RESPONSE TO COMPETITION AND MARKETS AUTHORITY CONSULTATION

BY BIRD & BIRD LLP

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

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1. Introduction

This response is submitted by and on behalf of Bird & Bird LLP, an international law firm with substantial experience of representing and assisting businesses before competition authorities in a number of jurisdictions. The views now expressed are those of Bird & Bird LLP and not necessarily those of the firm's clients.

We are pleased to have the opportunity of commenting on the consultation draft of the CMA's Statement of Policy on administrative penalties. We confirm that we are happy for this response to be published on the CMA's website.

The draft statement is a comprehensive explanation of the planned approach of the CMA to the use of administrative penalties, but we have certain comments and recommendations which we will set out below in response to the specific consultation questions.

Question 1: Do you consider that there are any other rules or objectives that should be taken into account when considering the CMA's approach to administrative penalties? Please give reasons for your views.

We consider that the objectives of administrative penalties are clearly set out in chapter 3 of the consultation document. In our view, the main reasons for a policy of administrative penalties for infringement of procedural requirements, is to create a culture of respect for the requirements of the CMA and for the rule of law through public enforcement action by the CMA. It is to be expected that the existence of the powers to impose administrative penalties combined with the actual imposition of them proportionately and on a consistent and transparent basis, will reinforce the belief amongst undertakings that requirements to, for example, provide evidence, documentation or attendance at interviews, must all be treated with due seriousness. This is necessary, not only in order to ensure deterrence of undertakings that might otherwise fail to comply with the requirements, but also to reinforce the commitment of undertakings generally to compliant behaviour and to provide assurance to undertakings that those who fail to comply with the procedural requirements will not gain a regulatory advantage, but rather will incur a penalty for non-compliance.

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

The overall policy objectives and the policy on whether and in what amount administrative penalties will be imposed (chapters 3 and 4) could be improved in clarity if they were to deal separately with, on the one hand, the CMA's investigatory powers and, on the other, its interim measures powers, and the imposition of administrative penalties in each case. Breach of investigatory requirements are infringements of a procedural nature, whilst breaches of interim measures imposed

in merger cases are infringes of substantive competition law requirements, albeit specific ones imposed by the CMA in the case in question.

Separating the statement of objectives and policy in this way would improve clarity and coherence and enable more detail to be stated on the CMA's position in each case.

Question 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.

We consider that further explanation could be given of the CMA's position in relation to "reasonable excuse" and the question of whether a failure to comply is "without reasonable excuse" in paragraphs 4.3 and 4.4. In our view, the CMA should take into account the period of time which has been given to the investigated party to comply, the nature of the task required and/or the nature and extent of the information required. In the case of information requirements, account should be taken in our view of the logistical feasibility of providing information within a specified time scale, in particular where information is to be assembled from a number of diverse locations and processed into a format meeting the CMA's requirements. Full account should also be taken of the bona fide steps made within the time available to meet the CMA's requirements to the extent possible, even if full compliance is not or cannot be achieved within the time scale.

The CMA should (in our view) also take into account the issue of whether an information requirement has first been put informally, by means of a request, to the investigated parties and whether they have taken reasonable steps to obtain and provide the information during that initial phase, as well as in response to a formal requirement.

Question 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? Please give reasons for your views.

We agree that, as a general rule, the turnover of the undertaking in question should only include the turnover of companies which are actually controlled by the relevant undertaking, not those over which it merely has material influence. Whilst it may be appropriate for a lower threshold of material influence to be applied under the merger control rules of the Enterprise Act 2002 for purposes of defining a merger situation, the policy issues are entirely different in such a situation to those concerning the measurement of the relevant turnover of a group of companies. In the absence of actual control, the turnover of a company over which an undertaking merely has material influence, is not available to an undertaking and would not be consolidated in the undertaking's accounts.

It should also be remembered that the material influence threshold for purposes of defining a merger situation under the Enterprise Act 2002 is an unusually low threshold by reference to international comparators. We do not think that there is any reason for extending this threshold into other areas of competition law. In particular, for the above reasons, it would not be appropriate to use a material influence test as the basis for determining relevant turnover for purposes of applying the administrative penalties. The use of the material influence test in this way could

unfairly prejudice companies investigated by the CMA as compared with those investigated by other national competition authorities.

Question 5: Is the Statement sufficiently clear to assist you in understanding how the CMA will set administrative penalties 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.

In paragraph 4.19, we propose deletion of the second sentence, which states that the CMA "does not generally expect to bring civil proceedings as it would usually expect parties suffering loss to take such action". (Likewise we would propose deletion of "However," at the start of the next sentence.) First, such powers have been conferred on the CMA (a public administrative body) by statute for a purpose and it is not appropriate in our view for the CMA to make a general statement to the effect that it would not generally use such powers. Second, it is in our view not appropriate for the CMA to define its position by reference to the question of whether or not private parties will take legal action in any type of situation.

In paragraph 5.6, we would propose deletion of the final sentence. This states that the CMA would not give the person concerned an opportunity to state reasons for its failure to comply with an investigatory requirement, where the CMA considers that the person concerned does not have any reasonable excuse for such failure. We consider that this is a breach of the rights of defence, contrary to the right of the party in question to have a fair hearing. There may be issues or factors of which the CMA is not or could not have been aware, which the party concerned should be given the opportunity to bring to its attention within a reasonable time scale. This could influence the CMA's decision on whether to impose a penalty or could at least affect the amount of the penalty which the CMA sees fit to impose. In our view, it is not appropriate for the CMA to take a decision to impose a penalty based on its own supposition of the relevant party's position and motives without giving the party concerned an opportunity to explain its position. It is in our view illogical for the CMA to give the party concerned an opportunity to state its reasons for a failure to comply, only when the CMA is aware that there may be a reasonable excuse for such failure but not where the CMA is not so aware. Logically, there is greater need in the latter situation rather than the former, for the party in question to be given an opportunity to state its reasons for failure.

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London
5th September 2013