EXPLANATORY MEMORANDUM TO

THE COMPETITION AND MARKETS AUTHORITY (PENALTIES) ORDER 2014

2014 No. 559

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Order specifies the maximum amounts that the Competition and Markets Authority (CMA) may impose as a penalty where a person has failed, without reasonable excuse, to comply with investigations powers under the Enterprise Act 2002 relating to mergers and markets investigations; or with antitrust investigations under the Competition Act 1998.

2.2 In all cases, the maximum amounts specified are the statutory maxima of £30,000 in relation to a fixed penalty; and £15,000 in relation to a daily penalty. These replace the previous maxima of £20,000 and £5,000 respectively.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Section 110 of the Enterprise Act 2002 permits the CMA to impose a penalty where a person has failed without reasonable excuse to comply with a notice under section 109 of the Act. The penalty may be a fixed amount; an amount calculated by reference to the daily rate; or a combination of the two. Where the penalty comprises or includes a fixed amount, the maximum fixed amount is £30,000. Where the penalty comprises or includes an amount calculated by reference to a daily rate, the maximum rate at which the penalty may increase is £15,000 per day. It also permits the imposition of a penalty where the CMA considers that a person has intentionally obstructed or delayed another person from complying – in which case the penalty must be for a fixed amount to a maximum of £30,000.

4.2 Section 174A(1) of the Enterprise Act 2002 permits the CMA to impose a penalty where a person has failed, without reasonable excuse, to comply with a notice under section 174 of the EA 2002. Again, the penalty may be a fixed amount; an amount calculated by reference to a daily rate; or a combination of the two. The same maxima as above apply. It also permits the imposition of a penalty where the CMA considers that a person has intentionally obstructed or delayed another person from complying – again to a fixed maximum of £30,000.

4.3 The Order also specifies the maximum amounts that the CMA may impose as a penalty under sections 26, 26A, 27, 28 and 28A of the Competition Act 1998. Section 40A(1) of the CA 1998 permits the CMA to impose a penalty where a person has failed to comply with a requirement imposed on the person under those sections. As before, the penalty imposed under section 40A(3) of the Act may be a fixed amount; an amount calculated by reference to a daily rate; or a combination of the two. Where the penalty comprises or includes a fixed amount, the maximum fixed amount is £30,000. Where the penalty comprises or includes an amount calculated by reference to a daily rate, the maximum rate at which the penalty may increase is £15,000 per day.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The Department for Business, Innovation and Skills set out in its consultation on this Order the arguments in support of an increase to the statutory maxima of the levels of administrative penalties available to the CMA.

7.2 These were as follows: that the existing maxima were relatively low when compared to the turnovers of many businesses and in comparison to the penalties that can be imposed under the EU competition regime; that inflation had significantly eroded the value of the maxima since 2003; that where civil penalties have replaced criminal sanctions, it is appropriate to compensate for the dilution of the enforcement regime by raising the maxima; and that a competition regime that relies on prompt and complete provision of information needs meaningful penalties to deter non-compliance.

7.3 The consultation can be viewed at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212271/Tranche_1_consultation_document_FINAL.pdf

8. Consultation outcome

8.1 BIS consulted on the proposals for the standard 12-week period as part of its consultation on a number of statutory instruments implementing elements of the new competition regime. Responses were received from around two dozen respondents to this consultation as a whole. The majority of these were law firms. Details of the responses to the consultation, and the Government Response, will be published at:

https://www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation

8.2 The consultation highlighted concerns about the proportionality of the increases in the maxima; and in particular the potential impact on smaller businesses.

8.3 The Government has responded to these concerns by ensuring that principles governing the proportionate application of the penalties will be set out in the CMA's guidance on the use of its penalty powers.

9. Guidance

9.1 The CMA has published guidance on its use of its penalty powers at: https://www.gov.uk/government/publications/administrative-penalties-statement-of-policy-on-the-cmas-approach

10. Impact

10.1 The impact assessment completed for Parts 3 and 4 of the Enterprise and Regulatory Reform Bill, introduced to Parliament on 23rd May 2012, contained an assessment of the effect that the reforms to the competition regime will have on the costs of business and the public and voluntary sector. It can be found at the website: https://www.gov.uk/government/publications/strengthening-competition-and-creating-a-single-market-authority

11. Regulating small business

11.1 The legislation applies to small business.

12. Monitoring & review

12.1 Sections 46 and 56 of the Enterprise and Regulatory Reform Act 2013, require the Secretary of State to conduct a review within five years of the operation of Part 1 of the Competition Act 1998 and certain of the provisions of Part 4 of the Enterprise and Regulatory Reform Act 2013 (which contains amendments to the mergers and market studies and market investigations provisions of the 2002 Act), which could encompass amendments by this Order.

12.2 The impact assessment for the Enterprise and Regulatory Reform Act 2013 competition provisions stated that there would be a review of the competition regime introduced by the Act in April 2018.

13. Contact

Stephen Childerstone at the Department for Business, Innovation and Skills; Telephone: 0207-215 0354; or email: stephen.childerstone@bis.gsi.gov.uk can answer any queries regarding the instrument.