Administrative penalties: Statement of Policy on the CMA's approach

Summary of responses to the consultation

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CMA4resp

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This publication is also available at: www.gov.uk/cma.

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1 INTRODUCTION AND SUMMARY

Background

1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) establishes the Competition and Markets Authority (CMA) as the UK's competition and consumer authority. The CMA will take on the functions of the Competition Commission (CC) and many of the competition and consumer functions of the Office of Fair Trading (OFT). The CMA was established on 1 October 2013 and will gain its full functions and powers on 1 April 2014, when the OFT and CC will be abolished. The CMA will be a single centre of expertise in UK markets focusing on public competition and consumer enforcement, guidance, advocacy and leadership for the UK. Its primary duty will be to promote competition, both within and outside the UK, for the benefit of consumers.

1.2 The CMA will have a range of statutory powers to address problems in markets. These include the ability of the CMA under the Enterprise Act 2002 (EA02) and Competition Act 1998 (CA98) (as amended by the ERRA13) to impose administrative penalties for failure to comply with certain information or other requirements in mergers and markets investigations (EA02 Requirements), certain information or other requirements in antitrust investigations (CA98 Requirements) and interim measures in merger cases (Merger IMs).

1.3 A series of draft guidance documents were prepared to assist the business and legal communities and other interested parties in their interactions with the CMA. The draft *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4con) (Draft Statement) was one of a number of draft guidance documents published for public consultation on 15 July 2013.[1]

1.4 The Draft Statement detailed the proposed approach to be followed and procedure to be used by the CMA in exercising its new or extended powers to impose administrative penalties under the EA02 and the CA98.

1.5 The consultation on these documents (Consultation) closed on 6 September 2013.

[1] These documents are available at www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-1

Purpose of this document

1.6 The consultation document accompanying the Draft Statement (Consultation Document) set out a series of specific questions on which respondents' views were sought. This document sets out a summary of the responses received to each of those questions and the CMA's views on those responses.

1.7 In parallel with the Consultation, the Department for Business, Innovation and Skills (BIS) consulted on draft secondary legislation[2] on the CMA's new or extended administrative penalties powers.

(i) The proposed *Competition and Markets Authority (Penalties) Order 2014* (Penalties Order), in relation to failure to comply with EA02 and CA98 Requirements.

- BIS consulted on a) increasing the current maxima under the Competition Commission (Penalties) Order 2003 (which are £20,000 for fixed penalties and £5,000 for daily penalties) to the statutory maxima permitted under the EA02 and CA98 (which are £30,000 in the case of fixed penalties and £15,000 in relation to a daily penalties, including cases where a combination of a fixed penalty and a daily penalty may be imposed); and b) whether there is any reason why the same maxima should not apply to mergers, markets and antitrust investigations.

- The Penalties Order therefore affects the maximum penalties that the CMA can impose. Below those statutory caps, the CMA has discretion as to the level of the penalty it may impose.

(ii) The proposed *Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014* (Interim Measures Order), in relation to failure to comply with Mergers IMs.

- BIS consulted on the way in which control of an enterprise is defined and the provisions for determining the turnover against which any penalty will be calculated.

- The Interim Measures Order therefore impacts on the way in which the CMA (and in certain circumstances, the Secretary of State) may

[2] Available at www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation

determine, in light of all the circumstances, whether P controls a particular enterprise for the purposes of determining the maximum turnover penalty cap.

1.8 Although referred to in this document, the proposed secondary legislation fell outside the scope of the Consultation Document. BIS will be publishing a separate response to its consultation.

1.9 This document does, however, note respondents' views on the above secondary legislation that were received in response to the Consultation Document.

1.10 For the purposes of this document, a person that fails to comply with EA02 Requirements, CA98 Requirements or Merger IMs shall be referred to as **P**.

Responses to the Consultation

1.11 17 written consultation responses referring to the Consultation Document were received within the deadline.[3] The Draft Statement was also discussed at a launch event for the first tranche of the CMA draft guidance on 24 July 2013, which was attended by members of the legal, academic and business communities. Additional comments on the Consultation were received during 'road shows' held with certain external stakeholder groups in August and September 2013.[4]

Consultation questions

1.12 The table below sets out the questions on which the Consultation Document sought views, and in which chapter of this document the responses are summarised and CMA views on them set out.

Question		**Chapter**
1.	Do you consider that there are any other roles or objectives that should be taken into account when considering the	2

[3] Annexe A lists the 17 organisations that provided responses relating the Draft Guidance within the deadline for Consultation responses. One respondent, who is not named or referred to in Annexe A, submitted a response to the Consultation outside the consultation window/period on 6 November 2013.

[4] Road shows were held with the City of London Law Society (CLLS), Joint Working Party of the Bars and Law Societies of the UK (JWP), ICC UK and the In House Competition Lawyers' Association (ICLA).

	CMA's approach to administrative penalties? Please give reasons for your views.	
2.	Do you agree that the level of detail in the Statement is appropriate? Please give reasons for your views.	3 and 6
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 and 5
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.	4
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.	3, 5 and 6

1.13 This document should be read in conjunction with the Consultation Document. It is not intended to be a comprehensive record of all views expressed by respondents: copies of responses received and taken account of are available at www.gov.uk/cma. Nor is this Summary of Responses a definitive statement of the CMA's policy or procedures in relation to the CMA's exercise of its powers to impose administrative penalties. Parties seeking guidance on the CMA's approach and procedures should refer to the final published version of *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4) (Statement), also available at www.gov.uk/cma.

2 ROLE AND POLICY OBJECTIVES OF ADMINISTRATIVE PENALTIES

2.1 Respondents' views were sought on the CMA's proposed role and policy objectives in considering and setting administrative penalties.

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.

Summary of responses

2.2 A number of respondents agreed fully with the roles or objectives set out in the Draft Statement and did not consider that any other factors should be taken into account.

2.3 Numerous respondents generally agreed with the policy objectives, but proposed the addition or amendment of some policy objectives, set out below in paragraphs 2.4 to 2.7.

2.4 A significant number of responses called for the Statement to cover explicitly the need for penalties to be reasonable and proportionate, in view of the CMA's new and extended powers to impose penalties, the proposed increase in the statutory instrument maxima and the introduction of a 5% of worldwide turnover penalty for non-compliance with Merger IMs. Several respondents suggested that it would be helpful if the wording regarding proportionality in the Consultation Document [5] were included in the Statement.

2.5 Several respondents argued that the Draft Statement overemphasised deterrence at the expense of proportionality or thought that deterrence of future non-compliance should be viewed as a secondary rather than a primary objective.

2.6 A small number of respondents proposed that the policy objectives should include other general legal principles, for example commitment to the

[5] Paragraph 3.8 of the Consultation Document stated that it would not necessarily serve the CMA's intended policy objectives to punish disproportionately minor/accidental failures which are promptly correctly.

principles of transparency and predictability in approach and/or to procedural fairness.

2.7 A couple of respondents called for the Statement to:

- acknowledge the difficulties, burdens and costs incurred by firms responding to complex, extensive or unclear requests for information, particularly for firms with less sophisticated information gathering and reporting systems, or with very complex business structures, and
- make clear that the CMA does not assume that P is necessarily trying to 'game' the system.

The CMA's views

2.8 The CMA acknowledges respondents' suggestions to include general legal principles in the main body of the Statement.

2.9 However, the CMA does not consider it necessary to reference each and every legal principle in the Statement, as the CMA must adhere to general legal principles such as fairness and non-discrimination across all of its work such that it is unnecessary to include this in the Statement.

2.10 The CMA's commitment to transparency is set out in the CMA's Transparency and Disclosure Statement.[6]

2.11 Nevertheless, the CMA has decided to take a slightly different approach to the principle of proportionality. This principle was stated explicitly at paragraph 4.10 of the Draft Statement in relation to the level of penalty imposed, and the CMA's commitment to proportionality in penalty-setting has been reiterated by officials at various external events. Moreover, the CMA recognises that it will have wider powers to impose administrative penalties than those available to the CC or the OFT, and that Government proposes to increase the statutory instrument maxima. In light of those factors, the CMA understands the apparent concern of respondents that the Statement should recognise more explicitly and more prominently the need to set proportionate penalties. Additional, or amended, references to the CMA's duty to act proportionately have therefore been included at paragraphs 4.1, 4.10, 4.11 and 4.14 and footnote 37 (to paragraph 4.2) of the Statement.

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[6] *Transparency and Disclosure: Statement of the CMA's policy and approach* (CMA6), available at www.gov.uk/cma/.

3 WHETHER AND IN WHAT AMOUNT ADMINISTRATIVE PENALTIES WILL BE IMPOSED

3.1 Respondents' views on questions 2, 3 and 5 addressed a very wide range of issues in relation to the CMA's proposed approach to administrative penalty-setting. In view of overlaps in responses to these questions, these have been grouped together by issue and set out below.

Question 2: Do you agree that the level of detail in the Statement is appropriate? Please give reasons for your views.
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?
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 that are not sufficiently clear, the reasons for this and any recommendations you may have.

Detail of CMA's approach to imposing and calculating penalties

Summary of responses

3.2 A large number of responses commented on the level of detail regarding the CMA's proposed approach to a) deciding whether to impose a penalty and b) the level at which such a penalty would be calculated.

3.3 Although most responses supported the broad level of detail in the Draft Statement, a number of respondents considered that the Statement should go into more detail on how the CMA will calculate penalties in practice. The key issues raised are summarised below.

Failure to comply

3.4 Several respondents sought further guidance on what constitutes a failure to comply and the exact meaning or treatment of different 'levels' of non-

compliance (for example minor, flagrant, aggravated, significant, and intentional).

3.5 A few respondents thought that the illustrative examples in Annexe A of the Statement could provide more detail or clarity on failures to comply. For example, some respondents considered that the second illustration, which suggested that ignoring questions or submitting only one word answers to a questionnaire would be a failure to comply, should be clarified as binary answers may in certain cases be appropriate.

3.6 One respondent suggested that detailed explanations should be provided in the main body of the Statement, rather than in illustrative examples in Annexe A.

3.7 A couple of respondents considered that the CMA should only impose a penalty where there has been an intentional failure to comply and not, for example, negligent failure to comply (save in exceptional circumstances) and that the CMA should not assume that businesses are ‘gaming the system’.

Reasonable excuse

3.8 Numerous respondents thought that the Statement should clarify the scope of ‘reasonable excuse’, for example by clarifying or adding to the examples in Annexe A.

3.9 Several respondents considered that the statement: ‘...the CMA may be more likely to consider that there is a 'reasonable excuse' when a significant and genuinely unforeseeable or unusual event beyond P’s control has caused the failure and the failure would not otherwise have taken place’ (at paragraph 4.3 of the Draft Statement) set a very high and unreasonably narrow ‘threshold’ for reasonable excuse. One respondent thought that the wording ‘genuinely unforeseeable or unusual event’ should be removed.

3.10 Some respondents put forward suggestions as to what factors should be considered in determining whether P has a reasonable excuse. These included whether P had:

- authority to meet the information request
- made reasonable or best endeavours to comply with the requirements (particularly in cases where requests for information were challenging), or

- had made an honest error in good faith, in particular if it had been drawn to the CMA's attention.

Decision to extend the timetable/deadlines

3.11 One respondent requested more detail on the CMA's approach to extensions to statutory timetables and recommended including the following wording from paragraph 4.17 of the Consultation Document in the Statement: '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 (for example a deliberate failure by a recidivist designed to achieve an advantage) will not necessarily make an extension more likely.'

Treatment of recidivism

3.12 Several respondents thought that recidivism should not be included as one of the factors in the CMA's decision to impose a penalty or its calculation of such a penalty.

3.13 One respondent argued that its inclusion would add to the CMA's administrative burden, as firms would seek acknowledgement/confirmation from the CMA that the information requested was not available or could not be provided in the format requested. Another respondent stressed that firms should not be punished for unrelated non-compliance.

3.14 A couple of respondents suggested that if recidivism were retained, it should be limited to certain or exceptional circumstances, for example where previous failures to comply resulted in the imposition of an administrative penalty, or where it could be shown that P had repeatedly and deliberately failed to comply with the investigatory requirement.

Factors affecting the amount of the penalty imposed

3.15 Several responses welcomed the explicit reference to proportionality in this section and the CMA's transparency in setting out the factors that may impact on the level of penalty imposed.

3.16 However, a number of respondents requested more detail on the factors affecting the level of penalty and/or requested the inclusion of additional factors or examples of mitigating circumstances, for example:

- the assessment of minor failures, accidental failures which are promptly corrected or steps taken by P to ensure that failures do not occur in the future (as detailed in paragraph 4.13 of the Consultation Document)[7]

- whether the failure to comply with the information requirement was due to a rogue employee and the extent to which management was in a position to detect such a failure to comply

- whether the information request was correctly addressed to an appropriate person within P

- the nature and relative burden of the information request (that is, the importance of the information relative to the size and administrative resources available to P and complexity of the internal business structure/sign-off processes), and

- the reasonableness of the CMA's conduct/information requests and the CMA's own conduct.

The likely magnitude of penalties/categories of penalties for different failures

3.17 A few respondents requested detailed guidance on penalty levels/tariffs in a range of circumstances, and suggested that the Statement:

- set out what the broad categories of penalty levels are likely to be

- explain how each of the factors set out in paragraph 4.10 of the Draft Statement are likely to affect which category the failure to comply falls into

- confirm that the statutory maxima will be reserved for the most serious cases of non-compliance and that lesser failures will attract a significantly lower fine, with additional examples of penalty-setting at the lower end of the penalty range, and

- clarify a set methodology for assessing fines (as does OFT 423, the OFT's published guidance on setting penalties for breaches of the

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[7] Paragraph 4.13 of the Consultation Document states: 'On the other hand, it would not necessarily serve the CMA's intended policy objectives to punish disproportionately minor failures in the context of general compliance with Investigatory Requirements, or accidental failures which are promptly corrected. As such, a history of compliance, either in the present or in earlier investigations, is likely to be taken into account in assessing any penalty. Any steps taken by P to ensure failures do not occur in future may also affect the level of penalty.'

substantive antitrust prohibitions in Chapter I and Chapter II of the CA98 and Articles 101 and 102 of the Treaty on the Functioning of the European Union).

Examples in Annexe A

3.18 Numerous respondents welcomed the inclusion of practical examples at Annexe A.

3.19 One respondent thought that the Statement should include more examples at the lower end of the penalty range. Several respondents sought clarification on a number of examples, with some also pointing to apparent/potential contradictions between the Draft Statement, the Consultation Document and the hypothetical scenarios/analysis in Annexe A.

The CMA's views

3.20 While respondents considered that the CMA's proposed approach to setting penalties is generally clear and transparent, the CMA notes that numerous respondents requested further detail on, or clarification of, a broad range of issues, including the non-exhaustive list of illustrative examples provided at Annexe A.

3.21 The CMA has sought to provide potential users of the Statement with clear yet succinct guidance and recognises that in doing so, it has not been possible to provide extensive detail on each and every factor which may impact on the determination of administrative penalties, nor to outline all potential scenarios. However, having regard to respondents' views, the CMA agrees that there are some aspects of the Draft Statement that could helpfully be clarified and has sought to achieve this in the final Statement, as summarised in paragraph 3.27 below.

3.22 As regards suggestions that the Statement should set out a detailed methodology for how it will calculate penalties similar to the approach in OFT 423 which deals with penalties for breaches of the substantive antitrust provisions, the CMA does not consider that this is appropriate. A key objective for the CMA is to be able to make penalty decisions that are swift, robust and efficient, without diverting significant resources away from progressing the substantive investigation they relate to. The non-prescriptive and flexible framework in the Statement seeks to strike a balance between that and providing transparency on how the CMA will set penalties.

3.23 As regards respondents' views that the Statement should provide an indication of likely penalty levels and/or specific categories of penalty levels,

the CMA does not consider that it is appropriate. This is because, in the CMA's view, the circumstances of non-compliance will be crucial in the penalty decision, and flexibility according to circumstances may be lost if the statement is too prescriptive. Also, the CMA considers that even if it were appropriate to have parameters for broad categories of failures to comply, such parameters should be set on the basis of experience. Fixing any such approach now, without the benefit of experience, may establish practices that are inappropriate or unwieldy.

3.24 As regards requests for changes to the approach to recidivism in the Draft Statement, the CMA considers that recidivism should be considered on a case-by-case basis and that it would not be appropriate to rule in or rule out specific previous instances of failure to comply with requirements.

3.25 In terms of requests for greater clarity around the treatment of reasonable excuse in the Draft Statement, the CMA does not consider it appropriate to seek to define reasonable excuse in more detail as the test needs to be considered on a case-by-case basis according to the relevant facts. Therefore, the indicative circumstances in the Statement which might, depending on the facts of an individual case, amount to a reasonable excuse, are not intended to be, and should not be interpreted as, a rigid threshold that P will be expected to meet for the CMA to consider that there is a reasonable excuse.

3.26 The CMA notes requests for further details on and examples of potential aggravating and mitigating factors. However, on balance the CMA considers that it is inappropriate to make significant changes to the Statement here as the factors are merely illustrative and the CMA will consider the circumstances of failure to comply on a case-by-case basis having regard to the relevant facts.

3.27 In light of respondents' views, the Statement has, however, been amended in a number of respects, as follows:

- **Decision to extend the timetable/deadlines**: The Statement has been amended to provide further guidance on how the CMA will approach this issue.

- **Illustrative examples in Annexe A:** The text of the examples has been revised and clarified to provide more clarity on the CMA's approach to the illustrative failures. An additional example has also been added to the Annexe.

- **Factors relevant to the amount of a penalty:** The CMA has made some minor revisions to this section of the Statement to enhance clarity and provide some additional detail.

Maximum penalties for failures to comply with mergers, markets and CA98 investigatory powers

Summary of responses

3.28 Numerous consultation responses on the Draft Statement commented on the case for/against increasing the statutory maxima. Although this is a matter for the Secretary of State, these responses are summarised below in the interests of transparency.

3.29 Several responses received on the Draft Statement considered that the case for increasing the maxima had not been made out, citing reasons such as: no penalties under the current levels have been set so there is no evidence that current levels are insufficient; the increase in daily penalties is particularly high in percentage terms; increases would be disproportionate; and the current levels already allow deterrent penalties to be set.

The CMA's views

3.30 The Secretary of State has discretion to decide the maximum fixed and daily penalties that may be imposed, subject to the maxima set out in the EA02. All responses received in relation to the proposed Penalties Order were flagged to and shared with BIS. In addition, it is understood that BIS also received submissions on the point in response to its parallel consultation on the Penalties Order, which BIS intends to make in early 2014 and which would then come into force on 1 April 2014. While the decision is ultimately one for BIS, the CMA notes that its views on the maxima in the statutory instruments are as follows:

- it is important to note that the CMA has discretion in the amount of the penalty that the CMA may impose below the statutory caps determined by the Secretary of State

- the CMA will apply penalties fairly and proportionately in all scenarios and to all persons failing to comply with an investigatory requirement, including having regard to their size and financial position

- the CMA considers that a wider potential range of penalties is more likely to ensure that it has scope to impose appropriate penalties which

can act as a meaningful deterrent to even the biggest firms as well as smaller firms, and

- any increase in the potential range of penalties does not mean an increase across the board in the penalties the CMA will actually wish to apply. Penalties at the top end will likely be applied only to the most serious failures to comply.

4 USE OF MATERIAL INFLUENCE TURNOVER FOR MERGER INTERIM MEASURES PENALTIES

4.1 Views were sought on the CMA's proposed approach to the use of material influence turnover in relation to setting penalties for failures to comply with Mergers IMs.

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.

4.2 BIS has consulted separately on the Interim Measures Order, which BIS intends to make early in 2014 and which would then come into force on 1 April 2014.

4.3 Chapter 4 of the Draft Statement set out the CMA's proposed approach to calculating the amount of penalty for Merger IM penalties in accordance with the Draft Order. Paragraph 4.15 stated: 'The CMA will assess material influence on a case-by-case basis, focusing on the overall relationship between P and the particular enterprise and on P's ability materially to influence policy relevant to the behaviour of a particular enterprise in the marketplace.'

4.4 The Consultation Document (paragraph 4.18) noted that 'Assessing material influence may not always be a straightforward exercise and may take more time and resources to assess compared to de facto control and controlling interest...' and that there may be merit in 'including turnover based on material influence only in cases where it is necessary to do so, for example where the business structure is such that only the material influence test would capture sufficient turnover under P's control to give rise to a deterrent penalty'.

Summary of responses

4.5 Numerous consultation responses noted that material influence is the lowest jurisdictional threshold test for merger control (that is, for determining whether a relevant merger situation exists).

4.6 A significant number of respondents argued that material influence would be inappropriate for calculating turnover for penalties, as it would:

- be difficult and time-consuming to assess and apply in practice, and therefore be at odds with the CMA's stated objective of ensuring swift compliance
- be counterintuitive to apply a more complex assessment to Merger IM penalties than to CA98 penalties
- divert resources away from the CMA and the parties concerned from the substantive merger assessment/investigation, and/or
- import unwarranted legal uncertainty given the scarcity of precedent (as compared to the 'controlling interest' or 'de facto control' tests)

4.7 Several respondents suggested that the concept of control should be limited to 'controlling interest' or 'de facto control'.

4.8 A small number of respondents considered that if material influence turnover were to be retained in the Interim Measures Order, it should be used in exceptional cases only, as envisaged in the Consultation Document.

4.9 A couple of respondents argued that material influence turnover should never be used in any circumstance, because of the practical challenges and resource implications and/or because they disagreed with its use in principle.

4.10 Some respondents queried whether the proposed Interim Measures Order gave the CMA discretion to apply material influence turnover or whether such turnover must always be included, and proposed that the Interim Measures Order should make the CMA's discretion in this regard clearer.

The CMA's views

4.11 The CMA is sensitive to the concerns raised by numerous respondents in respect of the use of material influence to calculate the Merger IM turnover penalty cap, particularly with respect to legal certainty and proportionality.

4.12 While the CMA recognises (further to the Consultation Document) that assessing material influence may not always be a straightforward exercise and may be more time- and resource-intensive to assess compared to de facto control and controlling interest, it also recognises that in certain instances only the material influence test may capture sufficient turnover under P's control to give rise to a meaningful deterrent penalty and/or to ensure that different business structures are not treat unfairly.

4.13 The CMA notes that the proposed Interim Measures Order would give the CMA discretion as to whether or not to apply the material influence test.

4.14 Mindful of respondents' requests for further detail on whether and how the CMA will apply the material influence test, paragraphs 4.14 to 4.17 of the Statement:

- set out key principles to describe the situations in which the CMA might exceptionally include material influence turnover. Material influence turnover is to be considered in particular circumstances, for example when turnover in the relevant financial year for penalty-setting is very low or zero, or the corporate structure of the entity failing to comply has a number of interests that are not under its legal or de facto control, such that calculation of the penalty cap by reference to turnover assessed on a controlling interests or de facto basis would not accurately reflect that entity's true financial position and would therefore lead to a perverse and/or unfair outcome, and

- provide further detail on the CMA's approach to calculating material influence turnover (by cross-reference to the mergers substantive assessment guidance which has a detailed treatment of material influence).

5 PROCEDURAL ASPECTS

5.1 In seeking respondents' views on whether the Draft Statement facilitated potential users' understanding of the CMA's approach to setting administrative penalties, a large number of consultation responses commented on the procedures involved (set out in chapter 5 of the Draft Statement).

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?
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?

Summary of responses

Procedure – general

5.2 One respondent commended the CMA for its detailed explanation of the procedures it intended to follow in applying administrative penalties, as this promoted transparency and predictability for users.

5.3 One respondent proposed restructuring the order of the chapter on 'Procedure', arguing that it would be clearer if paragraphs 5.6 to 5.8 of the Draft Statement were placed upfront in the final Statement, thereby taking the reader sequentially through the procedural steps.

5.4 One respondent requested guidance on the level or nature of any publicity that may be given to penalty decisions.

Seniority and/or independence of the administrative penalty decision maker

5.5 The Draft Statement stated that the decision maker would be the same person who makes substantive decisions in mergers, markets and CA98 investigations at the relevant stage of the case.

5.6 Some respondents considered that:

- penalty decision makers should be sufficiently senior (with one respondent arguing that they should not be below CEO level) and/or should be independent from the management of the investigation, and/or

- there should be independent review of a provisional penalty decision before a final decision is made (irrespective of who makes the decision).

Procedure before the provisional and final penalty is imposed

5.7 The Draft Statement anticipated that parties would generally get an opportunity to give reasons for an apparent failure to comply before a provisional penalty decision is made, although the CMA may go straight to a provisional penalty decision if it considered that there was not a reasonable excuse for the failure to comply.

5.8 Several respondents argued that there should always be an opportunity to make informal representations prior to a provisional penalty decision, as the CMA could not sensibly make a provisional decision that there was no reasonable excuse for the failure without such information.

5.9 One respondent requested further clarification on the extent, frequency, scope and manner of engagement with the CMA prior to the adoption of a provisional decision and final decision (for example, could P meet the decision maker face-to-face or would representations be in writing only?; would scope be limited to 'reasonable excuse' or would it also cover the nature and level of the proposed penalty?).

The CMA's views

5.10 In the interests of adopting a clear and transparent approach to penalty setting, the CMA has carefully considered all respondents' suggestions.

5.11 Chapter 5 of the Statement has been restructured to take a sequential approach to the procedural aspects of administrative penalty-setting.

5.12 The CMA acknowledges concerns raised by respondents in relation to the seniority and/or independence of the administrative decision maker.

5.13 Taking into account the importance of a streamlined, efficient decision-making process (both with respect to the substantive decision and the penalty decision), the CMA has, on balance, decided to retain the approach set out in the Draft Statement, that is, that the decision maker will be the

same person who makes substantive decisions in mergers, markets and CA98 investigations at the relevant stage of the case.

5.14 However, mindful of the importance of guarding against perceived or actual confirmation bias, the CMA considers that the substantive case decision maker should consult the General Counsel's Office (GCO) on the administrative penalty decision, in order to ensure a sufficient degree of independent scrutiny and consistency across the CMA in administrative penalty setting.

5.15 The CMA notes respondents' views that paragraphs 5.6 to 5.7 of the Draft Statement (regarding procedures before a provisional and final penalty are imposed) could merit from some clarification. In view of the CMA's commitment to ensuring transparent, fair and robust administrative penalty setting procedures, the Statement has been clarified as follows:

- To note that, in accordance with the CMA's guidance on transparency, before any provisional decision on penalties is made, P will have the opportunity to engage with the CMA. For example, the CMA will encourage parties to raise legitimate issues regarding difficulties complying with investigatory requirements or Merger IMs at the earliest opportunity before the deadline, and will listen to parties' views on deadlines in appropriate cases (see paragraph 4.3 and footnote 37 of the Statement), and

- Once the provisional decision has been issued, P will have a formal opportunity to make representations on the provisional penalty decision before it is finalised. Furthermore, as set out above, the decision maker will also consult GCO on the provisional penalty decision (see paragraphs 5.2 and 5.9 of the Statement).

6 OTHER COMMENTS

6.1 Comments received on a number of other issues are noted below.

Question 2: Do you agree that the level of detail in the Statement is appropriate? Please give reasons for your views.
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 that are not sufficiently clear, the reasons for this and any recommendations you may have.

Structure of the Statement

Summary of responses

6.2 One respondent thought that the Statement should separate out the CMA's approach to non-compliance with its investigatory powers and Mergers IM powers. As the former were considered to relate to infringements of a procedural nature and the latter to substantive law requirements, it was considered that separating objectives and policy in this way would improve clarity, detail and coherence on the CMA's position in each case.

The CMA's views

6.3 The CMA carefully considered this option, but on balance considers that the approach taken in the Draft Statement minimises duplication and thereby provides more succinct and accessible guidance to potential users. The Statement has, however, been clarified to note where particular aspects of the Statement apply differently to Mergers IM powers, on the one hand, and the CMA's investigatory powers, on the other.

Interaction between Merger IM penalty powers and power to bring civil proceedings

Summary of responses

6.4 A few respondents requested more detail on the interaction between the CMA's ability to impose administrative penalties in relation to a failure to comply with Merger IMs and civil proceedings to enforce Merger IMs. Queries included:

- Who are the parties to a civil proceeding likely to be other than the CMA?
- What type of failure could result in the CMA employing its administrative penalty powers and bringing civil proceedings?
- Will civil proceedings be limited in scope (for example would the CMA generally bring civil proceedings where the breach affects the CMA's ability to impose an effective remedy as per example 4 in Annexe A of the Draft Statement regarding injunctive relief)?

The CMA's views

6.5 In light of respondents' views, the CMA has amended the wording from the Draft Statement to provide slightly more detail and to clarify its approach to the power to bring civil proceedings.

ANNEXE(S)

A. List of respondents

- Allen & Overy LLP
- American Bar Association
- Ashurst LLP
- Baker & McKenzie LLP
- Bird & Bird LLP
- City of London Law Society
- Civil Aviation Authority
- Cleary Gottlieb Steen & Hamilton LLP
- Clifford Chance LLP
- Dickson Minto W.S.
- Edwards Wildman Palmer LLP
- Freshfields Bruckhaus Deringer LLP
- Herbert Smith Freehills LLP
- Hogan Lovells LLP
- Joint Working Party of the Law Societies and Bar Councils of the United Kingdom
- National Federation of Retail Newspapers
- Simmons & Simmons LLP