

Response to BIS CMA Transition Team

CM11con: Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders

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CMA11con: REMEDIES: GUIDANCE ON THE CMA’S APPROACH TO THE VARIATION AND TERMINATION OF MERGER, MONOPOLY AND MARKET UNDERTAKINGS AND ORDERS

This response represents the views of law firm Allen & Overy LLP on the draft Competition and Markets Authority (CMA) guidance document *CMA11con: Remedies: Guidance on the CMA’s approach to the variation and termination of merger, monopoly and market undertakings and orders* (the **Draft Guidance**). We have also responded separately to the following consultations:

- Competition Regime: Draft secondary legislation – part two
- CMA8con: Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998
- CMA9con: Cartel Offence Prosecution Guidance
- CMA10con: Regulated Industries: Guidance on concurrent application of competition law to regulated industries
- CMA12con: Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission guidance
- CMA13con: Vision, values and strategy for the CMA

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA’s website.

1. **Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the review of final undertakings and orders under the EA02? If not, what aspects do you think are missing?**
 - 1.1 We consider that the Draft Guidance deals with the main changes introduced by the Enterprise and Regulatory Reform Act 2013 (**ERRA13**) relevant to the review of final undertakings and orders under the Enterprise Act 2002 (**EA02**).
2. **Do you agree with the proposed simplified approach to the reviews of undertakings and orders, as set out in the Draft Guidance?**
 - 2.1 We agree that the creation of the CMA provides a perfect opportunity to simplify and streamline the process of reviewing undertakings and orders, and we consider that the Draft Guidance delivers on this aim.
3. **Do you agree with the list in Annexe B of the Draft Guidance of existing related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA?**
 - 3.1 Yes, the list in Annexe B appears sensible and correct.
 - 3.2 We note that the CMA plans to revise *CCI: Competition Commission: Rules of Procedure*. We would be grateful for any update on that workstream when appropriate.
4. **Do you consider that the Draft Guidance is user friendly in terms of its content and language?**

- 4.1 The Draft Guidance is generally clear and easy to navigate. In particular, the inclusion of examples of past cases, such as those at paragraph 2.6, enhances its usefulness. We have a few comments however.
- 4.2 Paragraph 2.1 notes that the Secretary of State is responsible for accepting undertakings or imposing orders in relation to certain public interest cases. The Draft Guidance should clarify at paragraph 2.3 whether it is the CMA or the Secretary of State that is responsible for deciding on the variation or termination of such public interest undertakings and orders.
- 4.3 In relation to CMA own-initiative activity, paragraph 3.8 states that the CMA will typically issue an invitation to comment to “relevant parties”. It would be helpful if the Draft Guidance was more explicit: are all parties who have given undertakings or are subject to orders “relevant parties”, or does the term also include other market players? Presumably the CMA will make and digest the responses to this directed invitation to comment prior to any public invitation to comment? If so, the final sentence of paragraph 3.8 should be amended to reflect the fact that the CMA may not go on to consult publicly in all cases.
- 4.4 Paragraph 3.10 notes that the CMA will act in accordance with its published prioritisation principles in deciding whether to conduct a review. Does the CMA intend to consult on its prioritisation principles and, if so, when?
- 4.5 There appears to be an error in the final sentence of paragraph 3.14, which states “At the same time as or following the public announcement, the CMA will also publish, *if and as soon as reasonably practicable*, the information referred to in paragraph 3.13” (emphasis added). We suggest that the text we have highlighted in italics should be removed.
- 4.6 At paragraph 3.35, the CMA could clarify that it will proceed with releasing parties from undertakings or revoking an order by means of a Notice of variation or termination.
- 5. Do you have any other comments on the Draft Guidance?**
- 5.1 We welcome the CMA’s statement at paragraph 3.26 that its provisional decision will “state what decision the CMA proposes to take and the reasons underpinning it”. This is an improvement in terms of transparency from the current guidance where the OFT only commits to provide this in “complex reviews” (paragraph 35, OFT1060).