

RESPONSE TO THE DEPARTMENT FOR BUSINESS INNOVATIONS & SKILLS' CONSULTATION ON THE PROPOSED APPROACH TO THE TREATMENT OF EXISTING OFFICE OF FAIR TRADING AND COMPETITION COMMISSION GUIDANCE

1 INTRODUCTION

Berwin Leighton Paisner LLP ("BLP") welcomes the opportunity to comment on the Competition and Markets Authority's ("CMA") proposed approach to the treatment of existing Office of Fair Trading ("OFT") and Competition Commission ("CC") guidance (the "**Proposed Approach**") published by the CMA Transition Team (the "**Transition Team**").¹

2 DO YOU AGREE WITH THE PROPOSED APPROACH TO THE TREATMENT OF EXISTING OFT AND CC GUIDANCE AND OTHER PUBLICATIONS?

2.1 We understand that the Transition Team proposes to carry across a number of guidelines for adoption by the CMA Board to ensure that existing guidance is not, in haste, replaced or declared obsolete. We consider this to be an appropriate and reasonable approach.

2.2 We would, however, request further clarity on the Transition Team's review process for selecting the guidance to be adopted by the CMA Board. For example, it may be helpful to understand how and when it will review the adopted guidance (see further the response to Question 4 below).

3 DO YOU CONSIDER THAT ANY OF THE EXISTING OFT AND CC GUIDANCE PROPOSED FOR ADOPTION IS, IN ANY RESPECT, NO LONGER APPROPRIATE?

3.1 We understand that the CMA Transition Team's approach has been to ensure that existing guidance is not prematurely replaced or removed which we welcome.

3.2 However, it is difficult to ascertain how and to what extent the CMA will in practice rely on adopted guidance. Accordingly, it is not clear how interested parties and advisors should treat such guidance, and how they should therefore expect to be treated by the CMA. The CMA could clearly state that all existing OFT and CC guidance which it adopts will be binding on the CMA (as far as required by law and subject to changes in the law since the publication date). Such clarity would assist practitioners and businesses during the transition phase until the CMA issues revised guidance.

4 DO YOU CONSIDER THAT THE TRANSITION TEAM'S PROPOSALS PROVIDE SUFFICIENT INFORMATION ON THE TREATMENT OF EXISTING OFT AND CC GUIDANCE AFTER THEIR FUNCTIONS ARE TRANSFERRED TO THE CMA?

4.1 We consider that the Transition Team's proposals generally provide sufficient information on the proposed treatment of guidance as regards its adoption, replacement or obsolescence. However, it may nonetheless be helpful to have some further clarity on how and why the Transition Team has identified particular documents as being obsolete, replaced by the new guidance or suitable for

¹ 'Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission guidance' Consultation Document (CMA12con) September 2013.

adoption. Without such clarification, practitioners and businesses may lack clarity on exactly how, why and the extent to which particular pre-existing guidance documents remain relevant.

- 4.2 In addition, it would be helpful to understand better the degree to which the CMA will rely on the adopted guidance and, as a natural corollary, how much reliance businesses and their advisers should place on adopted guidance. As noted in the response to Question 2 above, this uncertainty could be alleviated by a clear statement that the CMA will apply the guidance until such guidance is replaced or withdrawn.

5 **DO YOU CONSIDER THAT THE CMA SHOULD PRIORITISE UPDATING ANY GUIDANCE DOCUMENT OR PRODUCE NEW GUIDANCE ON ANY TOPIC AFTER 1 APRIL 2014?**

- 5.1 As set out above, we consider that the Transition Team's approach is broadly appropriate. However, in the interests of certainty and transparency during a period of transition, we would request the CMA outlines concrete proposals for how and when it will undertake a detailed review and update/replacement of the adopted guidance.
- 5.2 Such a review process may constitute a priority work-stream for the CMA during its first year. The work-stream may be broken down by tool, e.g. markets, mergers, Competition Act 1998 investigations, concurrency etc.
- 5.3 In addition to updating guidance, the CMA may wish to consider engaging generally with stakeholders both during its initial transition period and, more formally, at a stakeholder event or 'roadshow' shortly after 1 April 2015. This would be an opportunity for the CMA to publicise its work over the first year and to enhance its engagement with the business and legal communities. It would provide a good forum to share thoughts and feedback on the CMA's performance and its focus for the next year and beyond.
- 5.4 We would be happy to discuss any of the points raised in this response with officials of the CMA and/or the Department of Business, Innovation & Skills.

Berwin Leighton Paisner LLP
11 November 2013