THE CMA'S CONSULTATION ON ADMINISTRATIVE PENALTIES: STATEMENT OF POLICY ON THE CMA'S APPROACH (DRAFT CMA4)

RESPONSE BY FRESHFIELDS BRUCKHAUS DERINGER LLP

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1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP (the ***Firm***) welcomes the opportunity to respond to the Competition and Markets Authority (***CMA***)'s consultation on Administrative Penalties: Statement of Policy on the CMA's Approach (the draft ***Statement***).

1.2 The draft Statement sets out the CMA's policy regarding its powers to take enforcement action and impose administrative penalties in respect of breaches of Investigatory Requirements and Remedy Requirements (as defined in paragraph 1.2 of the draft Statement) (collectively, ***Requirements***) under the Competition Act 1998 (***CA98***), the provisions of the Enterprise Act 2002 (***EA02***) relating to markets and mergers, and the provisions of the Digital Markets, Competition and Consumers Act 2024 (***DMCCA24***).

1.3 This response is based on our significant experience and expertise in advising clients on a wide range of CMA proceedings under the EA02 and the CA98, together with our significant experience with similar proceedings conducted by competition authorities in other jurisdictions. We rely on this breadth of experience to provide these comments on the approach to administrative penalties.

1.4 We have confined our comments to those areas which we consider are most significant to ensuring the effective operation of the administrative penalties regime and providing clarity and certainty for companies that might be subject to such proceedings. This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients.

2. General observations

2.1 We welcome the draft Statement as a valuable indication of the approach the CMA intends to take to the imposition of administrative penalties for breach of Requirements. Guidance is particularly important because of the relative scarcity of decisional practice in the area and especially in light of the new and substantially expanded enforcement powers introduced by the DMCCA24. The comments below are intended to help clarify the CMA's approach, and to bring greater transparency, predictability and certainty to the imposition of administrative penalties for breach of Requirements.

2.2 In particular, there are a number of areas where we consider the draft Statement can be improved in order to help the CMA better achieve its objectives of the effective and timely administration and management of investigatory proceedings, namely:

(a) additional clarity about the application of and reliance upon the CMA's newly expanded duty of expedition, and how the CMA will interpret and apply this going forward, in particular, vis-à-vis the protection of parties' fundamental rights of defence and respect for due process;

(b) further explanation around the concept of "reasonable excuse". As currently drafted, the interpretation adopted in the draft Statement is overly narrow and restrictive. The draft Statement focuses too heavily on what would *not* be

considered reasonable by the CMA and fails to recognise that there may be other scenarios beyond those set out in the guidance where there may be a "reasonable excuse";

(c) recognition that in determining whether and in what amount administrative penalties will be imposed, the CMA must be as transparent as possible, even though it will take into account a number of factors "in the round". A consistent and unambiguous approach to the imposition and magnitude of penalties will best serve the interests of both parties and the CMA in terms of predictability and certainty;

(d) more precise guidance around the applicability and relevance of the new aggravating and mitigating circumstances listed in the draft Statement;

(e) further clarity on the CMA's approach to imposing administrative penalties for breach of Remedy Requirements. Consistent with the principles of legitimate expectations, legal certainty and proportionality, the guidance should include an explicit acknowledgement that administrative penalties will *only* be imposed by the CMA for breach of Remedy Requirements that were entered into or imposed by the CMA *following* the entry into force of the DMCCA24; and

(f) the addition of a number of necessary procedural safeguards that the CMA should follow in light of the increase in the statutory maxima for administrative penalties.

3. Duty of expedition

3.1 The CMA refers to the duty of expedition at several points in the draft Statement, which now applies across the CMA's CA98, markets and mergers, and digital markets competition regime functions.[1] As outlined in the Firm's response to the consultation on the updated CMA6 statement[2] and on the draft digital markets competition guidance, it is critical that this duty is interpreted and applied appropriately. As set out previously, the duty applies equally to "internal" steps the CMA takes in exercising its powers, not just to interactions with external parties. The CMA now has powers to apply even more significant administrative penalties, and in that context it cannot apply or seek to rely on the duty of expedition in a way which may override or unduly limit parties' rights of due process. In particular:

(a) Importance of due process: We agree that the CMA should generally conduct investigations as swiftly as possible. However, the duty of expedition does not give the CMA "carte blanche" to override the fundamental due process rights held by parties (particularly given the level of potential administrative fines, and the already limited powers of review that may be exercised by the courts). It is important that this duty is properly applied in practice and is not used to seek to justify investigative steps that are unlawful or otherwise fall short of the principles of good administration.

[1] Draft Statement, paras. 1.3, 1.15 and 2.2.
[2] Transparency and disclosure: the CMA's policy and approach: CMA6 (CMA6).

(b) The duty of expedition does not weaken the CMA's public law duties: As confirmed by Competition Appeal Tribunal (***CAT***) decisions in recent merger cases, the duty of expedition does not weaken public law requirements for the CMA to make sufficient inquiries to respond to submissions made by parties involved in proceedings,[3] or to consult appropriately.[4] It would be beneficial for the draft Statement to recognise this expressly.

(c) Deadlines must be reasonable: There is no basis in the DMCCA24 for any suggestion that the duty of expedition weakens requirements for the CMA to set deadlines that are reasonable (e.g., for information gathering), or to consider valid, reasoned requests for extensions of time (and for the process for requesting such extensions to be dealt with reasonably). It would again be beneficial for the draft Statement to recognise this expressly. In practice, and to guard against the risk of the duty of expedition being mis-applied in practice by individual CMA teams, we encourage the CMA to provide further detail (here and in other guidance) on how the duty will be applied in practice, including in relation to decisions regarding the imposition of administrative penalties.

4. Reasonable excuse

4.1 We welcome the clarification that the CMA will apply an objective test as to whether an excuse put forward by an undertaking is reasonable (paragraph 2.4, consistent with the CAT's judgment in *Electro Rent v CMA* [2019] CAT 4, 69). However, the discussion in the draft Statement of the concept of reasonable excuse implies that the CMA considers the threshold to be overly narrow and restrictive, given the suggestion that the CMA will only consider there to be a reasonable excuse where the failure has been caused by "a significant and genuinely unforeseeable or unusual event and/or a significant factor or event beyond the Relevant Person's control".[5] One would expect a broader range of scenarios to be captured by the term "reasonable excuse" on a plain reading. Indeed, the one example given in this section of the draft Statement is a significant and demonstrable IT failure that could not have been foreseen or avoided (paragraph 2.5). Such a case must certainly constitute a reasonable excuse; in fact, it would represent a situation in which compliance was rendered impossible by factors entirely outside the undertaking's control. However, circumstances falling short of that strict standard could, in our view, clearly also meet the standard of "reasonable excuse". The draft Statement would therefore benefit from additional, more nuanced examples than the one given.

4.2 Moreover, we consider that an honest error made in good faith whilst trying to comply with an investigative requirement constitutes a reasonable excuse, particularly where the error is drawn to the CMA's attention and promptly corrected. Imposing a fine in such circumstances would not achieve a deterrent effect as the undertaking in question is in fact using its best endeavours to comply. Conversely, recognition in the CMA's draft Statement that honest errors will not usually attract a fine would encourage

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[3] See *JD Sports Fashion plc v Competition and Markets Authority* [2020] CAT 24.

[4] See *J Sainsbury plc and Asda Group Limited v Competition and Markets Authority* [2019] CAT, referring to Enterprise Act 2002, s. 104.

[5] Draft Statement, para 2.5.

undertakings proactively to investigate and correct inadvertent mistakes, thus supporting the CMA's objective of obtaining accurate and reliable information.

4.3 Furthermore, in our experience it is often the case that the CMA issues requests for information that are challenging for undertakings to comply with – for example because the information does not currently exist, is not in the required format, will require very intensive data processing to produce, or is being produced to deadlines that do not allow reasonable, or indeed any, time to clarify and correct errors (and see our comments above on the duty of expedition). Companies may also need to take steps internally and vis-à-vis employees or third parties in order to comply with data protection legislation and ensure that the data processing activities are necessary, prior to providing certain data to the CMA, which may result in a reasonable delay to that company's compliance with a request.

4.4 In those circumstances, notwithstanding a genuine desire to be as helpful as possible to the authority (and contrary to the CMA's indication that it will not accept as a reasonable excuse any claim that compliance would constitute a breach of a non-disclosure agreement or duty under the Data Protection Act 2018[6]), undertakings may struggle to meet information requests in full, or to do so within the tight deadlines set out in requests. In our view, it would be inappropriate to impose a penalty on an undertaking that is making efforts to comply with a deadline. It would be helpful for the CMA to acknowledge expressly that companies' compliance with data protection legislation may be relevant to any delays in meeting deadlines, and that it will take this into account, including through coordination with the ICO if necessary.

4.5 The CMA's position on when the risk of foreign law breaches will meet the threshold for "reasonable excuse" is similarly too narrow: the only example provided of where such breaches will meet the threshold is where there is an "express legislative barrier" and there are "no steps the Relevant Person could feasibly take to facilitate compliance" (paragraph 2.9). While the draft Statement recognises that a reasonable excuse may exist in the case of other foreign law restrictions that fall short of this standard, it would be beneficial for the CMA to set out where it considers the line should be drawn. Even where foreign laws may not expressly prohibit a Relevant Person from complying with a CMA information request, foreign laws (including data protection laws) may prevent a Relevant Person from complying with such a request in practice and/or within the timeframe that the CMA may seek to impose. The draft Statement should also recognise that barriers to compliance may be executive rather than legislative. Undertakings otherwise risk being penalised by foreign authorities, through no fault of their own, if they are made to meet a Requirement by the CMA in breach of contradictory foreign law requirements.

4.6 The CMA should also clarify its position on potential additional circumstances when a Relevant Person based outside the United Kingdom may have a "reasonable excuse" not to comply with an information request issued under s. 111 DMCCA24. For example, a Relevant Person may have a reasonable excuse if the information request is issued in English but the Relevant Person is not English-speaking, or if the information

[6] Draft statement, para 2.8.

request is forgotten or overlooked (see paragraph 2.6) because the Relevant Person is not familiar with the CMA and its activity.

5. Whether and in what amount administrative penalties will be imposed

Initial remarks

5.1 The draft Statement confirms that the CMA will have regard to a number of factors "in the round" in determining whether and in what amount administrative penalties will be imposed. Our suggestions in this Section aim to ensure that the CMA's approach is transparent, predictable, and able to give certainty to participants in CMA processes – including new processes introduced under DMCCA24. This is not only important from the perspective of market participants subject to CMA investigations, but will also help to achieve the CMA's stated goal of deterring non-compliance with its Requirements.

5.2 One of the CMA's primary objectives is to ensure that the CMA can expediently gather information to carry out its functions. While we support that objective in principle, it is important that the CMA's expectations are tempered with a realistic acknowledgement of the difficulty and cost associated with responding to complex or extensive information requests, particularly for undertakings with less sophisticated information gathering and reporting systems. Such an acknowledgement from the CMA is particularly important in circumstances where it has powers to fine undertakings at any stage of a proceeding for failing to respond to requests in a manner that the CMA considers adequate.

Factors affecting the type of penalty imposed

5.3 The CMA has provided a helpful indication at paragraphs 2.13 and 2.14 of the draft Statement regarding the circumstances in which it will consider a fixed or daily penalty – or both – to be appropriate. However, we believe it is important – and consistent with relevant case law[7] - to ensure that the imposition of daily penalties does not result in an overall penalty that is disproportionate under the circumstances, when looked at in the round. We therefore suggest that proportionality should be expressly included as a relevant factor in the assessment of whether (and at what level) a daily penalty should be imposed, particularly in circumstances where any issue resulting in non-compliance with a Requirement may take some time to resolve (see further paragraph 6.3 below).

5.4 Before imposing a penalty, the CMA should have regard to the need to afford undertakings a reasonable period of time in which to bring into compliance a situation of which they may not previously have been aware. Indeed, an undertaking may not be able to comply with a Requirement if it could not reasonably be expected to remedy the situation during a specific period of time, despite making all reasonable efforts to do so. The legislation appears to leave open to the CMA the possibility of applying a daily penalty, the imposition of which post-dates its formal notice. Accordingly, where the CMA has determined that it is appropriate to impose a daily penalty, the CMA should also consider whether it is appropriate under the circumstances to provide that the daily penalty will only enter into force if the undertaking does not achieve compliance within a specified number of days.

[7] See, for example, *Eden Brown and Hays v Office of Fair Trading OFT* [2011] CAT 8.

Aggravating and mitigating factors

5.5 We welcome the addition of aggravating and mitigating factors in paragraphs 2.19 to 2.25 of the draft Statement. However, we consider that this section of the draft Statement might be improved in the following respects:

(a) First, the list of aggravating factors (paragraphs 2.19 to 2.24) is disproportionately longer than the list of mitigating factors (paragraph 2.25). Further mitigating factors should be included based on the opposite scenarios of the aggravating factors listed in the draft Statement. For example, given that paragraph 2.24 provides that an aggravating factor will exist where the undertaking has significant financial and administrative resources available to it to prevent breaches from occurring, there should conversely be a mitigating factor for smaller undertakings that have more limited resources available to ensure compliance with a Requirement (as is implied by Example 1 at Annex 2).

(b) Second, the draft Statement suggests that the CMA will consider a Relevant Person's size and administrative and financial resources as one of the factors affecting any deterrent uplift for a penalty (see paragraphs 2.17 and 2.26), and also as a separate aggravating factor (see paragraph 2.24). Such an approach may lead to disproportionately large penalties being imposed on companies by virtue of their size, potentially for relatively minor breaches. We suggest that a company's size and administrative/financial resources should only be taken into account as part of the CMA's deterrent effect calculation, and not as a separate aggravating factor.

(c) Third, the draft Statement should also clarify what precisely is meant by a failure of an undertaking's senior management to take "reasonable steps" to prevent a breach from happening.

(d) Finally, we suggest it would be appropriate for the draft Statement to state expressly at paragraphs 2.19 and 2.25 that the CMA will consider potential aggravating and mitigating factors on a case-by-case basis.

Magnitude of penalties

5.6 While the draft Statement provides further detail on the considerations the CMA will take into account when determining whether or not to impose a penalty and assessing the level of penalty, it still gives limited guidance on the magnitude of penalties that undertakings might expect to face as a consequence of failing to comply with the CMA's Requirements. We understand that the CMA's decisions on whether (and at what level) to impose a penalty will be made on a case-by-case basis. However, to the extent that the CMA considers breaches of certain Requirements to be more serious than others, this should be stated and explained in the guidance. For example, paragraphs 2.15 et seq. of the draft Statement give no indication of likely tariffs or penalty levels for particular types of breach (save to state that the CMA is "likely to set very large penalties for the most serious failures to comply"[8]). It would be helpful to give some indication – whether in the main text of the draft Statement or in the annexed

[8] Draft Statement, para. 2.16. We note the CMA must assess any failures on a case-by-case basis and there may be many different circumstances where a significant penalty is not necessary. There is no basis for the statement that the CMA is "likely to set very large penalties for the most serious failures to comply".

examples – of the levels of penalty that the CMA would consider imposing in a range of circumstances, or alternatively a methodology for assessing penalty levels in the same way that it does for breaches of the CA98 Chapter I and Chapter II prohibitions.

5.7 Similarly, we understand paragraph 2.16 of the draft Statement to mean that the CMA expects the statutory maxima to be reserved for the "most serious failures to comply" (i.e., breaches involving several of the CMA's aggravating factors and no mitigating factors). If that is correct, then it would be helpful for this to be confirmed expressly in the draft Statement. It would also be beneficial for the CMA to confirm that lesser breaches will attract a significantly reduced penalty where no aggravating factors are present and several mitigating factors exist.[9]

5.8 Finally, when considering the need for deterrence (paragraphs 2.17 and 2.26-2.27 of the draft Statement), it is important (and again consistent with the prevailing case law[10]) that the CMA does not merely look at turnover information but **all** appropriate indicators of a company's financial position and size. This assessment may include, amongst others, the company's profitability after tax, net assets and dividends.

Remedy Requirements

5.9 The draft Statement does not clarify whether penalties can be imposed for breach of Remedy Requirements that were entered into or imposed by the CMA prior to the DMCCA24 coming into force. We understand that the new powers outlined in the draft Statement are not intended to be used retroactively in relation to Remedy Requirements already imposed by the CMA,[11] as such an approach would contravene principles of legitimate expectation, legal certainty and proportionality. The scope, obligations and requirements in Remedy Requirements entered into prior to the DMCCA24 would have reflected the administrative penalties regime at that time and would not necessarily have been the same under the new administrative penalties regime introduced by the DMCCA24. Using these new powers retroactively would also be particularly problematic in the context of there being no materiality threshold for breaches which could incur a fine. Given the importance of this issue we consider it would be helpful for this to be explicitly clarified in the draft Statement.

5.10 For similar reasons, we also consider that the CMA should be required to explain the potential consequences of non-compliance with a Remedy Requirement to the relevant undertaking at the time when it is imposed. The CMA should ensure that any undertakings that agree to Remedy Requirements do so with full knowledge of the consequences of any hypothetical non-compliance.

5.11 Finally, the level of penalties for breaches of Remedy Requirements is potentially very high, particularly for commitments given where no infringement of competition law has been found, such as following a market study or investigation. Disproportionately high penalties are likely to reduce the willingness of undertakings to agree to, or show flexibility in relation to, commitments. We suggest that provisions are added into the draft Statement to explain that there will typically be different approaches to penalties

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[9] Paragraph 2.18 also appears to include a minor typo, as it refers to "sections A and B of this chapter" where no such sections exist in the draft Statement.

[10] Ibid.

[11] Except in the circumstances outlined in DMCCA24, Sch. 19, para. 3(4) and 4(3).

depending on whether the breach concerns an undertaking, order, or commitment. At a minimum, and as noted above, the CMA should indicate the likely magnitude of any penalty compared to the seriousness of the breach.

6. Procedure

6.1 Administrative penalties imposed by the CMA are 'final' decisions, appealable only to the CAT. With the increase in the statutory maxima, the magnitude of those penalties is also very significant. Accordingly, we set out below our suggestions on the necessary procedural safeguards that the CMA should follow and would be beneficial to include expressly in the Statement.

6.2 Decision-making: The Statement of Policy on the CMA's approach dated January 2014 (***2014 Statement***) contained a section referring to a decision-making process which has since been removed in the updated draft Statement. [12] This change has removed the clarity surrounding decision-maker identity for administrative penalties for breach of Requirements. In our view, to protect impartiality, the decision-maker should not be an individual with day-to-day operational management of the relevant case. Moreover, the scope and parameters of Requirements, as well as what constitutes adequate compliance, are frequently a matter of legitimate debate between undertakings and case teams. It does not seem to us appropriate therefore that the personnel imposing the Requirements should also have the responsibility for determining the extent to which undertakings have complied with those Requirements and, if not, the consequences of non-compliance in terms of appropriate administrative penalties. We see this level of impartiality reflected in the European Commission process under Regulation 1/2003, as decisions made under Article 23 are made by the College of Commissioners rather than by Directors General or Heads of Unit. We therefore suggest that a clarification is added into the draft Statement to confirm that impartiality will be sufficiently considered and that such individuals with direct case management responsibility will not be final decision-makers for the purpose of the imposition of administrative penalties.

6.3 Right to be heard: Undertakings subject to penalties should be given a reasonable opportunity to be heard at all relevant stages of the process for imposing penalties. We welcome the extension of the time period in which to make representations from one week to two weeks, but consider that the draft Statement should expressly provide that reasonable requests for further extensions will be considered by the CMA, given the significant potential adverse impact of a large penalty on an undertaking.[13]

6.4 Provisional decisions: We welcome the CMA's proposal to issue a provisional decision on which the undertaking in question will be invited to comment before issuing a final decision. We would further suggest that the CMA makes it clear in the draft Statement that a provisional decision will include all the relevant information on which any final decision would be based, including all the information outlined in paragraph 3.5 of the draft Statement, in order that the right to be heard can be effectively exercised.

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[12] Administrative penalties: Statement of Policy on the CMA's approach (January 2014), para. 5.8.

[13] Draft Statement, para. 3.4.

6.5 Remedy Requirements: As noted above, we consider that the draft Statement provides insufficient detail on the approach to penalties for breach of Remedy Requirements. The implementation of this new power therefore requires detailed guidance about how and when it could be used, as well as the identity of the decision maker and nature of the decision-making procedure. As noted above, the decision maker should not be someone directly responsible for the management of the proceeding. There is currently a notable absence of these kinds of clarification in the draft Statement, which stands in contrast with the amount of information provided on non-penalty enforcement action for breach of Remedy Requirements (see section 8 below).

6.6 Appeals: The draft Statement provides that interest will be payable on the balance of any penalty that is unsuccessfully appealed (paragraphs 3.7 and 3.8), but does not clarify that an appeal also has the effect of suspending the requirement to pay the unpaid balance under s. 114(7) EA02 until the appeal is complete. We consider that this should be included in the draft Statement for completeness.

7. Practical examples

7.1 As a general point we think examples are helpful only insofar as they give a clear indication of the manner in which the CMA would exercise its discretion under the circumstances. We note that all of the examples are positioned as "significant" or "serious" breaches meriting a penalty towards the top end of the range, with the exception of Example 1. The CMA might consider providing additional examples of compliance failures that it would consider to fall closer to the lower end of the penalty range. In addition, none of the examples specify the likely penalty that would be applied by the CMA (except Example 1, where the implication is that no penalty would be applied). It would be helpful to understand the level of penalty that would be applied by the CMA in each scenario, in order to give some sense of the CMA's view of how specific breaches should map across to the penalty tariff.

7.2 In relation to the specific examples provided in Annex 2:

(a) ***Example 1***: In our view this is clearly a case in which the imposition of a penalty would be counterproductive and would not serve the CMA's stated objectives. The failure to comply is inadvertent, the delay is not material and there is no suggestion that the CMA's work would be prejudiced under these circumstances. Moreover, it is apparent that A has a constructive attitude towards compliance. We suggest amending the penultimate sentence of this example to read: "In cases of this nature the CMA would typically not seek to impose an administrative penalty." We would also query whether any subsequent failure to comply with a different Requirement should appropriately be considered an aggravating factor, given that the initial breach would be considered minor.

(b) ***Example 2***: We welcome the CMA's additional guidance (as compared with the 2014 Statement) that it would be likely to impose two separate fines in this scenario. However, we do not consider that this scenario can be construed as a "serious failure" without first considering: (i) whether there was a reasonable excuse for the inadequate nature of D's response; and (ii) any explanation for the difference in the reported market share figures. Facts addressing both of those points would need to be included in the "Scenario" section of this example in

order to warrant the conclusion in the "Analysis" that this was a serious failure and a deliberate attempt to prejudice the CMA's investigation. As presently drafted, this example suggests that the CMA would conclude merely from the fact of a brief response and a difference in reported market shares that D has deliberately attempted to undermine the CMA's investigation, a conclusion that is not warranted based on the information provided in this scenario.

(c) ***Example 6***: The reference in this example to a "severe" penalty is inconsistent with references to "significant" and "very significant" penalties in earlier examples. We would encourage the CMA to indicate the penalty tariff that would be applied for this example; at the very least, we consider that the draft Statement should use consistent language throughout the examples provided in Annex 2 when describing the magnitude of penalties.

8. Annex 3 – civil proceedings and other non-penalty enforcement action in respect of breaches of Remedy Requirements

8.1 We note that this section of the draft Statement largely reproduces the parts of CMA136 that relate to the CMA's non-penalty enforcement powers, and that certain parts of CMA136 are due to be adapted for inclusion in the updated guidance CMA11 on variation and termination of undertakings and orders. We would expect the updated CMA11 to include the sections of CMA136 that have been omitted from the draft Statement. In particular, CMA11 should:

(a) clarify that it is open to undertakings bound by formal directions issued by the CMA to apply for those directions to be varied or terminated (CMA136 at paragraph 4.19); and

(b) clarify the undertaking's options for challenging any non-penalty enforcement action imposed by the CMA (CMA136 at paragraph 4.22).

8.2 In addition, it would be beneficial for the draft Statement to recognise expressly that, when deciding whether to take any non-penalty enforcement action in addition to (or instead of) imposing an administrative penalty, the CMA will have regard to the need to ensure that the overall enforcement action is proportionate in the circumstances, looked at in the round.

8.3 Finally, the legal basis for the CMA's imposition of "informal" non-penalty enforcement action is unclear. The draft Statement should clarify the statutory basis for these powers and provide an exhaustive list (or, at least, further examples) of the types of informal action that the CMA is empowered to take. The draft Statement should also clarify the interaction between informal non-penalty enforcement action and administrative penalties: in our view, the conduct examples provided at paragraph A.9 clearly point to a case in which the imposition of a penalty would be counterproductive given the limited practical impact of the breach on relevant third parties, and given the Relevant Person's constructive approach to compliance. We would suggest that the CMA clarifies that in this scenario, the CMA would typically not seek to impose an administrative penalty, as informal action is likely to be sufficient.

9. Conclusion

9.1 We welcome the updated guidance in the draft Statement in light of the new enforcement powers bestowed on the CMA by the DMCCA24 to impose administrative penalties following any breach of a Requirement.

9.2 However, the draft Statement would benefit from further clarification in a number of places (as outlined in our response above), if it is to support the CMA in achieving its objectives of effective and timely management of investigatory proceedings. We remain available for further dialogue with the CMA and other stakeholders on the draft Statement.

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