

# Consultation Response

## Administrative Penalties: Statement of Policy

August 2024



# Response to Consultation

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## Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Competition Law sub-committee welcome the opportunity to consider and provide comments on the Competition and Markets Authority (**CMA**) consultation on Administrative Penalties: Statement of Policy.

## General Remarks

We note that the proposed approach to determining the appropriate amount of a penalty appears to be well-structured and transparent. However, we would welcome greater clarity and guidance on how the CMA will assess the seriousness of a breach, particularly in relation to digital markets where it will take time for decisional practice to accumulate.

We are of the view that the draft policy appropriately addresses penalties under the new digital markets competition regime. However, given the ever-evolving nature of digital markets and the novelty of this new digital market regime, we believe that the CMA should also consider making specific provision for regular reviews and updates to this policy document to ensure it remains fit for purpose



and relevant as the digital landscape changes. This may include adopting lessons from decisional practice in similar regimes in other jurisdictions.

We also consider that changes to the policy and legislative framework on this matter would merit an appropriate awareness-raising campaign to make businesses aware of these requirements and help support industry compliance.

## Specific Remarks

We consider that sections 2.20 to 2.24 detailing the aggravating factors that increase the seriousness of a breach, and thereby justify the imposition of a higher penalty, is useful. Alongside this, we also consider that section 2.25 on mitigating factors also provides a good explanation of those considerations that are taken into account to reduce the seriousness of a breach thereby supporting the imposition of a lower penalty.

However, we consider that there is still room for the CMA to provide further detail as to how these factors will be weighted in its decision-making process so that businesses can guide their conduct appropriately. In addition, it is unclear how the CMA differentiates between "significant breaches" and less severe breaches, and the criteria used to assess the severity of breaches could benefit from more detailed explanation. For example, it would also be helpful for the CMA to include at least one practical example in Annex 2 relating specifically to penalties imposed in the context of an investigation under the digital markets provisions of the Digital Markets, Consumer and Competition Act 2024 (**2024 Act**).

Furthermore, we are also of the view that the guidance lacks clarity and certainty in terms of the non-retroactive application of penalties for remedies and infringements that pre-date the 2024 Act. We see clarity in this area as being of crucial importance to allow for businesses to plan and prepare as necessary for any changes to the CMA's powers in that regard.



Moreover, the CMA could elaborate on the process and considerations for transitioning from administrative penalties to non-penalty enforcement actions. For example, the circumstances under which the CMA might choose to apply civil proceedings rather than administrative penalties are not thoroughly detailed.

Finally, we consider that the CMA could provide further guidance concerning the application of penalties to relevant persons who are "third parties" in the context of a particular investigation or enforcement action. For example, where the CMA imposes an information requirement on a customer, competitor or supplier of a business with strategic market status, under section 69 of the 2024 Act, we are of the view that any penalty imposed under section 87 for failure to comply with that requirement should take account of that person's position relative to the principal target of the investigation. Again, a practical example of this in Annex 2 would be useful.

If it would be helpful to discuss any of these points in more detail or if we can be of any further assistance, we would be pleased to do so.

For further information, please contact:

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