

**Joint Comments of
ABA Section of Antitrust Law and Section of International Law
Concerning the United Kingdom BIS Consultation Document
*Administrative Penalties: Statement of Policy on the CMA Approach***

September 6, 2013

The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments to the United Kingdom’s Department for Business Innovation & Skills (“BIS”) in response to its open consultation inviting comment on draft guidance for the new Competition and Markets Authority (“CMA”). The Sections appreciate the opportunity to present our experience and views to the BIS, with particular focus here on the consultation document entitled *Administrative Penalties: Statement of Policy on the CMA’s Approach* (“APSP”).¹ The Sections appreciate the substantial thought and effort reflected in the APSP, and offer these comments in the hope that they may assist in completing the final version. The Sections’ comments reflect their expertise and experience with competition law in the United States as well as in numerous other jurisdictions worldwide.

The Sections commend the CMA for publishing detailed policy and procedural guidance regarding the imposition of administrative penalties. As a matter of notice and procedural fairness, it is critically important for the regulations governing administrative penalties to be clearly stated and consistently applied. The Sections appreciate the balancing that is required to retain flexibility for enforcement purposes while ensuring fairness and predictability for the business community. In the Sections’ view, the CMA has generally struck the correct balance in

¹ Available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212288/CMA4con_-_Administrative_penalties.pdf.

its Draft APSP, and the Sections suggest several small but important clarifications that would improve predictability for stakeholders and, therefore, facilitate compliance.

Chief among the Sections' suggestions are clarifications that penalties are warranted only for intentional, reckless, or significantly negligent failures (as opposed to inadvertent errors), and that penalty decisions will be subjected to at least one round of independent review. As to the latter point, it is recognized by most United States and European competition enforcers that it is a best practice that the same official who issues a preliminary request or finding regarding a process penalty cannot also be the official who decides the matter and imposes relief with the force of law. As to both points, the CMA can make clarifications within the structure of the current draft that would strengthen the draft's achievement of its stated goals.

Consultation Document Question 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.

Response

APSP, chapter 3 provides that the role and policy objectives of administrative penalties include preventing adverse consequences during the CMA's conduct of investigations; preserving existing conditions of competition pending the outcome of investigations; and deterrence. The Sections support these roles and objectives and agree with the CMA's goal of preventing parties under investigation from engaging in "regulatory gaming" by providing insufficient, inadequate or delayed responses to CMA investigations in order to further their own interests.

The Sections propose that the initial statement of purpose should make clear that the CMA will not presume, either as a matter of policy or of practice, that a party that fails to comply with an Investigatory Requirement has necessarily done so intentionally or improperly. The Sections consider that a necessary pre-requisite to a finding that a party has effectively engaged in "regulatory gaming" should be that the CMA has satisfied itself to the requisite legal

standard that the party had the intent to game the system, or acted with reckless disregard or significant negligence toward its compliance obligation (an intent or heightened negligence standard), and that its conduct was capable of producing this effect, on the basis of contemporaneous evidence (e.g., internal emails and other documents).²

The intent or heightened negligence standard has a precedent in the United States practice in the form of the “substantial compliance” merger standard with which the Sections are familiar.³ The substantial compliance standard recognizes that in complying with large data requests (merger data requests routinely involve hundreds of thousands of pages of hard copy or electronic documents), inadvertent errors or good-faith disagreements over relevance may occur, and do not by themselves demonstrate an attempt to game the system. If investigating staff believe that despite the parties’ good faith, further compliance is necessary, the staff may request further efforts. The substantial compliance standard prevents penalties based on good faith disagreement or inadvertence and helps promote a collaborative working relationship between parties and investigating staff while allowing the staff to receive all necessary information. This concept of substantiality already appears several times in other contexts in the APSP (at parts 1.2 and 4.2) and would be appropriate to apply to parties’ compliance.

On a related point, the Sections recommend that the APSP make clear that assertions of legal privileges against disclosure, such as the attorney-client privilege or work product doctrine,

² Cases No: 1156-1159/8/3/10, *BskyB v Ofcom*, [2012] CAT 20, paragraph 29.

³ Clayton Act 7A(g)(2), 15 U.S.C. § 18A(g)(2) (“Civil penalty; compliance; power of court [:] If any person, or any officer, director, partner, agent, or employee thereof, fails *substantially to comply* with the notification requirement [for merger data under the Hart-Scott-Rodino Act] under subsection (a) of this section or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) of this section and as may be extended under subsection (e)(2) of this section, [then the U.S. Federal Trade Commission or U.S. Department of Justice Antitrust Division may seek a penalty]).” (emphasis added).

should not be grounds for a penalty unless found in a judicial ruling to be in bad faith or otherwise fundamentally without merit.

Consultation Document Question 2

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

Response 2

APSP, chapter 4 sets out the various factors the CMA will consider when assessing whether to impose a penalty, the type and level of penalty that should be imposed and whether to extend any applicable statutory timetable. To further assist stakeholders, Annexe A to the APSP sets out a number of examples to illustrate how the CMA will apply these general principles in specific circumstances. The Sections find the examples particularly helpful because they demonstrate on balance that intentional conduct, not inadvertence or good-faith disagreement, is the focus of the administrative penalty regime.

The Sections suggest that the necessity of intent or heightened negligence be clarified in Example 2. A “likelihood” of regulatory gaming should not be presumed from the mere facts set forth in the example, such as disagreement between a company position and a single document, the statements of competitors (whose estimates are not necessarily more reliable than the company’s), and the fact that responses are unhelpful to the investigation. The example also does not appear to require that, to be subject to penalties, the conduct must materially prejudice the outcome of the CMA’s investigation (under the assumptions of the example, the CMA obtained from other parties the detailed information it sought in its information request). The Sections recommend that the example explicitly assume that there has been material prejudice and note that the CMA must investigate the nature of the alleged failure to determine whether the

company's positions lacked good faith.⁴ This focus on an intent or heightened negligence standard is implied by other text in the APSP but is not clear in the example itself.

Consultation Document Question 3

Do you agree with the approach in chapter 4 of 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.

Response 3

Subject to the concern expressed in Response 4, below, regarding the risk of disproportionate penalties, the Sections welcome the approach set out in chapter 4, which will provide increased transparency and predictability to the penalty process.

Consultation Document Question 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.

Response 4

The APSP provides that the CMA will calculate the penalty to be imposed on a party who failed to comply with Merger Interim Measures (IMs) based on the turnover of the enterprises controlled by that party. According to the APSP, this includes enterprises over which the party has a material influence, *de facto* control or *de jure* control. The Sections agree with the

⁴ Case No. 1121/1/1/09, *Durkan and Others v OFT*, [2011] CAT 6, paragraph 165.

Transition Team that it will be important for the CMA to strike the right balance between, on the one hand, being able to make decisions on penalties quickly and efficiently without diverting resources from its substantive merger assessment or holding up the progress of the investigation, and, on the other hand, being able to encompass sufficient turnover to ensure deterrence. However, assessing material influence is a subjective exercise and is likely to be more difficult and take more time and resources than assessing *de facto* or *de jure* control. Moreover, case-by-case determinations of material influence are inherently more likely to be controversial and difficult for parties to predict. That is particularly so in situations involving enterprises partly owned by investment firms or hedge funds whose ability to exert influence may be highly uncertain.

The Sections believe that a preferable approach would be to calculate the penalty to be imposed on a party that fails to comply with IMs based on the certified worldwide turnover of the group of companies to which that party belongs. An alternative would be to calculate turnover by reference to the same criteria as set out at Article 5(4) of the EU Merger Regulation. Such an approach would provide greater legal certainty, should be more readily ascertainable, and would be more consistent with international standards than applying the concept of material influence.

Consultation Document Question 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 which are not sufficiently clear, the reasons for this and recommendations you may have.

Response 5

The Sections applaud the clarity and thought behind the Transition Team's consultation. The Sections also commend the CMA's explanation of procedures for applying administrative penalties (chapter 5) as promoting transparency and predictability. In particular, providing notice of a provisional decision (5.6) and reasonable opportunity to make representations on the provisional decision (5.7) are best practices. The Sections note, however, that the APSP does not

explain what entity will review the provisional decision before it becomes final. The Sections recommend that a team of senior staff or CMA leadership, independent from the staff that make the provisional decision, review each provisional decision in order to recommend to the CMA whether it should be accepted, rejected, or modified. Independent review helps ensure policy consistency over time and increases perceived and real fairness. The Sections have long experience with such independent review and have found that it improves the predictability of results while not adding substantial time to the decision process.