



Statement of Policy on Penalties  
June 2003

This is one of a series of documents which the Competition Commission is required to publish under the Enterprise Act 2002

## Statement of Policy on Penalties

### Contents

Statement of Policy on Penalties	4
in connection with the enforcement of notices under section 109 pursuant to section 116(1) Enterprise Act 2002.....	4
Statutory background	4
Policy objectives	5
Statement of policy	6
Procedure	6
Failure to comply	7
The decision to impose a penalty	7
Decision to extend the period in which to report (merger references)	7
Criteria for determining the amount of a penalty	8

## Statement of Policy on Penalties

### in connection with the enforcement of notices under section 109 pursuant to section 116(1) Enterprise Act 2002

This statement sets out the considerations relevant to the determination by the Competition Commission as to whether to impose penalties enforcing notices requiring attendance of witnesses and production of documents etc, and if so, the nature and amount of the penalty or, if applicable, to extend the period in which to prepare and publish its report.

### Statutory background

1. Under section 109 of the Enterprise Act 2002 (“the Act”) the Competition Commission (“the Commission”) has power for the purpose of an investigation:<sup>1</sup>
  - (i) by notice, to require any person to attend at a specified time and place and to give evidence to the Commission or to a person nominated by the Commission;
  - (ii) by notice, to require any person to produce at a specified time and place and to a specified person any documents which are specified or described in the notice or which fall within a category of document which is specified or described in the notice, and which are in that person’s custody or under his control;
  - (iii) by notice, to require any person who carries on any business to supply the Commission at a specified time and place and in a form and manner so specified and to a specified person such estimates, forecasts, returns or other information;
  - (iv) to take evidence on oath, and for that purpose to administer oaths.

The person to whom a document is produced in accordance with any such notice has power under section 109(6) to copy any document produced in accordance with any such notice.

2. There are two circumstances in which the Commission may impose a penalty:<sup>2</sup>

<sup>1</sup>Section 109 is expressed to apply to merger references made under Part 3 of the Act. However, the powers under that section also apply to market investigation references made under Part 4 of the Act pursuant to section 176. The powers in section 109 also apply to references made under:

Section 32 of the Water Industry Act 1991 pursuant to paragraph 1 of Schedule 4ZA to that Act (when in force);

Section 13 of the Telecommunications Act 1984 pursuant to section 13B(1) of that Act;

Section 43 of the Airports Act 1986 pursuant to section 44B(1) of that Act;

Sections 24 and 41E of the Gas Act 1986 pursuant to sections 24B(1) and 41EB(1) respectively of that Act;

Sections 12 and 56C of the Electricity Act 1989 pursuant to sections 12B(1) and 56CB(1) respectively of that Act;

Schedule 4 to the Broadcasting Act 1990 pursuant to paragraph 4A(1) of the Schedule 4 to that Act;

Section 14 of the Water Industry Act 1991 pursuant to section 14B(1) of that Act;

Article 15 of the Electricity (Northern Ireland) Order 1992 pursuant to Article 15B(1) of that Order;

Section 13 and under Schedule 4A of the Railways Act 1993 pursuant to section 13B(1) and paragraph 10A(1) of Schedule 4A respectively to that Act;

Section 11 of the Competition Act 1980 pursuant to section 11B(1) of that Act;

Article 34 of the Airports (Northern Ireland) Order 1994 pursuant to Article 35B(1) of that Order;

Article 15 of the Gas (Northern Ireland) Order 1996 pursuant to Article 15B(1) of that Order;

Section 15 of the Postal Services Act 2000 pursuant to section 15B(1) of that Act; and

Section 12 of the Transport Act 2000 pursuant to section 12B(1) of that Act.

For investigations under section 162 of the Financial Services and Markets Act 2000 pursuant to paragraph 2A(1) of Schedule 14 to that Act.

<sup>2</sup>The powers applicable to merger references made under Part 3 of the Act are set out in sections 109 and 110. They also apply to the other references referred to in Footnote 1.

- (i) when the Commission considers that a person, without reasonable excuse, has failed to comply with any requirement of a notice under section 109 of the Act and referred to in paragraphs 1 (i) and (iii) above (“the section 110(1) infringement”). In this case, subject to the exception described in paragraph 14 the Commission may impose a fixed penalty or a daily rate penalty, or both; and
  - (ii) when the Commission considers that a person has intentionally obstructed or delayed another person’s efforts to copy a document that he has a right to copy under section 109(6) of the Act. In this case the Commission may impose only a fixed penalty.
3. The Commission may not, however, impose a penalty in respect of a section 110(1) infringement if the person requested to produce a document has been found guilty of having committed an offence by intentionally altering, suppressing or destroying any document which he has been required to produce.<sup>3</sup> The Commission may not, except in relation to any permitted variation or substitution, impose a penalty if more than four weeks have passed since the publication of the report of the Commission on the reference concerned.<sup>4</sup>
4. Any penalty imposed by the Commission may be of such amount as the Commission considers appropriate subject to any maxima specified by order of the Secretary of State.<sup>5</sup>
5. The Commission is required to publish a statement of policy in relation to the enforcement of notices under section 109 of the Act.<sup>6</sup> When deciding whether, and if so how, to proceed under the provisions enabling penalties to be imposed, the Commission is required to have regard to the statement of policy on penalties which was most recently published at the time when the failure occurred, or (as may be the case) the obstruction or delay concerned occurred.<sup>7</sup>
6. The Commission is also required to have regard to such a statement when considering whether to exercise its power enabling it to extend the period in which a report is to be prepared and published when it considers that a “relevant person” has failed (whether with or without reasonable excuse) to comply with any requirement of a notice made under section 109.<sup>8</sup> This power to extend the timetable is limited to merger references made under sections 22, 33, 45 and 62 of the Act.<sup>9</sup> It can be anticipated that the power will include water merger references under section 32 of the Water Industry Act 1991 as awarded by section 70 of the Enterprise Act and now schedule 4ZA to the Water Industry Act when these provisions are commenced.

## Policy objectives

7. The purpose of the Commission’s information gathering powers under the Act is to ensure that the Commission is able to carry out its functions by deciding the

---

<sup>3</sup>Section 110(8).

<sup>4</sup>Section 110(4).

<sup>5</sup>Section 111(7).

<sup>6</sup>Section 116(1).

<sup>7</sup>Section 110(9).

<sup>8</sup>Section 110(9). ‘relevant person’ is defined in sections 39(5) and 51(5).

<sup>9</sup>See section 39 in respect of references made under sections 22 and 33 and applied to references made under section 32 of the Water Industry Act 1991 pursuant to paragraph 1 of Schedule 4ZA to that Act (when in force). See section 51 in respect of references made under section 45 and applied to references made under section 62 of the Act pursuant to section 66.

questions that are set out in the Act within the strict deadlines set by the Act and with the best possible knowledge of the relevant facts.

8. The Commission's powers to impose penalties are the mechanism through which the Commission can ensure that its requests for information pursuant to its information gathering powers are complied with.
9. There are a number of possible adverse consequences for the Commission and others if information requested by the Commission is received late, incomplete, or withheld entirely:
  - (i) the costs of the investigation (both to the Commission and to persons involved) may increase;
  - (ii) the investigation may be delayed, which could have commercial implications and again increase costs;
  - (iii) the accuracy or quality of the Commission's report may be lowered; for example, the Commission may have to base its decision on estimates rather than actual figures; or
  - (iv) in the most extreme circumstance the Commission could come to a different decision from that it would have reached if the information had been available.

### Statement of policy

10. This statement has been prepared and published by the Commission following consultation in accordance with section 116 of the Act and shall come into force on 20th June 2003.

### Procedure

11. When considering the enforcement of notices under section 109 and the imposition of any penalty, the Commission will follow the procedural requirements set out in the Act<sup>10</sup> and the Commission Rules of Procedure.<sup>11</sup> The Commission will in particular address the following questions:
  - (i) where it appears that a person may have failed to comply with any requirement of a notice under section 109, whether in fact there has been a section 110(1) infringement and if so, whether there was any reasonable excuse for that failure;
  - (ii) where it appears that a person may have obstructed or delayed a person's efforts to copy a document he has a right to copy under section 109(6), whether in fact the person obstructed or delayed such right and if so, whether he intended to do so;
  - (iii) if either is the case, whether it is appropriate to impose a penalty and/or, if appropriate, extend the period in which to report; and if so,

---

<sup>10</sup>Sections 112–113.

<sup>11</sup>The Commission Rules of Procedure are made pursuant to paragraph 19A (1) of Schedule 7 to the Competition Act 1998.

- (iv) what amount is reasonable in the circumstances.

### Failure to comply

12. In deciding whether there is any reasonable excuse for the failure to comply, the Commission will take into account all the relevant circumstances, including any relevant information brought to the Commission's attention, including whether, and if so the extent, to which, the failure arose from circumstances outside the control of the person who has failed to comply.

### The decision to impose a penalty

13. The Commission will also take all the circumstances into account when deciding whether to impose a penalty. The following factors may make the decision to impose a penalty more likely:
- (i) the failure, obstruction or delay adversely affected the efficient carrying out of the Commission's functions. The Commission might conclude that there was such an effect even though it had not extended the period in which to prepare and publish or deliver its report;
  - (ii) the failure adversely affected other persons in relation to the carrying out of the Commission's functions;
  - (iii) the imposition of a penalty was likely to encourage compliance with the Act;
  - (iv) the absence of good reason for the failure;
  - (v) the person concerned attained or sought to attain some advantage or benefit from the failure.
14. When addressing these questions in the context of a section 110(1) infringement, the Commission may impose a fixed penalty, an amount calculated by a daily rate or a combination of fixed penalty and an amount calculated by a daily rate. The factors mentioned above will be relevant to its decision as to the type of penalty to impose. Moreover, if at the time the decision to impose a penalty is made, the notice which is the subject of the decision has been complied with, the Commission may only impose a fixed penalty.<sup>12</sup> If not, the Commission will generally impose a penalty calculated at a daily rate and may also impose a penalty of a fixed amount.

### Decision to extend the period in which to report (merger references)

15. Paragraph 6 above refers to the Commission's power to extend the period within which its report is to be prepared and published if it considers that a "relevant person" has failed (whether with or without reasonable excuse) to comply with any requirement of a notice under section 109. The period of extension is not limited by statute. The Commission is able to exercise such power and the power to impose a penalty at the same time or at different times. When deciding whether or not to

---

<sup>12</sup>Section 111(5).

impose a penalty, the Commission will also consider whether it has the power to extend the time within which the report must be prepared and published and if so, whether to exercise that power. When deciding whether to extend the period within which a report is to be prepared and published, the Commission will also consider whether to impose a penalty.

16. When considering whether to exercise its power enabling it to extend the period within which a report is to be prepared and published, the Commission will consider all relevant factors, including:
- (i) the Commission's assessment of whether the extension is necessary to enable the information gathering powers to be complied with and for the Commission to complete its functions;
  - (ii) whether any extension may jeopardise the effectiveness of any remedy the Commission might wish to impose, for example a divestment in the case of a completed merger. Any decision not to extend the reporting period will be kept under review.

### Criteria for determining the amount of a penalty

17. The amount of the penalty will be reasonable, appropriate and thus proportionate in the circumstances. All the circumstances of the case, including the factors referred to in the preceding paragraphs, will be taken into account when deciding the amount of penalty and other factors such as the resources available to the person concerned both in terms of staff and advisory resources and financial resources.
18. The Commission shall then consider any aggravating or mitigating circumstances that it considers should have an effect on the level of the penalty (or penalties) imposed.
19. In the case of a section 110(1) infringement or an obstruction or delay, factors that might, if appropriate, be considered aggravating factors and might therefore result in the penalty being adjusted upward include, but are not limited to:
- (i) failure to comply with other requests for information in relation to the same inquiry;
  - (ii) intentional failure;
  - (iii) continuation of failure after the person concerned has become aware of the contravention or failure or of the Commission's concern that there might have been a contravention or failure;
  - (iv) the involvement of senior management or of officers in any failure;
  - (v) the absence of any evidence of mechanisms or procedures intended to prevent failure;
  - (vi) any attempt to conceal the failure from the Commission.
20. In the case of a section 110(1) infringement or an obstruction or delay, factors that might, if appropriate, be considered mitigating factors and might therefore result in the penalty being adjusted downward include, but are not limited to:

- (i) adequate steps having been taken to secure compliance with the Commission's request;
  - (ii) the fact that the person concerned has complied with other requests for information in relation to the same inquiry.
21. Having considered all the circumstances of the matter, including the factors listed above, the Commission will determine an appropriate amount. In doing so it will ensure that the amount does not exceed the maxima referred to in paragraph 4.
22. A person on whom a penalty is imposed and who is aggrieved by the imposition or the nature of the penalty, the amount of the penalty or any date by which the penalty is required to be paid, may apply to the Competition Appeal Tribunal.<sup>13</sup>

---

<sup>13</sup>For more information about appeals and the recovery of penalties see sections 114 and 115 of the Act.

