RESPONSE TO CMA CONSULTATION: ADMINISTRATIVE PENALTIES: STATEMENT OF POLICY ON THE CMA'S APPROACH

Baker & McKenzie LLP welcomes the opportunity to comment on the CMA Consultation: Transparency and Disclosure: Statement of the CMA's Policy and Approach ("the Draft Statement"). Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on competition law.

1. 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?

1.1 We do not consider there are any other roles or objectives that should be taken into account considering the CMA's approach to administrative penalties.

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

2.1 Subject to the points below, we agree that the level of detail in the Statement is appropriate.

2.2 The CMA should provide additional guidance on what constitutes a 'failure to comply' with an Investigatory Requirement. The CMA provides some examples of what a 'failure to comply' is in Annexe A of its Statement, but we do not consider them to be sufficient. For example, the second scenario included in Annexe A suggests that, in relation to a questionnaire, sending in a response where '…many questions are ignored or receive one word answers…' would be a failure to comply. However, one word answers to a binary question (yes or no) can be appropriate. Greater clarity is needed in this area in order to adopt a more principled approach and enhance legal certainty, since this will allow companies to know and therefore observe the boundaries of the law.

2.3 In para 4.2 of its Statement the CMA notes that an intentional failure to comply with an Investigatory Requirement will be treated more severely, without further explaining what intentional means. A separate section should be added to that effect.

2.4 The CMA (in para 4.10) explains what are the factors that will affect the level of the penalty for failure to comply with an IR. However, the CMA also needs to explain which are the broad categories (for example, maximum penalty; significant penalty close to the maximum etc.) of the penalties and how each factor affects the broad level into which the failure to comply with an IR falls.

3. 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?

3.1 In fn 35 of the Statement the CMA notes that '*…persistent and repeated unreasonable behaviour that delays the OFT's enforcement action is an aggravating factor under the [OFT/CMA] Guidance as to the appropriate amount of penalty for substantive infringements of competition law*' and then states that ' *the CMA will consider on a case-by-case basis whether any non-compliance with information gathering powers merits both an administrative penalty and the application of the aggravating factor*'.

3.2 We disagree with this approach. The CMA's powers to impose fines for procedural infringements are sufficient in order to deter companies from unnecessarily delaying the

investigation. The CMA should therefore not use non-compliance with procedural requirements in order to increase the amount of the penalty for substantive infringements of the competition rules. However if the CMA were to persist with the current approach, we strongly believe that either an administrative penalty should be imposed or the CMA should increase the amount of the fine for the substantive infringement. By doing both, the CMA is effectively punishing the company twice for the same behaviour.

4. 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?

4.1 It is our strongly held view that the turnover of the undertakings over which P has material influence should never be taken into account in calculating the financial penalty for failure to comply with IMs. In assessing whether P exercises material influence over certain corporate entities, the CMA will have to detract significant resources from its substantive merger assessment as this is a time-consuming/resource-intensive exercise. Additionally we cannot see why the approach for determining the level of the penalty for failure to comply with Merger Interim Measures should be any different from the one adopted when calculating penalties for substantive infringements of the CA 98, where the material influence test is not applied. Given these considerations we believe that the only effect of using the material influence test will be to unnecessarily protract the length of the main investigation.

4.2 We also disagree with the CMA's current proposed approach, according to which, the 'material influence test' will be used only in cases where the business structure is such that only it would meaningfully capture P's turnover. Obviously the same considerations already mentioned above will be present in these cases that the CMA decides to apply the material influence test. However, such an approach will lead to different criteria being applied to undertakings in determining their fines for the same procedural infringements, which runs counter to the basic principle that the law should apply equally to all.

5. 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?

5.1 Subject to our comments in Question 2 we found the Statement sufficiently clear.

BAKER & McKENZIE

13 September 2013