

Tesco's response to the CMA's consultation on its draft guidance on its new enforcement functions under the Motor Fuel Price (Open Data) Regulations 2025

We welcome the invitation to respond to the CMA's consultation on its draft guidance (**Draft Guidance**) on its new enforcement functions under the draft Motor Fuel Price (Open Data) Regulations 2025 (**Regulations**).

We set out below our responses to Questions 1-3 and 5 outlined in the consultation.

Q1 & 2: Do respondents have any comments on the CMA's proposed targeted and proportionate approach to enforcement? Do respondents view the balance of informal and formal action to be appropriate?

We agree with the CMA's proposed targeted and proportionate approach in principle. However, the Fuel Finder and Regulations that underpin it are new and potential financial penalties for non-compliance are extremely high. It is imperative that the CMA sets out clear, practical guidance on when conduct will be treated as a breach of the Regulations and how the CMA will approach any investigation, enforcement action and setting of penalties.

We consider that further guidance from the CMA, before the Fuel Finder comes into operation, is critical.

Our comments on the CMA's proposed approach are as follows:

- The CMA should set a *de minimis* threshold for the aggregator to report breaches to it.
 - The Government suggested in its consultation response dated October 2024 that the aggregator would only escalate instances of non-compliance above a *de minimis* threshold to be defined by the CMA.
 - We consider a *de minimis* threshold to be an important aspect of the CMA's commitment to targeted and proportionate enforcement. It is required to provide certainty to MFTs regarding the CMA's approach to certain minor and/or transient data issues, which do not warrant the CMA's intervention.
 - We request that a *de minimis* reporting threshold is included in the final guidance.
- Further guidance on when the CMA will take informal and formal action is needed.
 - The Draft Guidance sets out at 22 and 24 a list of factors the CMA will consider when deciding whether to take informal or formal action. Some of these factors are not clearly defined - for example, how will the CMA measure "scale, harm caused, scope", and "significant impact on consumers"? What will the CMA consider to be of "limited practical impact", as opposed to being of "significant impact"? We ask that the CMA provides further detail and hard metrics for MFTs to understand which types of breaches are likely to be subject to informal and formal action respectively.
 - We also suggest the CMA provides illustrative examples of the following scenarios in its final guidance, drawing from the CMA's experience in administering the voluntary fuel finder:
 - The types of breaches it would not typically seek to investigate.

- The types of breaches it may take informal action against; what types of informal action may be taken and when the CMA considers it appropriate to issue a public letter.
 - The types of breaches it expects to take formal action against; the circumstances that may lead to formal action, and the compliance measures the CMA expects to set out in a compliance notice.
- The CMA should adopt a consistent set of factors and criteria for considering possible enforcement action and determining penalties.
 - The Draft Guidance refers to various lists of factors and circumstances at paras 13, 19, 22, 34, and paras 6 and 11 of Annex A, all of which are relevant to how the CMA will assess a breach of the Regulations.
 - However, the factors and circumstances outlined are not consistently defined, eg “harm caused” is referred to in considering enforcement action (paras 19, 24) but not in the determination of penalties.
 - In addition to our request that the CMA defines these factors and criteria, we consider that the CMA should adopt a consistent terminology in describing its criteria for assessing the appropriate action or penalty in each case.

Q3: Do respondents have any comments on the factors we propose to take in to account when considering penalties?

Our comments on the CMA’s approach to penalties are as follows.

- No financial penalties should be imposed in relation to MFTs’ duty to provide and update non-price information.
 - Pursuant to Part 3 of the draft Regulations, MFTs must provide a long list of non-price information upon registration, and ensure that any changes to such information is updated within 3 days of the change (we assume this is 3 working days, but the Regulations do not specify this).
 - Given that the non-price information set out in Schedule 1 of the draft Regulations is not central to the CMA’s mission to improve price transparency, was introduced without due consultation and has still not been finalised with less than two months before registration goes live, we ask the CMA to confirm that it will not impose any financial penalties in relation to any non-price registration requirements.
- Further guidance on what constitutes a “reasonable excuse” for failure to comply is needed.
 - We welcome the CMA’s recognition that there may be circumstances which may constitute a reasonable excuse for failure to comply with the Regulations, eg where non-compliance was not within an MFT’s control, unforeseeable, unavoidable, or unintentional.
 - While we understand it is not possible to exhaustively define such circumstances, we consider it important that the CMA provides further detail on the objective test it expects to apply, so that MFTs can self-assess their risk exposure.
 - Additional examples, drawing from the CMA’s experience in administering the voluntary fuel finder, would also be helpful.
- Step-by-step guidance on calculating the quantum of financial penalties is needed.

- As an overarching comment, we consider that the CMA should take a proportionate approach to penalties and ensure it does not impose any penalty that may be disproportionate to the level of actual economic harm caused by the breach in question.
- The Draft Guidance indicates that turnover is calculated by reference to the turnover achieved by the group of entities to which an MFT belongs, both inside and outside the UK. The broad definition of turnover means the quantum of potential financial penalties is significant for some MFTs, and indeed may vary significantly between MFTs, even for a breach of similar severity.
- We consider the CMA should provide further, step-by-step guidance on its approach to calculating any penalty to be imposed. For example, the CMA should consider adopting a percentage of the “relevant turnover” generated by the relevant PFS(s) under investigation as a starting point, with adjustments for duration and other relevant factors. This would be consistent with the CMA’s approach outlined in CMA73 and is an important procedural clarification to be addressed in the final guidance.
- In relation to the factors influencing the level of penalty imposed:
 - We strongly oppose the inclusion of “the size of MFT and administrative and financial resources available to them” as an aggravating factor in the context of the Fuel Finder.
 - Larger MFTs are already subject to a higher level of potential financial penalties by reason of the size of their worldwide turnover.
 - Further, there is no established correlation between the size of MFT on the one hand and its ability to comply on the other. Each MFT has been given equal opportunity to consult on the operation and enforcement of the Fuel Finder. Larger MFTs have a higher administrative burden due to the larger number of sites they manage, and we (along with other supermarket operators) do not operate fuel sites as part of our core business.
 - We understand the “scale of adverse effects” may encompass numerous factors relevant to the significance of non-compliance. We request the CMA elaborates on the considerations relevant to this factor. We note in particular that a proportionate approach to enforcement demands that the level of penalty be set having regard to the degree of actual harm caused by the breach on consumers.
 - We consider that the duration of breach should be a relevant factor. Efforts made by the MFT to address the breach, as well as its general cooperation with the CMA’s enforcement action, should be accepted as mitigating factors.

Q5: Is the guidance clear on the CMA’s proposed approach? If not, where would further clarification be helpful?

- VE3 guidance
 - The Draft Guidance refers to separate guidance from VE3 on how MFTs can register to and use the Fuel Finder, to ensure MFTs understand their obligations. As VE3 will have primary responsibility for the operation of the Fuel Finder and monitoring of compliance with the Regulations, VE3’s guidance is a critical document for MFTs to

understand their obligations under the Regulations and the CMA's approach to enforcement.

- We ask that VE3's draft guidance be shared with MFTs as soon as possible, and that the CMA addresses any consequential comments we may have on the Draft Guidance following the publication of VE3's draft guidance.