

**Department of Trade and Industry
Consumer and Competition Policy Directorate**

The Government's Response to the Consultation on Maximum Penalties for Failures to Comply with the Competition Commission's Requests for Information

Under Section 111 of the Enterprise Act 2003 (Clause 108 of the Bill at the time of the consultation) the Competition Commission has the power to impose monetary penalties on parties who, without reasonable excuse, fail to comply with notices requesting documents or information for the purposes of merger or market investigation references. This can take the form of a fixed rate penalty, a daily rate penalty or a combination of the two up to a maximum to be determined by the Secretary of State by Order.

In September 2002, the Department of Trade and Industry (DTI) issued a consultation document asking consultees to express their views on the level at which the Order should fix the initial maximum penalties. Three options were set out in the document:

Option 1 – the maximum permitted (£30,000 fixed, £15,000 daily rate)

Option 2 – maximum set at £10,000 fixed rate and £2,000 daily rate

Option 3 – any other permutation within the parameters set by legislation

The Department received eight responses by the close of the consultation period on 16 December 2002. Of these, two favoured Option 1 (Competition Commission and Wragge & Co) five favoured Option 2 (Baker & McKenzie; CBI; Denton Wilde Sapte; Freshfields Bruckhaus Deringer; and the Joint Working Party of the Bars & Law Societies of the UK) and one (ALM) said that the penalty should be linked to ability to pay.

The CBI said it would wish to see another permutation adopted for SMEs and suggested this could be achieved by a separate Competition Commission guideline. However, the DTI is satisfied that this covered by paragraph 16 of their Statement of Policy on Penalties which says:

“All the circumstances of the case...will be taken into account when deciding a level of penalty that the Commission considers is reasonable and appropriate. This will include (other) factors such as the resources available to the person concerned both in terms of staff and advisory resources and financial resources.”

Of those who preferred the lower rate, three said that the rate should be reviewed after an initial period and four urged caution at setting the maximum from the outset. A list of respondents is given at Appendix 1.

The main reasons given for favouring Option 1 (the maximum) were:

- Competition Commission is best placed to judge the level of the penalty;
- The higher level does not infringe on the rights of parties subject to Competition Commission investigation;
- Higher level provides the Competition Commission with a significant deterrent;
- Higher level avoids Competition Commission's information gathering powers being rendered ineffective
- Higher level avoids uncertainty for business

The main reasons given for favouring Option 2 (the lower rate) were:

- The lower level should provide an adequate deterrent to all parties;
- Actual instances of non-compliance are rare;
- Setting higher penalties would remove scope for later adjustment upwards;
- Lower penalties are in existence for more serious infringements;
- Setting higher level would mean greater risk of non-compliance by smaller companies as a result of limited resources.

Four of the five respondents who favoured the lower rate believed that caution should be taken at setting the maximum at the outset:

“...we believe that it would be more appropriate to review how these new powers work in practice before opting for the maximum sanctions.” - CBI

“We believe it would be wrong in principle to set the statutory maxima at the highest level immediately on introduction of this new penalties regime.” – Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law

“We believe that the maximum levels contained in Section 108 of the Enterprise Act 2002...are too high, particularly at the outset of the new regime.” – Denton Wilde Sapte

“...we advocate a moderate, even conservative, approach to setting the initial maximum fixed and daily penalties under the Act, particularly having regard to the new and untested nature of the monetary penalty powers of the Competition Commission.” – Freshfields Bruckhaus Deringer.

After careful consideration of all comments received, the Secretary of State has decided that the initial level of penalties will be set at a maximum of £20,000 fixed rate and £5,000 daily rate with a review after 2 years.

Copies of the responses are available for viewing in the DTI Library at 1 Victoria Street, London SW1H 0ET. (Call the Open Government Unit on 020 7215 6618). The Department was grateful for all the views received.

List of respondents

Association of Lloyds Members (ALM)

Baker & McKenzie

Competition Commission

Confederation of British Industries (CBI)

Denton Wilde Sapte

Freshfields Bruckhaus Deringer

Joint Working Party of the Bars & Law Societies of the UK on Competition Law

Wragge & Co

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