

Response to Competition and Markets Authority

***CMA12con: Proposed approach to the treatment of existing Office
of Fair Trading and Competition Commission Guidance***

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ALLEN & OVERY

ALLEN & OVERY LLP

CMA12con: PROPOSED APPROACH TO THE TREATMENT OF EXISTING OFFICE OF FAIR TRADING AND COMPETITION COMMISSION GUIDANCE

This response represents the views of law firm Allen & Overy LLP on the draft Competition and Markets Authority (CMA) guidance document *CMA12con: Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission Guidance* (the **Consultation Document**). 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
- CMA11con: Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders
- 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 agree with the proposed approach to the treatment of existing OFT and CC guidance and other publications?**
 - 1.1 We welcome the publication of this consolidated list of all Office of Fair Trading (**OFT**) and Competition Commission (**CC**) guidance, setting out clearly whether it is proposed that each guidance document will be put to the CMA Board for adoption, revoked or replaced. We find the split by tool helpful. It will be vital, in order to mitigate any confusion once the CMA becomes operational and finalises its new guidance, to display a prominent link to this summary document on the CMA's website.
 - 1.2 We accept that given the time and resources required to prepare new guidance prior to 1 April 2014, the Transition Team will have to elect for the CMA to adopt a number of the existing OFT and CC guidance documents, rather than prepare, consult on and agree a comprehensive group of replacement CMA guidance. We consider that, for the most part, the Transition Team has made the right choices in terms of the guidance which it is seeking to update prior to 1 April 2014.
2. **Do you consider that any of the existing OFT and CC guidance proposed for adoption (as set out in Annexe B. and subject to the limitations referred to therein) is, in any respect, no longer appropriate?**
 - 2.1 We consider all of the existing OFT and CC guidance proposed for adoption to be appropriate to the UK competition regime post 1 April 2013.
3. **Do you consider that the Transition Team's proposals set out at Annexe B provide sufficient information on the treatment of existing OFT and CC guidance after their functions are transferred to the CMA?**

- 3.1 We do not find the table at Annexe B sufficiently clear in terms of whether existing OFT and CC guidance is either being replaced by new CMA guidance or is obsolete. We suggest that the Transition Team amend the table to separate these eventualities into two separate columns. A cross reference to the CMA guidance that is replacing each of the existing OFT and CC guidance documents would also be extremely helpful.
- 3.2 In addition, there is some confusion as to the future of the OFT's prioritisation principles (OFT953). The table at Annexe B marks these as to be replaced/obsolete. *CMA11con: Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders* states at footnote 10 of Annex C that revised prioritisation principles will be finalised by April 2014. However, *CMA13con: Vision, values and strategy for the CMA* notes at page 17 that the CMA does not propose to change the OFT's existing prioritisation principles, but will interpret them in the light of the Government's strategic steer and CMA13con. We would be grateful for clarification. If the plan is to revise OFT953, we would welcome an opportunity to comment on draft CMA prioritisation principles prior to the OFT prioritisation principles becoming obsolete. (Any draft CMA prioritisation principles should also be added to the table at Annexe B.) If the plan is to adopt OFT953 and also rely on CMA13con and the Government's strategic steer, the table at Annexe B requires appropriate amendment. We would strongly support any plan to consolidate in one document the factors the CMA will consider when deciding where to focus its attention.
- 4. Do you consider that the CMA should prioritise updating any guidance document or producing new guidance on any topic after 1 April 2014?**
- 4.1 In due course, the CMA should seek to update the existing OFT and CC guidance that is adopted by the CMA Board to reflect the changes introduced by the Enterprise and Regulatory Reform Act 2013 (**ERRA13**) (in particular the establishment of the CMA), and to incorporate practical experience gained during the early operation of the new agency. We note that the CMA intends to keep the suite of adopted and new guidance documents under review, in light of its developing practice and case experience (paragraph 2.6 of the Consultation Document).
- 4.2 As we mentioned in our response to *CMA3con: Market Studies and Market Investigations: Supplemental guidance on the CMA's approach*, post 1 April 2014 the patchwork of guidance on the markets regime will be rather confusing, with four separate but complementary and overlapping documents (OFT511, OFT519, CC3 and CMA3con (once finalised)) setting out the CMA's approach. We therefore consider that the CMA should aim to consolidate the guidance on this topic as soon as it can after that date.
- 4.3 We note from *CMA8con: Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998* that the Transition Team is proposing to extend the short-form opinion process to include prospective vertical agreements. If this extension takes place, *Short-form opinions – the OFT's approach* (April 2010) will be an obvious candidate for an update.
- 4.4 *OFT404: Powers of investigation* is another candidate document for updating as a result of the ERRA13 giving the CMA the power to interview individuals and replacing the current criminal sanctions for failing to comply with investigations with civil financial sanctions.
- 4.5 Annexe B states that *OFT515: Powers for investigating criminal cartels* will be replaced or will become obsolete. *CMA9con: Cartel Offence Prosecution Guidance* states that this document is out of date and that the CMA will consider whether to issue new guidance (a point which should be reflected in Annexe B). Given the changes to the criminal cartel offence as a result of the ERRA13, and the more general increase in the number of criminal cartel investigations (i) recently opened by the OFT and (ii) expected to be initiated by the CMA post 1 April 2014, we believe it is important

that guidance on the CMA's powers and approach to investigating such cases is available. We would be grateful for an update on this workstream when appropriate.

- 4.6 Finally, CMA9con also makes reference to separate workstreams on new memoranda of understanding to replace *OFT546: Memorandum of understanding between the OFT and the NCD, Crown Office, Scotland*, and *OFT547: Memorandum of understanding between the OFT and the Director of the SFO*. Annexe B should also make reference to these.