How is this going to affect investigations?

In the areas of merger, market and Competition Act investigations, the new Competition and Markets Authority (CMA) has been given enhanced powers to impose penalties for breaches of procedural requirements and the CMA has publicly stated that it is committed to using these over the next 12 months, where appropriate. These new powers came into force on 1 April 2014.

The CMA may impose a fixed penalty of **up to £30,000** where, in response to a written information request, a company fails to either comply in full, reply within a given timescale or provides inaccurate information. The CMA may also impose a penalty of **up to £15,000 per day** for continued non-compliance in certain cases. The CMA also has a new power to impose penalties for breaches of interim measures (IMs) in merger and market investigation cases.

Whilst the Competition Commission (CC) (which has merged with the Office of Fair Trading (OFT) to become the CMA) had powers to impose administrative penalties for breaches of procedural requirements in relation to mergers at Phase II and market investigations, these powers were never used. The reforms are therefore designed to make it easier for the CMA to take swift, robust and efficient action and in a wider variety of circumstances.

### Overview

Following legislative changes which came into effect on 1 April 2014, the CMA is now obliged to complete merger investigations, market studies and market investigations within statutory timescales and, in the case of market investigations, within a shorter period than before. Given this increased pressure on the CMA, it has been granted enhanced procedural powers.

Where companies fail to provide information to the CMA in response to a formal request in a timely manner, or they provide incomplete or inaccurate information, they risk facing significant financial penalties. In the most extreme case, a company missing a CMA deadline by one week could face fines of **over £130,000** (see below). The new rules are also designed to address perceived concerns that companies may “game the system” to their benefit by providing incomplete or delayed responses to information requests.

### Investigatory requirements - in what circumstances may penalties be imposed?

**Phase I or II mergers, market studies and market investigations**

- Failure to attend a meeting or interview with the CMA when required to do so
- Failure to provide evidence or documents required by the CMA in response to a request
- Intentionally obstructing or delaying another person in copying documents in their possession.

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**Competition Act investigations (relating to alleged anti-competitive agreements or abuse of a dominant position)**

- Failure to answer questions asked by the CMA
- Failure to produce documents required by the CMA
- Failure to comply with CMA’s dawn raid powers of entry (with/without a warrant)
- Failure to provide adequate or accurate information in response to a request.

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**Ability to impose higher fines for breach of procedural requirements**

The new rules increase the **maximum** amount that may be imposed by the CMA by way of a fixed penalty from £20,000 to £30,000 and the maximum daily penalty has increased from £5,000 to £15,000. The CMA is also able to impose a combination of the two types of penalty where the circumstances warrant this. These penalties are separate from, and may be in addition to, any penalty (up to a maximum of 10% of a company’s worldwide turnover) for a substantive infringement of competition law (in the case of Competition Act investigations).

Where the CMA provisionally decides to impose a penalty, the company has the opportunity to make representations to the CMA prior to any final decision being taken. A company also has the right to appeal a CMA penalty decision before the Competition Appeal Tribunal (CAT).
Will the CMA impose a penalty in every case?
The CMA's guidance states that it will consider the circumstances of a company's failure to adequately respond to a request on a case-by-case basis to determine if imposing an administrative penalty is a proportionate response and balance this against the need for deterrence. The CMA has however stated that it is more likely to impose a penalty in cases where:

- The company has sought to obtain an advantage or derive a benefit from its failure
- There is likely to be an adverse effect on the CMA's investigation, for example, in its ability to meet a statutory timetable
- The company has previously failed to comply with a request or CMA decision in relation to this or another investigation (an element of recidivism is also likely to lead to a higher penalty)
- The failure was flagrant (where the company was aware or ought to have known that its conduct would result in a failure to comply) and/or significant; and/or
- A penalty is needed to encourage a company to comply quickly.

Even if the CMA decides to extend the case timetable (where it has the ability to do so) this does not prevent it from also imposing an administrative penalty.

How will the level of penalty be determined?
There is no hard and fast rule as to how the CMA will determine the level of penalty to be imposed. The most serious cases will attract fines at the top-end but a range of factors will be taken into account including:

- Whether the involvement of senior management contributed to the failure, including whether sufficient resources were allocated to comply with the request or IM
- The size of, and administrative and financial resources available to the company
- The nature and gravity of the failure, including any attempt to conceal it; and/or
- Any steps taken by the company to avoid the failure or ensure that it does not occur again, including disciplining responsible individuals.

Defence of “reasonable excuse”
The CMA's power to impose administrative penalties applies in the most part 1 where a company fails, either intentionally or without “reasonable excuse”, to comply with an investigation requirement or IM. The CMA's guidance is however deliberately vague on what may constitute a “reasonable excuse” in the circumstances. The starting point will be for the CMA to consider whether the excuse is the result of a significant and genuinely unforeseeable or unusual event and/or one that is beyond the company's control. Significant IT failures may fall into such a category, depending upon the circumstances.

Ability to impose fines for non-compliance with interim measures in the case of mergers
Interim measures (or “hold-separates”) are a mechanism used by the CMA to prevent (further) integration between the merging parties (for further information on IMs please see our briefing note on M&A activity.)

The new rules allow the CMA to fine a company up to 5% of its worldwide turnover derived from any “enterprises” owned or controlled by it where it breaches an IM. The CMA can apply these rules flexibly to ensure that the resulting penalty is high enough to act as a deterrent. Where the relevant turnover would lead to a penalty which is disproportionately low, the CMA may take into account turnover derived from enterprises which the company does not control outright, but where it has the ability to exercise “material influence” over policy.

Obligation to respond to third party information requests in relation to Phase 1 mergers and market studies
Under the new rules, the CMA will have the power to require third parties to respond to information requests sent as part of a market study or as part of the consideration of a merger at Phase I. Although the CMA may use informal information-gathering powers in the first instance when dealing with third parties, where non-compliance is likely, the CMA may use its statutory powers backed up by the threat of administrative penalties (see above).

Retention of existing criminal offences
In addition to the enhanced powers to impose administrative penalties, the CMA retains the right to criminally prosecute individuals where they:

- Intentionally or recklessly destroy, dispose of, conceal or falsify documents to be produced to the CMA in the context of a Competition Act investigation
- Knowingly or recklessly provide false or misleading information to the CMA in the context of a merger or Competition Act investigation
- Intentionally alter or destroy documents to be produced to the CMA in the context of a merger or market investigation; and/or
- Obstruct the CMA when carrying out its activities on a “dawn raid” on business or domestic premises (with or without a warrant).

Individuals may be imprisoned for up to two years and/or face unlimited fines for the majority of these offences.

In relation to merger and market investigations, the CMA may only impose administrative penalties on the company or criminal sanctions on individuals, whereas in Competition Act investigations, the CMA may impose both civil and criminal sanctions for the same offence.

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1 An exception is the act of obstructing or delaying another person in copying documents for production to the CMA where intent needs to be demonstrated.
CMA: new rules on penalties from 1 April 2014

How is this going to affect investigations?

Immediate impact on ongoing investigations and IMs
The new rules apply to any company subject to a merger, market or Competition Act investigation which commences on or after 1 April 2014. The rules also apply to companies who are part of an ongoing investigation, where a request for information is made on or after 1 April 2014.

In relation to IMs, companies are at risk of being fined for any breaches of IMs which take place after 1 April 2014, even if the IM was imposed before 1 April 2014. The rules also apply to any IMs put in place from 1 April 2014 onwards.

Flexibility granted to CMA means uncertainty for business
So what level of fines is the CMA likely to impose in practice? How often will it take enforcement action? Unfortunately, the level of flexibility provided to the CMA in the guidance means that there is a degree of uncertainty while the new regime beds in. The CMA’s message of deterrence suggests that enforcement action will be on its agenda and it will wish to make an “example” of one or more companies as soon as possible. Companies should therefore take action to minimise this risk (see “Next steps” below).

Next steps
Each investigation is different and will raise its own specific issues. It is therefore essential that you contact your Competition law advisors at the earliest possible stage on receipt of an information request to discuss the specific details and how best to co-ordinate the response process.

Whilst the procedure will be different in each case, the following are general points to consider in conjunction with your advisors in order to ensure that the relevant deadline is met and to minimise the risk of enforcement action by the CMA:

• Where an information request is anticipated, have you proactively engaged in dialogue with the CMA to establish the content and likely deadline? Have you managed the CMA’s expectations as to the type and quantity of data you will be able to provide in the timescale?

• Have you allocated sufficient resources internally and at the appropriate level in order to respond to the request? Have you engaged external advisors (such as economists) where necessary?

• Have you made senior management/the Board of directors aware of the potential implications of failing to respond adequately to the request or missing the CMA’s deadline?

• Have you established who will sign-off on the response as being complete and accurate and made them aware of the risks if this is not the case?

• Have you comprehensively checked your internal records for any relevant data including presentations made to the Board?

• Have you stated that the responses provided are to the best of the company’s knowledge in the limited time available and included any other caveats?

• Have you stated where estimates have been provided and explained the basis for them?

• Have you stated where you have relied on external sources?

• Have you ensured that any decision to withhold documents from the CMA is valid i.e. because the documents are out of scope or are covered by legal professional privilege?

• Are you monitoring progress towards completing the response on an ongoing basis so that you can manage any issues as they arise?

• If you later anticipate difficulty in meeting the deadline, have you contacted the CMA without delay to inform it and to adjust the CMA’s expectations in terms of seeking an extension, where possible?

• If an oversight means that a request is not actioned within the deadline, have you apologised to the CMA and offered to immediately rectify the situation by providing the information without delay, where possible?

• Have you adequately documented the response process in case the CMA instigates proceedings with a view to imposing administrative penalties so that you can defend the approach taken?
CMA: new rules on penalties from 1 April 2014

How is this going to affect investigations?

For further information, please contact any of the partners or senior associates in the EU & Competition team

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