA does not consider it appropriate that an honest error made in good faith whilst trying to comply with Requirements should constitute a reasonable excuse. However, depending upon the circumstances, this might be a factor that the CMA takes into account when considering whether to impose a penalty, and if so, at what level (and see, Examples 1 and 9 in Annex 2 of the Final CMA4, which consider such circumstances).

2.34 The CMA has clarified the discussion of how the CMA will assess reasonable excuse in relation to claims that a party cannot comply with a requirement on the grounds of data protection law obligations (see paragraph 2.9 of the Final CMA4).

### *Aggravating and mitigating factors*

2.35 One respondent welcomed the aggravating and mitigating factors set out in the Draft CMA4 and agreed with the principle that a business should not profit from its infringements. Another welcomed the detailing of aggravating and mitigating factors that increased and decreased the seriousness of a breach, citing that they found it useful.

2.36 There were suggestions from some other respondents to reduce the number of aggravating factors and to increase the number of mitigating factors discussed in the Draft CMA4. On the latter, there were suggestions, for example that the reason for the breach should be a mitigating factor, as well as, for example, long-standing compliance with a requirement, co-operation

with the CMA and that a large proportion of the requirements had otherwise been met. Two respondents said that having significant financial and administrative resources should not be an aggravating factor, with one suggesting that this should only be considered as part of the CMA's deterrent effect calculation, and not as a separate aggravating factor.

2.37 One respondent, for example, raised concerns that the proposed approach to recidivism risks being overly simplistic and fails to recognise the way in which large organisations operate in practice. They suggested that 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. The respondent suggested avoiding an overly 'binary' approach to recidivism.

2.38 One respondent called for detail as to how these various factors would be weighted in the CMA's decision-making process.

*CMA views*

2.39 The CMA considers it inappropriate to add the factors such as reasons for the breach or long history of compliance with the remedy as mitigating factors. For example, long compliance with a remedy should not reduce the seriousness of a breach, indeed this could increase the seriousness since it could indicate that a party was previously able and willing to comply with a remedy but was now choosing not to do so. Furthermore, contrary to what has been suggested, the CMA considers that the approach to recidivism set out the Draft CMA4 is entirely appropriate. Businesses should ensure a culture of compliance with CMA requirements, and it is a very serious matter if a business repeatedly breaches CMA requirements. A party can nevertheless in its representations state the reasons for the breach, and these will be considered.

2.40 However, at the suggestion from one respondent, the CMA has added co-operation with the CMA's breach investigation as a mitigating factor, to the extent that it enabled the CMA's investigation of the breach to be concluded more effectively and/or speedily and went beyond mere compliance with CMA deadlines for information requests (see paragraph 2.26 of the Final CMA4).

2.41 The CMA has also, as suggested by some respondents, removed size and administrative resource from the list of aggravating factors, since this is considered as part of the deterrence consideration when setting the penalty (see paragraph 2.18 of the Final CMA4, for example).

2.42 In response to a request from one respondent, the CMA has provided in paragraph 2.22 of the Final CMA4 an example of when the CMA might

consider that senior management failed to take reasonable steps to prevent a breach from occurring.

2.43 Consistent with the overall approach taken in the Final CMA4, the CMA will consider the various aggravating and mitigating factors 'in the round', on a case-by-case basis, when setting a suitably deterrent but proportionate penalty. There will be no particular weighting, percentage or tariff assigned to each factor.

2.44 The CMA has also clarified in the final version CMA4 that the aggravating and mitigating factors discussed are non-exhaustive (see for example, paragraph 2.19 of the Final CMA4).

***Decision making and procedure***

2.45 Some respondents discussed what they considered to be insufficient consideration of procedural points in the Draft CMA4. They further called for clarification in the Final CMA4 that the decision maker for administrative penalties would not have direct case-management responsibility for the case.

2.46 One respondent argued that where the CMA provisionally decides to impose an administrative penalty on a firm, the decision should be taken by an appropriate group of senior individuals within the CMA. That respondent and another respondent also argued that where the alleged remedy breach was in a regulated sector, the CMA should draw a comparison with the approach taken by the relevant regulator in respect of a comparable breach. Another made a similar point, arguing that some sectoral regulators in their view had a higher threshold for taking action against regulatory breaches than the CMA did for dealing with remedy breaches.

2.47 One respondent suggested that the CMA should indicate that it is prepared to give extensions to the time period set out in the Draft CMA4 for making representations on provisional penalty notices for administrative penalties (paragraph 3.4 of the Draft CMA4 said that this will not normally be more than two weeks), and one respondent suggested that that period for making representations was too short.

2.48 One respondent called for clarification that an appeal has the effect of suspending the requirement to pay the unpaid balance of any penalty under s.114(7) EA02 until the appeal is complete.

*CMA views*

2.49 The CMA has not made any changes with respect to decision making in the Final CMA4. The identity of the decision maker will depend upon the nature

and circumstances of the case. Moreover, setting out a decision-making process in such guidance approved by the Secretary of State would reduce flexibility and make it difficult to change approach in the light of experience or a change in circumstances, as it would require new guidance, which would also need to be approved by the Secretary of State. It would furthermore undesirably bind the concurrent regulators to the CMA's decision-making processes, as they must also have regard to the Final CMA4 with respect to administrative penalties for breaches of the concurrent Requirements covered by the Final CMA4 (such as under CA98). However, the identity of the decision maker will be made clear to the party when the provisional penalty notice is sent.

2.50 The CMA does not consider that it would be appropriate for the CMA to take a different approach to penalties enforcement where the breached market remedy is in a regulated sector. EA02 remedies are imposed for the purposes of that statute. The CMA does not consider that it would be appropriate in the case of EA02 breaches in a regulated sector for the CMA to take a different approach by reference to decisions made for a different statutory purpose by the sector regulator.

2.51 Given the need promptly to address breaches covered by the Final CMA4 – including as necessary through the use of daily penalties – and noting the duty of expedition that the DMCAA24 imposes on the CMA, the CMA considers that normally providing a period of up to two weeks for providing representations on a provisional penalty notice is appropriate, fair and reasonable. If a party considers that there are good reasons to seek an extension, case teams will of course give reasonable consideration to any such request. It is clear on the face of the Final CMA4 that this period will be determined on a case-by-case basis (see paragraph 3.4 in the Final CMA4).

2.52 The CMA also considers that paragraphs 3.2--3.5 in the Final CMA4 are consistent with the relevant statutory requirements and the CMA will ensure that provisional penalty notices and final penalty decisions will set out in sufficient detail the factors that the CMA has considered in arriving at a penalty.

2.53 Having regard to a respondent suggestion, the CMA has added a reference in the Final CMA4 clarifying that an appeal has the effect of suspending the requirement to pay the unpaid balance of any penalty under s.114(7) EA02 until the appeal is complete (see footnote 62 of the Final CMA4).

***Examples in Annex 2***

2.54 Some respondents considered that the CMA was taking too strict an approach in some of the examples in Annex 2 of the Draft CMA4 as to when penalties would be imposed for the breaches in question. Two respondents asked for an example involving digital markets.

*CMA views*

2.55 The examples in Annex 2 of the Draft CMA4 accurately reflect the CMA's views on how the CMA would assess the scenarios in question. The CMA has nevertheless clarified some of the examples in Annex 2 of the Final CMA4 (see for example, examples 3 and 7).

2.56 The CMA has furthermore added Example 8 to Annex 2 of the Final CMA4 involving the application of administrative penalties in the digital markets context and involving personal liability of a 'nominated officer' of a firm with Strategic Market Status under the digital markets competition regime.

2.57 Moreover, as noted above, the new Example 9 added to Annex 2 of the Final CMA4 illustrates that the CMA will assess remedy breaches reasonably and proportionately and may elect not to impose a penalty for a minor and isolated breach, taking into account all of the circumstances.

***Interface with Digital Markets Competition Regime guidance***

2.58 One respondent said that the Draft CMA4 did not contain a clear statement as to when CMA4 applies to actions taken under the digital markets competition regime established by Part 1 of the DMCCA24. That respondent noted that the covering consultation document for the Draft CMA4 included a clear description of the interplay between the Draft CMA4 and the draft *Digital Markets Competition Regime Guidance* (CMA194).[26] This explanation, they said, should also be incorporated into both the Final CMA4 and the final *Digital Markets Competition Regime Guidance* (CMA194), to ensure clarity and transparency.

2.59 One respondent also suggested that guidance and policy related to the DMCCA24 – including the Final CMA4 – should reflect the CMA's stated intent to 'adopt a participative approach' and take 'a targeted, evidence-based and proportionate approach to implementing' under the new digital markets competition regime.

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[26] See paragraph 2.12—2.13 of Consultation document (publishing.service.gov.uk)

2.60 Two respondents asked for an additional example involving digital markets.

*CMA views*

2.61 The CMA has added text at footnote 2 of the Final CMA4 to make it even clearer which guidance applies to which penalties functions under the digital markets competition regime.[27] The CMA has also made it even clearer at paragraph 1.13 of the Final CMA4 applies to administrative penalties that may be imposed on senior managers or nominated officers of firms with Strategic Market Status for the purposes of the digital markets competition regime.

2.62 The CMA does not however consider it appropriate to include reference to the digital markets participative approach in the Final CMA4. The Final CMA4 applies to a wide range of functions beyond the digital markets competition regime and referring to the participative approach on the face of the Final CMA4 could create confusion. In any event, there are numerous references in the Final CMA4 to the *Digital Markets Competition Regime Guidance* (CMA194), guidance which discusses the participative approach.

2.63 As noted above, the CMA has added Example 8 to Annex 2 of the Final CMA4, which sets out a scenario involving a nominated officer for the purposes of the digital markets competition regime.

***Duty of Expedition/Discussing information requests***

2.64 One respondent noted that the duty of expedition should not be applied in a way that may override or unduly limit parties' rights of due process in the case of administrative penalties. Another party said the CMA should make firmer commitments that it will discuss Investigatory Requirements with intended recipients prior to issuing the investigatory notice.

*CMA views*

2.65 The duty of expedition will be applied in a way consistent with the CMA's obligations under administrative law, and the CMA does not consider it necessary to state this in the Final CMA4. Furthermore, various tool-specific pieces of CMA guidance (for example *Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases* (CMA8)) discuss the circumstances in which the CMA may discuss Investigatory Requirements with the intended recipients prior to their issuance.

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[27] Similar changes have been made to the *Digital Markets Competition Regime Guidance* (CMA194).

# 3. List of respondents

- Amazon
- Ashurst
- The Association of Convenience Stores
- Coalition for App Fairness
- Dentons
- Freshfields
- Fuels Industry UK
- The Law Society of Scotland
- Linklaters
- NatWest Group
- Petrol Retailers Association
- Santander
- UK Finance