BIS CONSULTATION ON
COMPETITION AND MARKETS AUTHORITY (CMA) GUIDANCE – PART 1

Response of Edwards Wildman Palmer LLP

(Administrative Penalties: Statement of Policy on the CMA's Approach)

Introduction

- This response has been prepared by Edwards Wildman Palmer LLP (**Edwards Wildman**), an international law firm with offices in London and 14 other locations across the United States and Asia. The views set out in the response reflect our lawyers' experience representing clients before the EU and UK competition authorities and are provided in the interests of assisting Government and the CMA Transition Team. We have not consulted with our clients as part of the preparation of this response and, as a result, the response does not necessarily represent their views. We are happy for this response to be published on the CMA website.

- Given the unprecedented volume of live BIS consultations, we have chosen to focus on those aspects of this consultation that raise the most significant issues for us and our clients. On this basis, we are at this time providing comments only on one of the documents out for consultation in the first phase, namely the consultation document entitled *Statement of Policy on the CMA's approach to Administrative Penalties* (the **Consultation Document**). As a result, all references in this response are to that document, unless otherwise specified. To the extent that terms have been defined in that document, this response adopts the same terms. We note that the Consultation Document is split into two main component parts, namely: (i) chapters 1 to 4 and Annexes A to B; and (ii) the draft Statement of Policy itself, as provided at Annex C of the Consultation Document. Each of these deals with essentially the same issues, albeit at times in a slightly different way. To reduce the scope for confusion, the latter part, i.e. the document entitled '*Administrative Penalties: Statement of Policy on the CMA's approach*', is specifically identified in this response as the **Draft Statement**, as distinct from the remainder of the Consultation Document.

General comments

- Before proceeding with our responses to the specific questions raised in the Consultation Document, we would like to provide some general comments. First, we would like to make it clear that we welcome the Government's decision to introduce civil penalties as the standard means of punishment for failure to comply with Investigatory Requirements, with criminal penalties being retained only for the most serious and individually culpable forms of obstructive conduct. Although companies under investigation generally take their legal responsibilities seriously, and are well aware of the serious consequences of failure to comply with Investigatory Requirements in general and CA98 Requirements in particular, where the current regime relies on criminal penalties only there can be a mismatch between the procedure by which information is provided to an authority and the (potentially rather remote) consequences of non-compliance. In addition, the heavy

burden of a criminal prosecution for the OFT, and the fact that the OFT has apparently never actually brought a prosecution for failure to comply with a CA98 Requirement, means that, in practice, the current regime may not act as a real deterrent in a small number of cases where a company is unwilling to respond to an information request.

- That said, it is crucial that, in moving to a civil regime, the CMA does not adopt an approach where financial penalties are imposed too liberally, as this could impose a disproportionate burden on businesses. This is a particular concern in CA98 cases. Based on our experience, there is a tendency for OFT information requests in CA98 cases to be extremely broad, particularly at the outset of an investigation. Such requests may ask for thousands of documents generated by a business over a period of several years. They may also ask for extensive and detailed data (relating, for example, to revenues, customers or costs) that are not retained by the business under investigation for such a long period or which are held in a way that is not consistent with the request. Even where a response to such a request is possible, this is likely to impose a significant burden on the business concerned, which often increases with the size of the company. While it is of course inevitable that an investigation will impose some cost and disruption on the recipients of information requests, whether they are parties under investigation or third parties, we would suggest that the burden should be proportionate to the objective and the wider public interest in effective enforcement.

- Information requested by the OFT in the course of a CA98 investigation may be: (i) relatively straightforward for a company to collect and provide; (ii) difficult to provide in the time available; (iii) possible to provide only with more time; or (iv) impossible to provide (whether in the time period specified by the OFT or at all). Although our experience is that the OFT is generally prepared to discuss the scope of a CA98 information request at the outset, and to adapt its request to reflect any identified difficulties in provision, it may not be possible for a business to determine which of the above categories applies at the time that the information request is received. It is also our experience that the OFT may sometimes refuse to adapt its request and instead persist in requiring a response from a company to a question, even if it has been explained to the case team that a response cannot be provided (including in situations where the company's inability to respond arises at least in part from the fact that a question is poorly-worded or excessively broad).

- Concerns may also arise with respect to EA02 Requirements. In particular, companies with wide-ranging business interests may receive a large number of information requests, whether as a potentially interested third party in the context of a first phase merger review or in the course of a market study. Such companies must prioritise how they deploy their internal and external resources, with the result that a company may decide not to respond to every such request that it receives. Any move to impose penalties for such failures to respond, as a matter of course, would raise concerns, particularly if this were to coincide with extensive use of the CMA's new formal information gathering powers in the context of first phase merger and market investigations.

- Given this context, it is essential that the CMA uses its new powers to impose civil penalties in a reasonable and proportionate way. On this basis, we would suggest that penalties should be considered only in situations where a company has deliberately failed to comply with an Investigatory Requirement in circumstances where the scope or extent

of the information requested is not overly broad or ill-defined and the company could reasonably have been expected to meet the request in the time available, in circumstances where the provision of the information concerned is essential for the CMA's investigation. Although the Draft Statement provides some reassurance on this point, it fails to recognise the need for the CMA to undertake such a careful balancing exercise when deciding whether or not to exercise its penalty powers, rather than as part of its calculation of the size of the penalty. The Consultation Document as a whole, including the Draft Statement, also fails sufficiently to reflect the distinction between situations where it is simply impossible to provide the requested information and those where a request may be disproportionate, unclear or unduly burdensome.

- While it is possible that the forthcoming draft guidance on the CMA's CA98 investigation procedures may provide additional reassurance on these points, it is impossible to be sure of this at this time, as that document has not yet been published and will not be available for review until after the current consultation period has closed. As a result, we can only base our comments on the Consultation Document, including the Draft Statement.

Questions

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. Although we broadly agree with the objectives set out in paragraph 3.1 of the Draft Statement, it is unclear how these will be applied in particular cases. It is notable that the second objective (to prevent action that might prejudice a reference) appears to apply only to EA02 Requirements. In addition, it could be argued that the third objective (deterrence of future non-compliance) should be viewed as a secondary objective, rather than an objective in itself. While it is likely that the imposition of a penalty on a company will make it more likely that that company or other companies will comply with similar requests in the future, we would suggest that this should not be the main factor in the decision to fine that company in the first place, since this should be based more on that company's conduct at the time.

1.2. With respect to CA98 Requirements, this leaves the first objective, namely that the CMA can carry out its functions with the "*best available evidence in compliance with relevant investigation timetables*". While it is understandable that ensuring efficiency and avoiding delays is important to the CMA, this should not be the key objective when imposing an administrative penalty. In our view the primary driver in any such decision should be the extent to which a failure to comply with an Investigatory Requirement prevents the CMA from reaching good decisions that are supported by the available evidence. We think it could, and should, be set out more clearly in the Draft Statement that this is the most important objective for the CMA.

1.3. Although not explicit in the Draft Statement itself, there appears to be an underlying assumption in the Consultation Document that any failure to provide information is likely to be an attempt to "game the system". Based on our experience, this is rarely the case, as the majority of businesses are well aware of their legal obligations and are keen to assist an investigating authority as far as they reasonably can. It is important that the

CMA recognises: (i) the huge time and resource burdens that can be placed on parties from whom information is requested (particularly in the context of CA98 investigations); and (ii) the fact that complete and verifiably accurate information is not always readily available. Parties that fail to answer every question asked by the OFT are rarely trying to obtain an advantage or be obstructive, but are rather providing the most complete information available, often under very tight deadlines. The breadth of CA98 information requests, combined with the size and complexity of many organisations, mean that it is often impossible for a company to confirm with absolute certainty that it has provided the OFT with every single document requested or that no such information is available anywhere within the company. This reality is not reflected in the document.

1.4. Furthermore, parties involved in a case recognise the importance of cooperating with the CMA. In merger, market and CA98 cases, where the outcome of the CMA's investigation is likely to have a direct impact on a company, it is typically as much in the parties' interests as it is the CMA's to provide as complete and accurate information as possible. Notwithstanding the fact that a party may not want to submit information to the CMA that is harmful to its case, any party involved in an investigation will be aware of its obligation to do so, irrespective of the threat of penalties.

1.5. We do not consider that it is appropriate, as a general policy, to oblige third parties to provide information, under threat of an administrative penalty, unless they hold information which is vital to the CMA's investigation and which cannot be obtained elsewhere. In our experience, third parties with views on a matter under investigation (typically a merger) will choose to express them to the CMA.

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

2.1. To the extent that we think further detail is necessary in respect of any part of the Draft Statement, we have covered this elsewhere in this response. We do not think that the Draft Statement is too detailed.

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?**

The decision to impose a penalty

3.1. While we support the apparent intention, as reflected in paragraph 4.1 of the Draft Statement, that the CMA will take into account "*all relevant circumstances*" when considering whether to impose an administrative penalty, this statement in and of itself provides little practical guidance. Although paragraph 4.1 goes on to list five factors that make a penalty more likely, these do not add a great deal, for the following reasons:

(a) The first factor listed (the failure to comply is likely to have an adverse impact on the CMA's investigation) is potentially very wide. It is notable that all information requested in the course of a CA98 investigation, for example, is likely to be "*relevant to the determination of issues being investigated*", on the basis that the CMA is likely to have requested information only if has some

relevance for its investigation. On this basis, in the absence of any materiality threshold, this ground adds little and leaves the CMA with too much discretion.

(b) We would also question whether the third ground (recidivism) is an appropriate factor when considering whether to impose a penalty for failure to comply with an Investigatory Requirement, especially where this takes account of a prior unrelated infringement. This is because the factors involved in such a failure are likely to be very different from those that may have been behind a previous substantive competition law infringement or even from the factors that may have led to a prior failure to comply with an Investigatory Requirement.

(c) The fourth ground (the penalty is required to encourage swift compliance) is very wide, since in most cases it is in the nature of a penalty that it encourages compliance. Inclusion of this ground is meaningful only in the rather limited and circular sense that, if a company is poised to comply with an Investigatory Requirement without a penalty being imposed, no penalty is required.

(d) The fifth ground (that P sought to obtain an advantage from the failure to respond) is also extremely broad, given the range of potential benefits or advantages. While it may be legitimate for the CMA to impose a penalty if a company had withheld clearly inculpatory evidence, we would suggest that it would not be appropriate for the CMA to view the fact that a company had, for example, saved itself the potentially disproportionate costs of a wide-ranging internal investigation as a relevant ground for the imposition of a penalty under this heading.

3.2. This leaves the second factor, that the failure to comply is "*significant and/or flagrant*", as the only one that withstands scrutiny. While this factor also leaves significant room for discretion and subjectivity on the part of the CMA, it does at least reflect a desirable policy that penalties should be reserved for serious failures to comply and should not be routine.

3.3. We do not consider that the reference at paragraph 4.2 of the Consultation Document that the CMA will base a decision whether to fine solely on "*factors* [that] *relate directly to the achievement of the intended CMA policy objectives*" is particularly helpful. It appears to us that the CMA should weigh up all surrounding circumstances before deciding to impose a penalty, including the importance of the information for the CMA's investigation (which may be expected to encompass whether the party gains a benefit from the information not being provided), the extent of the party's failure compared with the extent of the information that it has in fact provided, the nature of the request (e.g. the volume of information requested, the age of the information requested, the manner in which the request was drafted), and the apparent intention behind the party's failure to provide information.

3.4. As far as a party's apparent intention is concerned, while we agree with the statement at paragraph 4.2 of the consultation document that wilful non-compliance is likely to require *more stringent* measures than negligent failures, it would also seem desirable to treat a party's intention as a factor in the CMA's decision as to whether or not to impose a penalty in the first place. We are concerned by the implication that even negligent failures to respond will be likely to result in the imposition of a penalty and that,

according to paragraph 4.2 of the Consultation Document, such penalties could be substantial. Rather, we would argue that the imposition of any administrative penalty should generally be reserved for serious and deliberate non-compliance. On this basis, a negligent failure to provide information should attract a penalty only in exceptional circumstances, for example if such a failure by a company under investigation materially undermines the CMA's ability to come to an accurate and robust decision against that party.

3.5. The Draft Statement notes that the CMA may be more likely to impose a penalty where the CMA has previously provided a draft request or set a deadline for compliance which takes P's comments into account. This raises a number of issues:

(a) In our experience of CA98 cases, the OFT has not adopted a consistent approach of issuing draft information requests. In fact, in most cases no draft has been provided before the final information request has been issued, notwithstanding the OFT's stated policy to provide drafts. This appears to us to be a good opportunity to revisit the OFT's practice and to ensure a more consistent approach by the CMA to using draft requests as a matter of standard practice.

(b) Even when a draft request is issued, the time given for comments on the request may not be adequate to enable a company to confirm with confidence and accuracy which information can be provided in the format requested within the proposed time period. It is often the case that difficulties in obtaining and providing information only come to light once a company begins the process of collecting the data. In such circumstances, it does not appear fitting that the mere fact that a draft request was issued, or that a limited time extension was granted, should be used as a factor in deciding to impose a penalty for subsequent non-compliance. Provided that a company has commented on a draft request and the proposed deadline in good faith, the fact that it later discovers that it is not able to provide some information (either on time or at all) should not be viewed as an "aggravating factor" in deciding whether to impose a penalty.

(c) Requests for documents raise particular challenges and should therefore be carefully drafted by the CMA and always issued in draft form first, with flexibility maintained to allow for changes in the availability of documents and in the timeframe for providing them. It is often very difficult to predict with certainty, when a request for documents is first received, the extent to which external IT support will be required, how many potentially relevant documents may have to be reviewed or how long it will take to review those documents. In our experience, it would be far better to discuss these issues openly and on an ongoing basis with the CMA, including in advance of a draft or final request being issued. It appears unreasonable that the CMA could issue a draft document request, give P a week to comment on the draft, and then impose an administrative penalty for a failure to comply, in circumstances where it may have been impossible for the company meaningfully to comment on the draft request in the time provided.

Factors affecting the level of penalty

3.6. As with the decision as to whether to impose a penalty, we consider that the CMA should weigh up all surrounding circumstances when setting the level of a penalty, including the importance of the information for the CMA's investigation, the scope of the failure compared with the extent of the information that has been provided, the nature of the request and the apparent intention behind the party's failure to provide information.

3.7. We welcome the CMA's recognition that a party's intention and likely advantage will be taken into consideration. However, we are concerned about how this will be applied in practice. It is unclear from the Draft Statement how "wilful" will be interpreted. For example, it may be the case that P informs the CMA that it is unable to provide a full response to a particular question because it is unable to find the information or cannot confirm with certainty that all such information that is in existence has been found (often the case with large organisations). Would this be viewed as a "wilful" failure to comply justifying a high penalty, on the basis that P is arguably refusing to respond to a question in full, or would the inability to find the information be accepted as a reasonable excuse (see below our comments on reasonable excuse)?

3.8. Although the provision of practical examples is welcome, the examples provided do not provide reassurance but rather raise further concerns about the likely approach of the CMA. Example 2 in Annexe A describes a scenario and provides an analysis which appears to assume that the failure to comply in question was both intentional and for the purposes of obtaining an advantage. The case study does not take into account, for example, that (i) D's competitors have an incentive in downplaying their own market shares and generously interpreting D's market share; (ii) the individual responsible for preparing the response may not have been aware of the presentation;[1] and (iii) market shares are often difficult or impossible to estimate with any degree of certainty and are generally open to a wide range of subjective interpretation (as a result of which, the presentation may simply have overestimated D's market share). This example therefore appears to reflect the general approach noted above that the CMA will start with an assumption that P is attempting to "game the system" if its answers are not complete and/or subsequently are revealed to have provided some inaccurate information, rather than starting from a more neutral position.

3.9. Of particular concern to us is the reference in the Draft Statement to recidivism as a factor in deciding the amount of the fine. It is not entirely clear what "recidivism" means in this context. If a party's prior conduct has any role in calculating the amount of a penalty, we would suggest that it should be limited to establishing whether there has been a past failure to comply with an Investigatory Requirement *which resulted in the imposition an administrative penalty*. Mere failure to provide information in the past should not be sufficient. In our experience, there have been many instances where a company has informed the OFT that it is unable to answer a particular question in the time available or at all, and the OFT has not explicitly acknowledged or accepted this statement. It appears perverse that this could be viewed as recidivism. We would therefore welcome greater clarity from the CMA on the meaning of recidivism in such circumstances. In addition, the likely knock-on effect of the Draft Statement is that

[1] It is extremely difficult, when preparing a response to a request for information, to locate and verify all internal communications estimating P's market shares or those of its competitors.

parties are likely to seek explicit acknowledgement from the CMA of its acceptance that certain information is not available or cannot be provided in the manner requested, potentially adding to the CMA's administrative burden.

3.10. We welcome the statement in the Consultation Document that it is not in the CMA's interests to "*punish disproportionately minor failure…or accidental failures which are promptly corrected*" (paragraph 4.13). It seems odd that no similar statement is included in the Draft Statement itself. An express recognition of the duty of the CMA to act proportionately and reasonably, both in deciding whether to impose a penalty and in setting the type and level of the penalty, would also be very welcome.

Reasonable excuse

3.11. We note that the CMA provides only one (rather extreme) example of a situation that would be viewed as a "reasonable excuse", namely a "*significant and demonstrable IT failure*". It is important to recognise that there may be a reasonable excuse for not providing certain information at all (e.g. because it is simply not available) or for not providing information in the format or in the level of detail requested (e.g., again, because the format or detail is simply not available). Neither of these situations are the result of "*a significant and genuinely unforeseeable or unusual event*" and this should not therefore be the sole criterion for establishing whether a company has a reasonable excuse for non-compliance.

3.12. In our experience, there may be a mismatch between what is requested by the OFT and what can be provided by a company because the OFT does not understand the nature of a company's business or how it manages its internal information. The OFT sometimes fails to appreciate that the manner in which a company operates means that information cannot be provided in a way that the OFT is used to seeing. It does not seem reasonable or appropriate to punish a company in such circumstances.

3.13. It is also worrying that the wording of paragraph 4.4 of the Draft Statement and Example 1 in Annexe A suggest a very hardline approach to requests being inadvertently forgotten or lost. We are particularly concerned to note from Example 1 that the assumption appears to be that a company would be fined when it has inadvertently missed a deadline, even if the failure to comply was remedied immediately and did not materially adversely affect the CMA's investigation. This does not appear to us to be reasonable or proportionate, as it elevates punishment for a non-material failure to meet the letter of a request above the need for the CMA to reach an accurate and robust decision. It is a fact of life that companies sometimes mislay information requests or that information requests are not immediately passed to the appropriate person. Within large companies, even the internal legal team may span several countries and cover myriad responsibilities and it can take some time for an information request to be matched to the right person. While a company that is under investigation will be on the lookout for information requests, and is likely to have instructed external counsel who will receive copies, companies receive many third party information requests and it cannot always be predicted where these will be received and who is responsible for answering them. In this context, it would be inappropriate routinely to fine companies for failures to respond.

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. We agree that it is likely to be proportionate to apply the material influence test only in cases where this is necessary meaningfully to capture P's turnover. This is on the grounds that the test can be hard to apply in practice and it is preferable that a case team is not unduly distracted by this issue, which may require detailed consideration of the intricacies of a company's control structure, its board composition and past shareholder voting patterns, in order to issue an administrative penalty. It is unclear to us why this position is not reflected in the Draft Statement itself, however, but is only referred to at paragraph 4.18 of the Consultation Document.

5. **In 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. We have set out, in our responses to the previous questions, our views on whether Chapters 3 and 4 of the Draft Statement are sufficiently clear. We also have some concerns about the clarity of the procedure to be used for imposing penalties, as outlined in Chapter 5 of the Draft Statement.

5.2. Paragraph 5.6 of the Draft Statement indicates that the CMA will "generally" write to P before making a final decision to impose a penalty and inviting reasons for the alleged failure to comply with an Investigatory Requirement, but that the CMA will not follow this procedure where it considers that P does not have a reasonable excuse. This rather begs the question of how the CMA would be able to reach a view on whether P has a reasonable excuse, without having first asked P. It also reinforces the need for more detailed guidance on the circumstances in which the reasonable excuse "defence" will apply. It would be preferable to provide that the CMA will follow the steps set out in paragraph 5.6 in all cases.

5.3. Paragraph 5.7 indicates that the "reasonable opportunity" to make representations on a provisional decision will not usually exceed one week. This is an extremely short time period, particularly if P has not been consulted before the provisional decision has been issued. It is also important to note that, while it is understandable that statutory deadlines will affect the period for representations, the driving factor in setting the period should be ensuring that P is treated fairly and that its rights of defence adequately protected. (For example, a company may need to undertake an extensive internal investigation to determine why it was unable to respond to a question.) This is particularly relevant to CA98 cases, where there are no statutory deadlines. In our view, the existence of an administrative deadline should not be sufficient to override a company's need for adequate time to make representations.

5.4. Given the seriousness and impact on a business of an administrative penalty being imposed, it is important that P is given adequate opportunity to make representations directly to the decision maker. While Chapter 5 broadly describes who will be responsible for an administrative penalty decision, it does not provide comfort that P's

representations will be heard by that decision maker directly. In circumstances where a substantial penalty may be imposed, it would not be adequate for representations to be filtered through a case team.

5.5. Finally, the Draft Statement does not give any indication of the level or nature of any publicity that may be given to decisions to impose a penalty. More clarity on this point would be particularly welcome, given the potential impact of any public announcement on a company and the risk that any publicity regarding the imposition of such a penalty could be misinterpreted, for example as a final infringement decision.

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