Response to BIS CMA Transition Team

CMA4con: Administrative Penalties: Statement of Policy on the CMA's approach

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This response represents the views of law firm Allen & Overy LLP on the draft Competition and Markets Authority (**CMA**) guidance document *CMA4con: Administrative Penalties: Statement of Policy on the CMA's approach* (the **Statement**). We have also responded separately to the following consultations:

- Competition Regime: Consultation on CMA priorities and draft secondary legislation
- CMA2con: Mergers: Guidance on the CMA's jurisdiction and procedure
- CMA3con: Market Studies and Market Investigations: Supplemental guidance on the CMA's approach
- CMA6con: Transparency and disclosure: Statement of the CMA's policy and approach

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

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? Please give reasons for your views.

1.1 We agree with the roles and objectives listed in the Statement. However, we believe that the CMA should place a greater emphasis in the Statement on its obligation to act proportionately when considering administrative penalties. This obligation underpins each of the CMA's policy objectives for the imposition of a penalty and, while it is mentioned briefly in the introductory part of the consultation (the **Introduction**) (paragraph 3.8), does not feature at all in section 3 of the Statement ("Policy Objectives"). We suggest that the CMA includes an explicit reference to proportionality in this section.

2. Do you agree that the level of detail in the Statement is appropriate? Please give reasons for your views.

2.1 Overall, yes. There are however some areas where helpful statements or explanations contained in the Introduction are not reflected in the Statement itself. These details should be incorporated into the body of the Statement. In particular:

(a) Paragraph 4.2 of the Introduction clearly states that the CMA is more likely to impose a penalty if the failure to comply with an Investigatory Requirement is *intentional*. While this is implied at paragraph 4.1 of the Statement (which lists, for example, "flagrant" failures as a relevant factor when deciding whether a penalty should be imposed) it is not stated explicitly. Paragraph 4.1 should therefore be amended to include an express reference to intentional or deliberate failures.

(b) When discussing the CMA's power to extend timetables or deadlines following a failure to comply with an Investigatory Requirement, the Introduction states "*the CMA would not usually expect to use minor occurrences of non-compliance or those with limited impact to justify extensions to statutory timetables. In addition, the fact that a failure to comply is particularly serious…will not necessarily make an extension more likely*" (paragraph 4.17). These are useful statements of the CMA's intended approach to extensions and should be contained in the corresponding section of the Statement (paragraphs 4.5 to 4.7).

(c) In the Introduction (paragraph 4.13) the CMA notes that a history of compliance and steps to ensure future compliance are factors that may affect the level of penalty imposed. Paragraph 4.10 of the Statement captures this to some extent, listing as a relevant factor "*any*

steps taken by P to ensure compliance or to discipline responsible individuals" as well as recidivism. But in our view this is not drafted widely or clearly enough to encompass both a previous record of good compliance or measures to ensure future compliance. It should therefore be expanded. Please also see question 3 below for our comments relating to recidivism as a factor affecting the level of penalty imposed.

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? Please give reasons for your views.

3.1 The CMA's approach of identifying three types of decision to be made in relation to the imposition of a penalty (i.e. (i) whether to impose a penalty, (ii) the type, and (iii) the level) is in principle sensible. However in practice we think it is unlikely that in all cases the decision making process will be so clear cut and would expect that many of the factors listed as relevant for a particular decision will overlap, as indeed will the consideration of the three decisions themselves. It would be useful if the CMA could acknowledge this in the Statement.

3.2 We welcome the CMA's commitment to transparency in listing the factors it will take into account when deciding whether to impose a penalty and, if so, of what type and level. As the CMA's practical experience in this area develops post-April 2014 it should keep these factors under review and update the guidance where appropriate.

3.3 However, we do have concerns over the use of "recidivism" as a factor that may affect the level of penalty imposed. We can see why previous failures to provide information in relation to the same investigation might justify harsher treatment. But we struggle to see the justification for taking into account completely unrelated non-compliance, particularly under other legislative provisions or in different investigations. This is a departure from the current CC Guidance (CC5), which only includes as an aggravating factor the "*failure to comply with other requests for* ***information in relation to the same inquiry***" (emphasis added; paragraph 19(i)).

3.4 We note the CMA guidance on the concept of "reasonable excuse" (paragraph 4.3) including the example of unforeseeable IT failure. Example 1 in Annexe A also describes administrative error (together with steps to rectify and limited delay) as a possible reasonable excuse for a failure to comply with Investigatory Requirements. It would be helpful if this example (or at least a cross-reference) could be added to the body of the Statement at paragraph 4.3, and is squared with the CMA's statement at paragraph 4.4 that forgetting a deadline is unlikely to be a reasonable excuse. However, we have concerns about the seemingly narrow set of circumstances that the CMA will consider a "reasonable excuse". It appears to encompass only serious IT issues or administrative errors (which are in practice unlikely). As such, parties may face administrative penalties despite their best efforts to respond to information requests. In our experience, requests for information, particularly in CA98 cases, can be extremely wide in scope and may be drafted in open-ended terms. This can create scope for genuine misunderstandings or differences in interpretation as to what information is required. We do not consider it appropriate for penalties to be imposed in such cases.

4. Do you agree with the approach in the Statement to assessing the turnover of enterprises owned or controlled by P? 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 The CMA's approach to assessing the turnover of enterprises for the purposes of determining the upper limit of an administrative penalty for failure to comply with merger interim measures is directed to a large extent by the Secretary of State's Interim Measures Order. We will be providing comments separately to BIS on the order.

4.2 We agree with the concerns set out at paragraph 4.18 of the Introduction, i.e. that assessing material influence is not straightforward. Applying a material influence test in order to determine turnover in these circumstances will result in unnecessary complication and wasted time and resources. The CMA's primary concerns when calculating an administrative penalty should be legal certainty together with a speedy resolution. Engaging in an analysis of material influence will result in an unwarranted distraction from the ongoing progress of the merger investigation. Moreover, it is not unusual for different tests to be used for first, the jurisdictional assessment of a merger and second, other procedural matters. For example, under the EU Merger Regulation the definition of "control" for the purposes of calculating turnover is different to (and more simple than) the definition of "control" for the question of jurisdiction. Our preferred approach would therefore be one in which the CMA never considers material influence when assessing the turnover of enterprises owned or controlled by P. At the very least the CMA should only apply a material influence test where, as it suggests at paragraph 4.18 of the Introduction, it is necessary to do so in order to ensure a deterrent penalty.

4.3 The approach adopted by the Transition Team should be reflected in the Statement. The CMA should republish the revised section for consultation.

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

5.1 In general the Statement is well drafted and clear. There are just a few areas where we believe it would benefit from more clarity:

(a) Footnote 35 of the Statement notes that persistent and repeated unreasonable behaviour that delays the enforcement action is an aggravating factor when setting the amount of the penalty for a substantive infringement of competition law. In such circumstances the CMA will consider whether the non-compliance merits both an administrative penalty and the application of an aggravating factor for the substantive penalty. Due to the significant impact of such a "dual punishment" on the party in question, the CMA should include a clear statement here that it is under a duty to act proportionately when making a decision on this issue.

(b) Paragraph 4.19 states that in relation to failures to comply with merger interim measures the CMA "*does not generally expect to bring civil proceedings as it would usually expect parties suffering loss to take such action*". Who are the "parties" here? Are they third parties e.g. competitors or customers? In general we think it would be unusual for merging parties to face civil proceedings for failing to comply with interim measures from any entity other than the CMA. The main circumstance in which we can envisage the CMA bringing such proceedings would be where the breach affects the ability of the CMA to impose an effective remedy (as per Example 4 in Annexe A). We suggest that the CMA includes this example in paragraph 4.19. Presumably the CMA could also make an order requiring the parties to unwind the pre-emptive action under sections 72(3B) or 80(2A) of the EA02.

(c) In section 5 on procedure it strikes us that the guidance would be clearer if paragraphs 5.6 to 5.8 were placed at the beginning of the section (before the current 5.1), thus taking the reader sequentially through the procedural steps.

(d) The inclusion of practical examples at Annexe A is in principle very helpful. However:

- The facts cited in Example 2 are not a good example of deliberate misstatement. First, in practice it is unlikely that third parties will have carried out a scientific

exercise to estimate the market shares of merging parties. Second, internal presentations often overstate market shares – they are usually designed for a different purpose, e.g. for a sales manager to show to senior management how well his/her product line is performing in the market. Third, the difference between 25% and 32% is not major. This example should be reworked.

- We do not think that the analysis section in Example 3 is particularly clear. The CMA starts by stating that it "might consider whether it is appropriate to seek to take criminal action against the individual director as opposed to imposing an administrative fine" and that if it "decides not to proceed with such criminal action the CMA is likely to impose a very significant penalty". This implies that the powers to take criminal action and to impose an administrative penalty are in the alternative. But our understanding is that in behavioural antitrust investigations (as recognised by the final sentence of the analysis) consideration of an administrative penalty is without prejudice to the CMA's ability to consider prosecution for the criminal offence and in certain cases both may be appropriate. This point should therefore be clarified. The analysis then rather confusingly returns to the possibility of a criminal offence – this should be reworked. Finally, it should be made clear in the analysis the entity on which the CMA is proposing to impose the administrative penalty: is it company E?