RESPONSE OF CLIFFORD CHANCE LLP TO THE CMA ADMINISTRATIVE PENALTIES: STATEMENT OF POLICY ON THE CMA'S APPROACH CONSULTATION DOCUMENT

Clifford Chance LLP welcomes the opportunity to comment on the BIS CMA Transition Team's "Administrative Penalties: Statement of Policy on the CMA's approach" consultation document (the "**Consultation Document**") and the draft statement of policy (the "**Statement**").

Our comments below are based on the substantial experience of lawyers in our Antitrust Practice of advising on competition law for a diverse range of clients, and across a large number of jurisdictions. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

Terms defined in the Consultation Document have the same meaning in this response.

Q1. Do you consider that there are any other roles or objectives that should be taken into account when considering the CMA's approach to administrative penalties?

Please give reasons for your views.

1.1 The Consultation Document states:

> "In addition to ensuring the timely provision of accurate and complete data to inform investigations, it is also considered that administrative penalties should reflect the seriousness of the failure to comply. In accordance with the CMA's obligation to act proportionately, those failures to comply which carry particularly adverse consequences and/or reflect a significant level of culpability are likely to be more heavily penalised than those having minimal effects and/or result from mere negligence".[1]

It does not appear to us that these considerations are adequately reflected in the Statement.

1.2 The Statement provides that the CMA's investigatory and interim measures powers are intended (inter alia) to "ensure that the threat of penalties will deter future non-compliance with relevant CMA powers, by those on whom penalties have been imposed and other persons who may be considering future non-compliance".[2] In this respect, the Statement differs from the Competition Commission's Statement of Policy on Penalties (**CC Statement**), which does not mention deterring future non-compliance as an objective. The CC Statement instead focuses on ensuring "that the Commission is able to carry out its functions by deciding the 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",[3] with penalty powers stated to be "the mechanism

[1] Consultation Document, paragraph 3.8.

[2] Statement, paragraph 3.1.

[3] Competition Commission's Statement of Policy on Penalties, June 2003, CC5, paragraph 7.

through which the Commission can ensure that its requests for information pursuant to its information gathering powers are complied with".[4] In addition, the CC Statement provides that the amount of the penalty will be reasonable, appropriate and thus proportionate in the circumstances.[5]

1.3 In our view, by treating deterrence of future non-compliance as a primary objective, the Statement does not adequately emphasise the point that is made separately in the Consultation Document, that "it would not necessarily serve the CMA's intended policy objectives to punish disproportionately minor failures in the context of general compliance with Investigatory Requirements, or accidental failures which are promptly corrected".[6] Accordingly, we consider that the Statement should clearly state that the objective of future deterrence is subject to the principle that the penalty should not be disproportionate to the seriousness of the breach, i.e. that CMA will not impose disproportionate penalties, simply for the purpose of deterring third parties. At the very least, the Statement should provide that the amount of the penalty will be reasonable, appropriate and thus proportionate in the circumstances.[7]

Q2. Do you agree that the level of detail in the Statement is appropriate?

Please give reasons for your views.

2.1 Subject to our comments in response to the other questions, we agree that the level of detail in the Statement is in general appropriate.

Q3: Do you agree with the approach in the Statement to determining whether to impose a penalty, the level at which penalties should be set and the various factors to be taken into account?

Please give reasons for your views.

3.1 The Statement provides that:

3.1.1 the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis;[8] and

3.1.2 the CMA may be more likely to consider there is a reasonable excuse when a "significantly and genuinely unforeseeable or unusual event beyond P's control has caused the failure and the failure would not otherwise have taken place".[9]

4 Competition Commission's Statement of Policy on Penalties, June 2003, CC5, paragraph 8.

5 See CC5, paragraph 17.

6 Consultation Document, Paragraph 4.13.

7 See CC5, paragraph 17.

8 Paragraph 4.3.

9 Paragraph 4.3.

The CC Statement acknowledges that whether, and the extent to which, the failure arose from circumstances outside the control of the person who has failed to comply will be a relevant circumstance in deciding where there is any reasonable excuse for the failure to comply[10]. We consider that the approach in the CC Statement is to be preferred. In particular, there may be circumstances where a failure to comply arose from circumstances that cannot be considered a "genuinely unforeseeable" or an "unusual" event, but are nevertheless outside the control of the person who has failed to comply.

Q4. Do you agree with the approach in the Statement to use the material influence test when determining turnover only in cases where the business structure is such that only the material influence test would meaningfully capture P's turnover? In particular, do you have views on whether turnover based on material influence should be used in all cases.

Please give reasons for your views.

4.1 We agree with the Transition Team that assessing material influence may not always be a straightforward exercise and may take more time to assess compared to de facto control and the existence of a controlling interest.[11] In our separate response to the consultation regarding the draft Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014 (the "**Draft Order**"), we have submitted that material influence should be excluded outright from the test for calculating turnover-based maxima for the purpose of Section 94A(2) Enterprise Act 2002, as amended ("**EA2002**"). This would make such calculations simpler – allowing for quicker imposition of penalties – and would also ensure consistency between turnover-related penalties under the EA2002 and those applicable for infringements of the Competition Act 1998.

4.2 If material influence is retained in the Draft Order, we agree with the proposition that including turnover based on material influence would not be appropriate unless it is necessary to do so, although this may depend on whether a discretion not to do so is included in the Order (it does not appear to be, at present).[12] Assuming such a discretion is included, we consider that turnover of materially-influenced companies should be included only where necessary to ensure adequate deterrence, for example because the infringer is a small company which has a shareholding conferring material influence in a much larger company, and a disproportionate percentage of its revenues are derived from that shareholding.[13] The Statement might also usefully clarify that in such circumstances, the fact that P is only entitled to a portion of the

[10] CC Statement, paragraph 12.

[11] Paragraph 4.18.

[12] We note that this approach (set out in the Consultation Document) is not reflected in the Statement as drafted (paragraphs 4.11-4.19).

[13] We do not consider envisage any circumstances in which it would be necessary to include turnover based on material influence for the purpose of ensuring that the penalty reflects the seriousness of the breach, as this would result in subjective and arbitrary decisions as to whether or not to include such turnover.

profits of the materially-influenced undertaking would be taken into account when determining the level of the penalty, and whether it will ensure adequate deterrence.

4.3 We also consider that the Statement should incorporate a principle that the inclusion of turnover based on material influence would not be considered necessary unless the relevant party is in some way competitively related to P, i.e. it is operating on the same or a related market. This would ensure that there is some objective link between the turnover of the materially influenced undertaking and the conduct that amounts to the breach. It would also be consistent with:

4.3.1 the application of UK merger control to situations of material influence;

4.3.2 the fact that the relevant party would not be regarded as part of the same undertaking as P for the purposes of EU and UK competition law; and

4.3.3 the relatively low degree of influence conferred.

Q5. Is the Statement sufficiently clear to assist you in understanding how the CMA will set administrative penalties for failure to comply with the relevant Investigatory Requirements?

Please describe any areas that are not sufficiently clear, the reasons for this and any recommendations you may have.

5.1 Please refer to our responses to questions 1 to 5 above.

Clifford Chance LLP
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