Appendix 1

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

1. Roles or objectives that should be taken into account when considering the CMA's approach to administrative penalties

1.1 We have no comments on any other roles or objectives that should be taken into account when considering the CMA's approach to administrative penalties. The underlying objective should be to ensure that the CMA is able to take robust, properly evidence-based decisions, fully respecting parties' rights of defence. We welcome the recognition of this fundamental objective in the consultation document.

1.2 We are, however, aware of material concern in the business community about a potentially greater use of administrative penalties to enforce the CMA's formal information gathering powers.

1.3 In a number of respects the July consultation document, including in the introductory section, does not in our view sufficiently acknowledge the considerable burden that information requests can impose on business and the related responsibility of the CMA to ensure that such requests are targeted, proportionate and that deadlines given are reasonable in all the circumstances. The generality or vagueness of requests and their length has on occasions in the past had a significant impact on the ability of business to respond effectively within the short timescales that are frequently required. We are also aware of circumstances in which information requests could have been sent earlier, which would have allowed the parties responding to them materially more time in which to gather the relevant data and documents. We accept that there is acknowledgment of these points elsewhere, but they have a place also upfront in this draft Statement. A strict approach to administrative penalties, as appears from the consultation document, must be set in the context of the CMA's broader responsibilities in handling investigations appropriately.

1.4 More specifically in Section 3, we note in relation to the objective of *"preventing action which might prejudice any mergers or markets reference or impede the taking of action following such a reference"*, the reference to potential *"gaming of the system"* (paragraph 3.5). This suggests some form of intent on behalf of the respondent to an information request and while perhaps not deliberate, we believe it would be unhelpful if this were perceived to be the starting assumption when parties are unable to meet information requests fully or on time. In our experience, the most common reason for failures to comply with a request for information in the time period specified is due to difficulties in obtaining the required information either because it is not recorded in that form, is voluminous or due to a lack of internal resources. There is also no recognition that very often the business concerned is not in a position to exercise any degree of control over the timetable and to manage its own resources accordingly, for example, third parties in merger cases.

1.5 We would therefore suggest that the CMA makes it clear that there is no starting presumption that the reason for failure to meet an administrative deadline is due to any intent to 'game the system'.

1.6 We would also welcome an express acknowledgment that the CMA's approach to the circumstances in which it issues administrative penalties will determine how parties and their advisors interact with the CMA. If the CMA is considered liable to act unreasonably in its approach to imposing administrative penalties it risks provoking a highly antagonistic, rather than cooperative, interaction with parties and third parties. The potential unintended consequence would be that (third) parties seek to protect themselves against the risk of administrative penalties by challenging aggressively (possibly via satellite litigation), and potentially on an ongoing basis, the

reasonableness of the CMA's actions, which could have materially detrimental effects for the efficiency and effectiveness of the CMA's investigations.

2. The level of detail in the draft Statement

2.1 As a starting point, we suggest reflecting in the draft Statement that there are many circumstances in which the CMA will not resort to using formal powers immediately. Paragraph 4.1 of the draft Transparency Guidance (CMA6con) makes it clear that in practice the CMA will primarily use informal requests. This will provide some comfort to business as to how the CMA's powers will be used generally.

2.2 Secondly, we recognise that at this stage it is not straightforward to provide concrete guidance as to the range of circumstances in which penalties will be imposed or of circumstances that would be accepted as giving rise to a 'reasonable excuse' for failure to do so. We also accept that the CMA is keen to retain as flexible an approach as possible, particularly given the various contexts in which information requests are made. However, that appears to have led to giving only fairly extreme examples which are potentially rather unhelpful.

2.3 In particular, it would be helpful to understand further the concept of *"reasonable excuse"*. Paragraph 4.3 of the draft Statement states that the CMA may be more likely to consider this as applicable when a *"significant and genuinely unforeseeable or usual event beyond P's control has caused the failure and the failure would not otherwise have taken place"*. It then provides an example of a significant and demonstrable IT failure which could not reasonably have been foreseen or avoided. This, when read with the example in the scenario in Annexe A, Example 1 suggests an extremely high bar for the defence of *"reasonable excuse"* to be acceptable, and there is limited comfort in the comment in Annexe A, Example 1 that *"in **some** cases of this nature the CMA **may** decide not to impose an administrative penalty"*.

2.4 There is particular uncertainty as to when the CMA will impose a penalty where the delay in responding to the information request is not intentional. We would welcome further guidance on this issue in the draft Statement (for example, as to the threshold for a *"minor"* failure).

2.5 The draft Statement also states that the CMA will take action when the response is 'insufficient, inadequate or delayed' and gives the example of a case where a market share figure supplied proves to be incorrect. It is an extremely odd example, as market share figures are notoriously difficult to *estimate* in many cases and companies cannot be expected necessarily to know (or in some cases potentially even be able accurately to estimate) market shares in terms of volume or value. If the example had instead been intended to refer to the parties supplying accurate details of the value and/or volume of their own sales, then the example becomes more understandable but even then parties may not have all the necessary relevant data (in the format sought) at their fingertips. More generally, in the time available, there may be little opportunity for rigorous inquiries about all aspects of parties' responses or for detailed analysis of data to be undertaken. Parties with limited resources in particular, but indeed all parties, will be very concerned about the implications in terms of cost and resources of the inquiries that it would appear they are expected to make, particularly when a view as to what is 'inadequate' or 'insufficient' is potentially very subjective. While the draft Statement gives examples of responses where the failure might be considered 'obviously' inadequate or insufficient, where the boundaries would lie is far from clear.

3. The approach in the draft 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

3.1 The draft Statement notes that the CMA may be more likely to impose a penalty where it has provided a draft request for information or has set a deadline for compliance which takes the respondent's comments into account (paragraph 4.2 of the

Statement). It is not however clear from the wording whether the reference to "taking into account" means in practice that the party's comments have been fully acted upon by the CMA, or whether it simply means that the CMA noted the comments and made some, but not all of the adjustments sought by the party; the former scenario may, but the latter does not necessarily, support the imposition of an administrative penalty. In this context, we consider that this should only be a relevant factor where the CMA has acceded in full to the respondent's requests for amendments, particularly where the failure to comply arises from the issues or concerns already raised. At the very least, the CMA should take into account previous comments or objections as to the substantive nature of the information request (for example, a respondent may have difficulty gathering certain types of information), as well as the deadline for compliance.

3.2 We note the intention to take 'recidivism' into account when setting a penalty (paragraph 4.10 of the Statement). We see no justification for the CMA's taking into account behaviour that arose pre 1 April 2014 or behaviour with any authorities or bodies other than the CMA when considering whether 'recidivism' exists. We also do not consider that it would be appropriate to take past behaviour (especially if the relevant events occurred on an entirely separate CMA investigation) into account when setting administrative penalties if no sanction was imposed previously for any failure to do so. Even if the factor is to be relevant, we consider that there should be a time period (we suggest of no more than one year) over which such 'recidivism' might be taken into account. We appreciate that this will have implications at the outset of the new ERRA13 regime, but that has to be right given the very different approach taken previously by the competition authorities.

4. **The approach in the draft Statement to use the material influence test when determining turnover only in the cases where the business structure is such that only the material influence test would meaningfully capture P's turnover**

4.1 As a matter of principle, we do not believe that in merger cases the CMA should take material influence into account for these purposes. As a practical matter, we do not believe it would be practicable for the CMA to perform a material influence test in all cases, to establish whether it should or should not be used. In relation to all investigations other than merger cases, we consider that the CMA should use the legal definition of "undertakings" consistent with the Competition Act 1998 and Articles 101/102 of the Treaty on the Functioning of the European Union.

4.2 If this is to be retained, we would agree that it should be relied upon only rarely. In that respect, by reference to the current draft Statement, it is unclear how the CMA will determine the circumstances in which the material influence test would be the only test that would 'meaningfully' capure relevant turnover.

5. **Clarity of the draft Statement to assist in understanding how the CMA will set administrative penalties for failure to comply with the relevant Investigatory Requirements**

5.1 Given the level of penalty that may be imposed, it would in our view be essential to ensure that there is a review by an independent 'second pair of eyes' at this stage. This independent review should consider whether a penalty is in all the circumstances appropriate and what the level of that penalty should be. We consider that the procedural officer could have a role to play in this respect and that there should be a transparent mechanism by which the party facing the penalty could make representations directly to the person or body exercising that review function. Without such an independent review mechanism, we consider that there is a real risk of satellite litigation developing if administrative penalties are imposed in situations where there has not been an egregious breach by the relevant party (especially if the CMA does take 'recidivism' into account when setting penalties).

5.2 Generally we would welcome more clarity and specificity in relation to transitional arrangements. We agree generally that penalty powers should come into force at the same time as any new substantive investigatory powers to which they relate come into force, and that otherwise they should not be applied retrospectively to any information requirements that were made before that date.

Appendix 2

Transparency and disclosure: Statement of the CMA's policy and approach (CMA6con)

1. Statement of the CMA's commitment to transparency

1.1 We welcome a greater focus on transparency and consider that the draft Statement sets out a clear statement of the CMA's commitment to transparency and the reasons why this is important. However, there are a number of important issues to raise in relation to the consultation document and the draft Statement concerning transparency in general and also the CMA's information gathering powers and how these are used, particularly in the light of new powers to impose penalties for failures to comply with such requests. We have set out these concerns in more detail below.

2. How the CMA will engage with parties and other interested persons at each stage of its cases, and the CMA's approach to handling information (including in particular confidential information)

2.1 In relation to the CMA's engagement with relevant parties and announcements during a case, we note the reference in paragraph 3.12 of the draft Statement that the "*CMA must, in some cases, take certain steps to share its provisional thinking*" and the examples listed therein. However, as stated in paragraph 3.13 of the draft Statement, in "*all other circumstances, the CMA will take a **flexible approach to sharing** its **developing thinking and/or evidence** with parties directly involved and other interested persons, having regard to the desirability of ensuring that such parties are kept informed of key developments in the progress of their case.*"

2.2 The example that is given in the draft Statement of CMA sharing its developing thinking and/or evidence is the provision of results of research or surveys relevant to a market study or investigation; or disclosure of parties' key submissions in Phase 2 merger inquiries and market investigations (paragraph 3.13 of the draft Statement).

2.3 We would welcome if the CMA *did* share its developing thinking and/or evidence with parties to a larger extent than has been the case to date; and, indeed, we expect that such an approach and policy could also benefit the CMA.

2.4 We currently experience concerns amongst many of our clients concerning the lack of transparency from the OFT and the CC with regard to the above; and would particularly welcome if the CMA:

2.4.1 as a general rule disclosed third parties' key submissions (e.g. complaints) to the main parties;

2.4.2 improved the access to file procedures to ensure that parties are given the opportunity to effectively access information that is relevant to their rights of defence and, hence, be enabled to challenge the CMA's emerging thinking at an early enough stage (which e.g. could be at the stages of Phase 1 merger investigations and the market study stage, given that the mere triggering of in-depth stages of such investigations can involve significant costs and commercial damage); and

2.4.3 clarified the role of the Procedural Officer ("PO") with regard to challenging decisions not to allow sufficient access to file and/or not sharing the CMA's developing thinking and/or evidence (see also below).

3. Further comments on the draft Statement

3.1 Requests for information

3.1.1 Requests for information ("RFI") in the context of competition law investigations can prove extremely burdensome for companies and, in merger and market investigations, the scope of RFIs can often be conceived as disproportionate, considering the subjects to the RFIs are not under investigation for having breached the law, such as the CA98. Given also that the 40 working days administrative deadline in merger cases would become statutory, and market investigations will also proceed under shorter timescales, coupled with the sanctions for failure to comply, we believe both the CMA and businesses could benefit from RFIs being substantially more targeted in their scope in relation to the CMA requirements that they are intended to meet.

3.2 Obtaining and using information

3.2.1 As noted in Appendix 1, there is real concern about businesses potentially becoming liable for a penalty merely for not having been able to fully comply with an RFI, which may have been disproportionate in terms of scope or the imposed deadline, without them having had the opportunity to challenge either in a meaningful way.

3.2.2 It is noted that while "formulating information requests, the CMA will (...) **strive to avoid imposing unnecessary burdens** on such persons while considering also the need for the CMA to **operate efficiently**" (paragraph 4.2 of the draft Statement). The draft Statement further states in that the CMA seeks to address these aims by, e.g. "considering the information that is **required for the CMA's purposes**" (paragraph 4.3 of the draft Statement) which we believe is a key point in this context. We would welcome if:

(a) the PO's role was strengthened and clarified with regard to determining whether the scope of RFIs are required and proportionate for the "CMA's purposes" - i.e. in order to efficiently enforce the relevant legislation under which it is requested (see also below); and

(b) the CMA seeks to ensure that the scope of RFIs is more targeted and limited to what is required for the "CMA's purposes" (particularly when the recipient is an entity with more limited resources, e.g. SMEs).

3.2.3 Moreover, according to the draft Statement, the CMA may pre-submission "discuss" the RFI with the intended recipient where this is "practicable and appropriate", to determine what information it holds and in what form. We note, however, that previous guidance (OFT1234) made clearer references to a draft RFI actually being shared with the recipient pre-submission. In addition, relevant EU guidance on economic evidence states that "*when appropriate and useful, DG Competition will send a 'draft' Data Request for quantitative data in order to facilitate a better identification of the format, and to allow for basic consistency checks*". As, in particular, subjects to RFIs in the future will be exposed to a more considerable risk of penalties in cases of non-compliance with RFIs, in addition to the comments made in Appendix 1, we strongly encourage that:

(a) the CMA would provide draft requests as a general rule, subject to suitable exceptions; or

(b) at least as a policy, the CMA will not impose penalties unless a draft was provided prior to being issued, a reasonable opportunity was given to comment and comments taken into account and/or a reasonable deadline had been agreed with the party.

3.3 Disclosure of information obtained by the CMA

3.3.1 We recognise the difficulties that the CMA will face in balancing the confidentiality concerns of the relevant parties in a case. We consider that it is important for the treatment, and process, in relation to the disclosure of information obtained by the CMA, to be consistent.

3.3.2 As regards confidentiality rings and data rooms and when such will be used, we note that "the CMA has discretion as to whether to agree to such requests [for their use], and is likely to do so only where it is proportionate" (paragraph 4.27 of the draft Statement): therefore the CMA is given a significantly wide discretion as to their use. It would be helpful for the CMA to set out the types of cases where a confidentiality ring will be used and the circumstances in which it would not be regarded as appropriate. Any decision not to grant access to information via a confidentiality ring or data room should be fully reasoned.[2]

3.3.3 In our view, confidentiality rings and data rooms are important for the fair running of a case and the seriousness of potential information leaks could arguably be questioned when the CMA has a clear ability to prosecute and penalise anyone who breaches such undertakings.

3.4 Complaints and Accountability

3.4.1 Given the need for swift conclusions of investigations and particularly the shortened duration of merger and market investigations, we would recommend that:

(a) parties could immediately raise any complaints about the conduct of an ongoing CMA case with the PO (or GCO, as applicable), rather than first having to raise it with the most senior CMA contact responsible for that case. We also note that this would mirror the procedural position on EU level (see below references to the Hearing Officer frameworks);

(b) parties are able to raise a complaint against an administrative penalty in the first instance with the PO, rather than appealing to the CAT.

3.4.2 We consider that most of the above could, and should, be replicated in the UK, particularly in light of the administrative penalty orders coming into force.

3.5 Publication of decisions

3.5.1 We recognise the difficulties faced by competition authorities in publishing non-confidential versions of decisions (where this requires consent from numerous parties to a case).

3.5.2 However, this can currently take a substantial amount of time, especially in the case of antitrust cases, and legal advisors would appreciate faster availability of new precedents. We consider that the CMA should consider having a timetable for the publication of such decisions, to ensure that the

[2] We note, for example, that rejections have been given in the past without any clear reasoning being stated by the CC.

parties involved are required to cooperate with the authority, and allow a full non-confidential version of the decision to be published as soon as possible.