City of London Law Society Competition Law Committee

RESPONSE TO BIS CONSULTATION ON CMA PRIORITIES AND DRAFT SECONDARY LEGISLATION

This paper is submitted by the Competition Law Committee of the City of London Law Society in response to the BIS consultation in respect of CMA priorities and draft secondary legislation,, published in July 2013.

2.1 The CLLS represents approximately 15,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to competition law matters.

2.2 The Competition Law Committee members responsible for the preparation of this response were:

2.2.1 Philip Wareham Partner Hill Dickinson LLP,

2.2.2 Antonio Bavasso, Partner Allen & Overy LLP;

2.2.3 Robert Bell, Partner, Bryan Cave LLP (Chairman, CLLS Competition Law Committee);

2.2.4 Alex Potter, Partner, Freshfields Bruckhaus Derringer LLP;

2.2.5 Jenine Hulsmann, Partner, Clifford Chance LLP;

2.2.6 Deidre Trapp, Partner, Freshfields Bruckhaus Derringer LLP

2.2.7 Samantha Mobley, Partner, Baker & McKenzie LLP.

2.2.8 Dorothy Livingston, Consultant, Herbert Smith Freehills LLP

1. QUESTION 2

What is your view on the proposed maximum penalty levels?

1.1 We do not believe that the level of maximum penalties should be raised. Legal regimes should not seek higher fines per se. As a general principle fines should only be raised when there is evidence that they are not sufficient in order to achieve deterrence. No such evidence seems to exist in this particular case. It needs to be explained therefore how the new figures were calculated and why the increase is necessary? Were they calculated simply on the basis of inflation? If the proposal is to raise fines to the proposed level in order to address the point that they were not in line with the fines that overseas agencies could impose then the objective is not achieved through the proposed increases as, for example, the European Commission is able to impose significant one off fines of up to 1% of worldwide turnover of the relevant undertakings and daily penalties of up to 5% of the average daily turnover in the preceding business year. For the avoidance of doubt, we do not agree that fining levels should be increased to those which apply to the overseas agencies mentioned because, as is pointed

out although Parliament recognised the need to extend the civil enforcement regime, it did not also see the need to change the penalty levels in this way.

2. QUESTION 5

Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?

2.1 We note that the current draft Order on Merger Interim Measures (IMs) stipulates that in calculating the financial penalty imposed for failure to comply with interim measures, the CMA will have to take into account *inter alia* the turnover of the enterprises upon which the person who has failed to comply with an interim measure (hereafter 'P') has 'material influence'[1].

2.2 We do not agree with this approach. Our experience shows that assessing whether P exercises material influence over certain corporate entities can be a time-consuming/resource-intensive exercise. As the CMA itself has noted, in engaging in this assessment in a particular case will detract significant resources from its substantive merger assessment which will hold up the progress of its investigation[2]. Also we cannot see why the approach for determining the level of the penalty for failure to comply with Merger Interim Measures should be any different from the one adopted when calculating penalties for substantive infringements of the CA 98, where the material influence test is not applied. Given these considerations we strongly believe that the turnover of the undertakings upon which P has material influence should never be taken into account in calculating the financial penalty for failure to comply with IMs.

2.3 The CMA has suggested, as an alternative, 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[3]. We do not agree with this approach. Obviously, the same considerations already mentioned above will be present in these cases that the CMA decides to apply the material influence test. However, and at a more fundamental level, such an approach would mean that different criteria will be applied to undertakings in determining their fines for the same procedural infringements, which runs counter to the basic principle that the law should apply equally to all.

---

[1] See Section 2(1)(c) of *The Enterprise Act 2002 (Mergers) (Interim Measures:Financial Penalties) (Determination of Control and Turnover) Order 2014*).

[2] See CMA *Administrative Penalties: Statement of Policy on the CMA's approach*, July 2013, CMA4con, para 4.18.

[3] Ibid, para 4.18.