# RESPONSE TO THE CONSULTATION ON THE DRAFT GUIDANCE FOR THE COMPETITION AND MARKETS AUTHORITY: PART 1

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Simmons & Simmons

# COMMENTS ON THE DRAFT GUIDANCE FOR THE COMPETITION AND MARKETS AUTHORITY: PART 1

The Simmons & Simmons LLP EU, Competition & Regulatory Group welcomes the opportunity to comment on the draft guidance for the Competition and Markets Authority (**CMA**): part 1 (**Draft Guidance**).

As this response does not contain any information that is confidential to Simmons & Simmons LLP or our clients, we confirm that we are happy for it to be published on the CMA's website.

## 1. General comments

As a general remark, although we welcome many of the suggestions proposed by the CMA in the Draft Guidance, we recognise that their implications will not become fully apparent until they have been tried and tested by the CMA in practice. However, the CMA's decision to build on existing OFT and CC guidance is a sensible one – this guidance should at least serve as a stable foundation upon which to build up this practice. Where the CMA exercises its new powers, it is key that it does so with a firm eye on proportionality – for example, in relation to requests for information, so that the timescales it imposes are realistic and reasonable, and when it imposes penalties on parties for failure to comply with their obligations.

### 1.1 Mergers

We welcome the Government's decision to retain a voluntary merger control regime and recognise that, in order to enforce that regime, effective remedies are required. We also welcome the increased certainty for businesses brought about by the introduction of statutory time limits for the CMA's phase 1 and phase 2 review processes (as well as for the parties to offer UILs at the end of phase 1), but are concerned about the potential length that the overall phase 1 review period could reach.

We also have some reservations about the extent of information that is required to be provided in the draft Merger Notice in order for a notification to be deemed complete, particularly given that it goes far beyond the information required under the existing Statutory Merger Notice or that is listed in the OFT's *Jurisdictional and Procedural Guidance* (OFT527) as necessary for the purposes of compiling an informal submission.

We welcome the proposal to harmonise for all merger cases the point of time at which the merger fee is payable. This will not only be necessary in order to streamline the process under the new "single track" notification procedure but also has the added advantage of avoiding a situation where a merger fee becomes repayable in the event that the CMA subsequently considers that the transaction would not result in a relevant merger situation.

We agree that the ability to approach the CMA at an early stage of the process by engaging with the parties during pre-notification merger discussions will be particularly important in light of the introduction of the 40 working day statutory time limit for phase 1. However, we are concerned about the potential length of pre-notification discussions under the new regime which could have a serious impact on the transaction timetable.

We very much welcome the decision to retain a voluntary notification regime in the UK, but are concerned that, regrettably, the very low threshold and "one size fits all" approach towards interim measures that is proposed goes some way to undermining the benefits of retaining a voluntary regime.

We see no compelling reason why the decision maker should not attend the issues meeting and have an opportunity to engage with the parties and assess the evidence first hand before weighing the CRM recommendation against his or her own assessment of the evidence in the SLC meeting following the CRM. We believe that a separate CRM (not attended by the decision maker) in combination with the decision maker's direct access to the evidence should provide both sufficient safeguards and a better basis for a robust decision.

### 1.2 Market Studies and Market Investigations

We welcome the decision to bring the public interest markets regime in line with the public interest mergers regime. We also welcome the decision to remove duplication from and streamline the markets regime (albeit retaining the complementary procedures of a phase 1 market study and a phase 2 market investigation) and to introduce new statutory time limits. We also recognise that the CMA's statutory powers to gather information and to impose interim measures need to be increased in order to ensure that the CMA is able to meet its new statutory obligations. However, we consider that the CMA will have to use its wide-ranging powers carefully given the significant time and cost involved for the parties concerned, as well as their potential exposure to far-reaching remedies. This is likely to be of particular concern in the case of cross-market references given their potential breadth in scope.

### 1.3 Administrative Penalties

We generally agree with the roles and objectives to be taken into account when considering the CMA's approach to administrative penalties. However, we consider that it may be appropriate to include restitution in the list of objectives in order to deal with a situation where P has derived, or might reasonably be expected to derive, an advantage from its failure to comply with its obligations.

As regards the approach to assessing the turnover of enterprises owned or controlled by P, we agree with the approach of adopting the jurisdictional test of *de jure* and *de facto* control. In particular, this test is already familiar to merging parties and benefits from being well-tried and tested. However, we agree that it should not be necessary for the CMA to undertake a material influence analysis in all cases in order to identify the 5% upper limit for the penalty. Where the turnover figures deriving from *de jure* and *de facto* control provide a basis for imposing a suitably deterrent level of penalty on the defaulting party or parties, we believe the material influence assessment to be unwarranted. Indeed, we have reservations overall about the analysis of material influence, given that this would necessitate a detailed and, in all likelihood, burdensome assessment. The analysis is not only likely to prove complex in practice, but is also at odds with the goal of using penalties to incentivise swift compliance.

Although, overall, we find the draft Statement of Policy on the CMA's approach to administrative penalties to be sufficiently clear in order to assist parties in understanding how the CMA will set administrative penalties for failure to comply with the relevant investigatory requirements, much of the statement is necessarily hypothetical and it remains to be seen how this area will evolve in practice. In particular, in order to avoid unwanted litigation, the CMA will need to ensure that it has due regard to principles of proportionality and equal treatment.

### 1.4 Transparency and disclosure

We welcome the CMA's general statement on how it will engage with parties and other interested persons at each stage in its cases, as well as the circumstances in which the CMA may disclose information to other UK public authorities and overseas authorities. However, we would be grateful for some further clarification on various aspects of this process, for example, what the CMA would deem to constitute "sufficient and fair" notice before making public announcements and what the CMA considers to be a "reasonable deadline" for information requests.

## 2. Specific comments

### 2.1 Mergers: Guidance on the CMA's jurisdiction and procedure, July 2013 (CMA2con)

***Q.1 Do you agree with the list in Annexe D of the Draft Guidance of existing merger control-related OFT and CC guidance documents and publications proposed to be put to the CMA Board for adoption?***

Yes. In particular, we welcome the CMA's decision to build on the OFT and CC's current procedural practice by adopting the existing (and recently published) text of these bodies' jurisdictional and procedural guidance documents. Moreover, we recognise that, in order to reduce procedural uncertainty at this time of change, it is important to ensure that the new procedural guidance is consolidated into a single document. We also welcome the CMA's proposal not to issue new guidance on the substantive assessment of mergers.

***Q.2 What, if any, further guidance do you think that the CMA should produce in the future in relation to its operation of the UK merger regime?***

We do not currently consider that the CMA should produce any further guidance in relation to its operation of the UK merger regime. However, going forward, it will be important for the CMA to update its existing guidance in order to reflect the experience that it has gained under the new regime.

***Q.3 Is the draft Remedies Form clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested from parties in that form?***

The draft Remedies Form is clear and comprehensible. We do not have any comments regarding the categories, or scope, of information requested from parties in that form.

***Q.4 Do you consider the guidance on the circumstances in which the CMA may extend the period for acceptance of UILs to be clear and understandable?***

We consider the circumstances in which the CMA may extend the period for acceptance of UILs, as set out under paragraphs 8.23 and 8.24 to be clear and understandable.

***Q.5 Do you have any further comments on the explanation in the Draft Guidance of the time limits and processes described above?***

While we welcome the increased certainty for businesses brought about by the introduction of statutory time limits for the CMA's phase 1 and phase 2 review processes, as well as for the parties to offer UILs at the end of phase 1, we are concerned about how long the overall phase 1 review period could take, potentially making it one of the longest phase 1 review periods of any merger regime globally. By way of comparison, the European Commission has 35 working days to review a merger (including proposed remedies) and to reach a phase 1 decision. The CMA, on the other hand, could potentially have up to 90 working days, extendable by a further 40 working days (i.e. up to 130 working days) to complete its phase 1 investigation: 40 working days (extendable in some circumstances) for Phase 1; and 50 working days (extendable by 40 working days for special reasons) from notifying the parties that its duty to refer applies in which to decide whether to formally accept the proposed UILs. Given the potential overall length of the review period (up to 130 working days for phase 1 and up to 24 weeks, extendable by 8 weeks, for phase 2), the benefits of the proposed streamlined process appear less obvious.

***Q.6 Is the draft Merger Notice at Annexe E clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested in that Notice?***

While the information requested in the draft Merger Notice is clearly set out, we have some reservations about the extent of information that is required to be provided in order for a notification to be deemed complete, particularly given that it goes far beyond the information required under the existing Statutory Merger Notice or that listed in the OFT's *Jurisdictional and Procedural Guidance* (OFT527) as necessary for the purposes of compiling an informal submission. In particular, we have concerns in two areas:

- **Supporting documents** are no longer limited to those prepared "by or for any member(s) of the board of directors, or the supervisory board, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting" and now extend to documents prepared "by or for personnel working on the transaction [or] by or for senior management and/or member(s) of the Board". Not only is the request extended to a larger category of authors but it will also extend beyond documents prepared for the purposes of assessing or analysing the transaction to capture "marketing and advertising strategy documents" which relate to the relevant markets. In our view, the classes of documents potentially covered by these requests could be very wide and this will place a significant and unnecessary burden on the parties to the transaction (in terms of both time, internal resource and cost) which would be unlikely to be justified by the CMA.

- **The impact of the form on the statutory timetable.** The breadth of prescribed information in the form combined with the requirement for the CMA to confirm receipt of a "complete Merger Notice" now means that the CMA will effectively control when the clock starts. Our experience of certain other jurisdictions where this is the case suggests that this form of control lends itself to misuse. We are particularly concerned that the CMA should not wield this power as a means of delaying the start of the statutory proceeding, adding time and uncertainty to the transaction timetable by refusing to confirm receipt of a "complete Merger Notice" for minor omissions.

***Q.7 Do you agree with the proposed harmonisation for all merger cases of the point of time at which the merger fee is payable?***

We welcome the proposal to harmonise for all merger cases the point at which the merger fee is payable. This will not only be necessary in order to streamline the process under the new "single track" notification procedure but also has the added advantage of avoiding a situation where a merger fee becomes repayable where the CMA subsequently considers that the transaction would not result in a relevant merger situation (as is currently the case under the Statutory Merger procedure).

However, the timing of the payment aside, in our experience, the level of merger fees currently imposed is an active deterrent for clients against filing, and will continue to be so. We would urge the CMA to revisit the issue.

***Q.8 Do you have any further comments on the explanation in the Draft Guidance of the updated process for notifying mergers?***

We welcome the CMA's stated aim to engage in early dialogue with the parties during pre-notification discussions (at 6.41 of the Draft Guidance). We agree that the ability to approach the CMA at an early stage of the process will be particularly important in light of the introduction of the 40 working day statutory time limit for phase 1 review during which the CMA is generally not able to 'stop the clock' to allow time for further consideration of complex issues or significant volumes of new information. However, we are concerned about the potential length of pre-notification discussions under the new regime which could have a serious impact on the transaction timetable. We consider that the OFT's approach in pre-negotiation discussions to date has been both efficient and effective. We would not welcome any material change to this.

In respect of the new power granted to the CMA to address interim orders to the parties to an anticipated merger to prevent integration, and understand this to mean that the imposition of an interim order – and by extension, any undertakings agreed in place of an order – will not prevent the parties from completing the transaction. We would however, welcome explicit confirmation of this in the Draft Guidance.

We note from 7.52-7.56 of the Draft Guidance that the Phase 1 decision maker is not to attend the issues meeting held prior to the Case Review Meeting and query why this should be the case. The merging parties will be aware of the identity of the decision maker (see 2.5 of the Draft Statement on the CMA's policy and approach to transparency and disclosure) yet the decision maker will have to consider the evidence provided during the issues meeting second hand, through the filter of those attending. We see no compelling reason why the decision maker should not attend the issues meeting and have an opportunity to engage with the parties and assess the evidence first hand before weighing the subsequent CRM recommendation against his or her own assessment of the evidence in the SLC meeting following the CRM. We believe that a separate CRM (not attended by the decision maker) in combination with the decision maker's direct access to the evidence should provide both sufficient safeguards and a better basis for a robust decision.

We are concerned by the proposition at 8.18 of the Draft Guidance that parties should only submit one UIL offer which they consider is capable of addressing the concern identified, rather than a range of alternative options. Under the current regime it is possible for parties to submit alternative remedy proposals and we do not see why that should be different here.

***Q.9 Do you have any comments on the draft template order, or on the guidance on the CMA's use of interim measures included in the Draft Guidance?***

We do not have any comments on the draft template order other than those made below.

We welcome the decision to maintain a voluntary regime in the UK and recognise that, in order to enforce that regime, effective remedies are required, such as a power to reverse pre-emptive action in both completed and anticipated mergers. We also welcome the CMA's stated position that an interim order at phase 1 preventing the parties to an anticipated merger from completing will not generally be imposed (at 7.32 of the Draft Guidance).

However, we are concerned about the stated "low" threshold to be applied by the CMA to consider whether it is appropriate to make an interim order at Phase 1 (at 7.35 of the Draft Guidance). While we agree that "[l]engthy consideration of these issues would divert CMA resources from the substantive assessment of the case", we consider that at least a reasonable degree of consideration should be given in order to determine whether an interim order is, in fact, appropriate. This is of particular importance given that the standard text of the interim order is necessarily broad in scope and can only be limited upon successfully obtaining a subsequent derogation from the CMA (at 7.40-7.41 of the Draft Guidance). This very general, "one size fits all" approach to interim measures, regrettably, goes some way to undermining the decision to continue with a voluntary notification regime.

***Q.10 Do you agree with the proposed transitional arrangements for merger cases ongoing as at 1 April 2014, as set out in Annexe E of the Draft Guidance?***

Yes. We agree with the proposed transitional arrangements for merger cases ongoing as at 1 April 2014.

2.2 **Market Studies and Market Investigations: Supplemental guidance on the CMA's approach, July 2013 (CMA3con)**

***Q.1 Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the CMA's conduct of market studies and market investigations? If not, what aspects do you think are missing?***

Yes. We consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the CMA's conduct of market studies and market investigations.

***Q.2 Do you consider that the Draft Guidance will facilitate your understanding of the markets regime when read in conjunction with the existing guidance documents?***

We welcome the CMA's decision to build on the OFT and CC's existing practice and guidance. Although the main body of the Draft Guidance is helpfully structured to reflect the key stages of a market study that results in UILs or in a market investigation, we consider that, in order to help reduce procedural uncertainty at this time of change, it would be useful to be able to refer to a single set of consolidated guidance documents and not have to cross-refer between the existing and new Draft Guidance.

***Q.3 Do you agree with the list in Annexe B of the Draft Guidance of existing markets-related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA?***

Yes. We agree with the list in Annex B of the Draft Guidance of existing markets-related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA.

***Q.4 Do you consider that the Draft Guidance is user friendly in terms of its content and language?***

We consider that the Draft Guidance is user friendly in terms of its language and also provides a good overview of the framework of the new market studies and market investigations regime. However, as noted in response to question 2 above, in order to avoid confusion, it would be helpful if the Draft Guidance expanded on the areas covered in the existing guidance documents, rather than only touching upon these areas in the footnotes.

***Q.5 Do you have any other comments on the Draft Guidance?***

We welcome the decision to bring the public interest markets regime in line with the public interest mergers regime. We also welcome the decision to remove duplication from and streamline the markets regime (albeit retaining the complementary procedures of a phase 1 market study and a phase 2 market investigation) and to introduce new statutory time limits. We also recognise that the CMA's statutory powers to gather information and to impose interim measures will need to be increased in order to ensure that the CMA is able to meet its new statutory obligations. However, we consider that the CMA will have to use its wide-ranging powers carefully given the significant time and cost and potential exposure to far-reaching remedies for the parties concerned. This is likely to be of particular concern in the case of cross-market references given their potential breadth in scope.

Paragraph 2.8 of the Draft Guidance states that a market study notice must contain information on the "scope of the market study". It would be helpful if the Draft Guidance could expand on the information that would need to be included under this heading.

Paragraph 2.15 of the Draft Guidance states that the CMA will use its statutory powers of investigation "where necessary" to ensure that information requests are answered completely and in a timely manner and "will adopt a flexible approach". Whilst we appreciate the CMA's decision to adopt a "flexible approach", it would be helpful to understand the circumstances in which the CMA will consider it necessary to use its statutory powers of investigation. This may be best achieved through the inclusion of some hypothetical examples of scenarios.

Paragraph 2.18 of the Draft Guidance sets out the two types of public interest reference that are available to the Secretary of State. Although it is useful to understand that the circumstances in which the Secretary of State will make full public interest references is extremely rare, it would be helpful to understand more fully what factors the Secretary of State will take into account when determining the most suitable type of public interest reference.

Paragraph 2.35 of the Draft Guidance provides an example of a "feature" of a market. In addition, it would be useful to include an example of a "combination of features".

## 2.3 Administrative Penalties: Statement of Policy on the CMA's approach, July 2013 (CMA4con)

***Q.1 Do you consider that there are any other roles or objectives that should be taken into account when considering the CMA's approach to administrative penalties? Please give reasons for your views.***

We generally agree with the roles and objectives to be taken into account when considering the CMA's approach to administrative penalties. However, we consider that it may be appropriate to include restitution in the list of objectives to deal with a situation where P has derived, or might reasonably be expected to derive, an advantage from its failure to comply with its obligations.

***Q.2 Do you agree that the level of detail in the Statement is appropriate? Please give reasons for your views.***

In general, we agree that the level of detail in the Statement is appropriate and recognise that it cannot be seen as a substitute for the EA02 and the regulations and orders made under the EA02. However, given that the Regulators are required to have regard to the Statement (footnote 11, at 1.6 of the Statement), in order to ensure legal certainty, it is important that it contain the main reasoning that will form the basis of the CMA's decision to impose an administrative penalty.

***Q.3 Do you agree with the approach in chapter 4 of the Statement to determining whether to impose a penalty, the level at which penalties should be set and the various factors to be taken into account? Please give reasons for your views.***

We welcome the CMA's approach to ensuring transparency by listing the factors that will be taken into account in deciding whether or not to impose a penalty, as well as in deciding the level of that penalty. We also find useful the practical examples listed in Annex A of the Statement and welcome the CMA's clarification of the circumstances in which it would be likely to consider that company P had a reasonable excuse for failing to comply.

***Q.4 Do you agree with the approach in the Statement to assessing the turnover of enterprises owned or controlled by P? In particular, do you have views on whether turnover based on material influence should be used in all cases? Please give reasons for your views.***

As regards the approach to assessing the turnover of enterprises owned or controlled by P, we agree with the approach of adopting the jurisdictional test of *de jure* and *de facto* control. In particular, this test is already familiar to merging parties and benefits from being well-tried and tested. We also agree that it should not be necessary for the CMA to undertake a material influence analysis in all cases in order to identify the 5% upper limit for the penalty. Where the turnover figures deriving from *de jure* and *de facto* control provide a basis for imposing a suitably deterrent level of penalty on the defaulting party or parties, we believe the material influence assessment to be unwarranted. Indeed, we have reservations overall about the analysis of material influence, given that this would necessitate a detailed and, in all likelihood, burdensome assessment. The analysis is not only likely to prove complex in practice, but is also at odds with the goal of using penalties to incentivise swift compliance.

***Q.5 Is the Statement sufficiently clear to assist you in understanding how the CMA will set administrative penalties for failure to comply with the relevant Investigatory Requirements? Please describe any areas which are not sufficiently clear, the reasons for this and recommendations you may have.***

Overall, we consider that the Statement provides a sufficiently clear overview in order to assist parties in understanding how the CMA will set administrative penalties for failure to comply with the relevant Investigatory Requirements. However, much of the Statement is necessarily hypothetical and it remains to be seen how this area will evolve in practice. In particular, in order to avoid unwanted litigation, the CMA will need to ensure that it has due regard to principles of proportionality and equal treatment.

## 2.4 Transparency and disclosure: statement of the CMA's policy and approach (CMA6con)

***Q.1 Do you consider that the Draft Statement sets out a clear statement of the CMA's commitment to transparency and the reasons why this is important?***

We welcome the CMA's decision to consolidate and regularise the practices of the OFT and CC in the form of a single general statement of the CMA's policy and approach to transparency and consider that the Draft Statement does set out a clear statement of the CMA's commitment to achieve this goal and the reasons why this is important (in particular, the need to achieve due process, to ensure that parties are treated fairly and to enhance visibility). However, in our view, in order to avoid confusion and unnecessary duplication, it would be helpful if the more detailed guidance contained in the various existing OFT and CC guidance documents were consolidated into a single document to be read alongside the Draft Statement.

***Q.2 Do you consider that the Draft Statement contains the right level of detail in explaining how the CMA will engage with parties and other interested persons at each stage of its cases, and the CMA's approach to handling information (including in particular confidential information)?***

In general, we consider that the Draft Statement contains the right level of detail in explaining how the CMA will engage with parties and other interested persons at each stage of its cases. However, it would be useful if the CMA could provide additional information in a few areas.

The CMA states that, in relation to market studies, undertakings in the relevant sector will not always be informed individually of the CMA's decision before the case opening announcement is placed on the CMA website (at 3.6 of the Draft Statement). Although we understand that use of the website might be the only means of communicating with the possibly large number of parties directly involved, to the extent that such parties can be identified and the CMA deems it appropriate, we consider that it would be helpful for the CMA to at least inform those parties individually of its decision to open a case.

As regards the giving of notices of announcements, the CMA states that, in the majority of cases, it will give the parties directly involved "such advance notice as it considers fair and sufficient before making any public announcements, either during or at the end of the case" (at 3.18 of the Draft Statement). It would be useful to understand what the CMA would consider to be "fair and sufficient" notice, as well as the circumstances in which the CMA might decide not to provide such notice.

As regards the handling of information, we welcome the CMA's statement that, while formulating information requests, it will strive to avoid imposing unnecessary burdens (at 4.2 of the Draft Statement). We also welcome the CMA's statement that it will seek to set a reasonable deadline for all information requests (at 4.6 of the Draft Statement). However, it would be useful to have some further guidance on what the CMA considers will constitute a reasonable deadline, including the factors that the CMA will take into account in determining what it considers to be "reasonable".

***Q.3 Do you consider that the Draft Statement contains the right level of detail in explaining the circumstances in which the CMA may disclose information to other UK public authorities and overseas authorities?***

We consider that the Draft Statement contains the right level of detail in explaining the circumstances in which the CMA may disclose information to other UK public authorities and overseas authorities. However, in order to ensure clarity and to avoid confusion, it would be useful if the information contained in Annex C were incorporated into the body of the Draft Statement. We also consider that it would be useful if the CMA could elaborate on the circumstances in which a waiver might be used in order to obtain the necessary consents to the disclosure of information to an overseas authority (at 7.11 of the Draft Statement).

***Q.4 Do you consider that there are any aspects missing from the Draft Statement in respect of the CMA's approach to transparency and disclosure?***

Subject to our comments in response to questions 1 to 3 above, we do not consider that there are any particular aspects missing from the Draft Statement in respect of the CMA's approach to transparency and disclosure.

***Q.5 Do you consider that the Draft Statement is user friendly in terms of its content and language?***

Subject to our comments in response to questions 1 to 3 above, we consider that the Draft Statement is user friendly in terms of its content and language.

***Q.6 Do you have any other comments on the Draft Statement?***

We do have some concerns about points of conflict between the existing guidance and the Draft Statement. Annex B states that the adopted guidance will prevail over the Statement, but certain conflicts have a direct bearing on practical issues and such a blanket assertion may not be adequate. Examples include whether the parties are entitled to provide a non-confidential version of substantial submissions in addition to key submissions (as provided in the Statement) or only the latter (CC7), or the basis on which the CMA will permit time (including the length of time) for their provision (CC7). Where differences may have a significant impact on the parties, either the guidance should be amended before adoption or the Statement should provide a more nuanced indication of which document takes priority.

***Q.7 Do you agree with the list in Annex B of the Draft Statement of existing OFT and CC guidance documents related to transparency and disclosure proposed to be put to the CMA Board for adoption by the CMA?***

We agree with the list in Annex B of the Draft Statement of existing OFT and CC guidance documents related to transparency and disclosure proposed to be put to the CMA Board for adoption, subject to our comments in response to question 1 above, and with one exception. The OFT's October 2008 Prioritisation Principles (OFT 953) are omitted from the Annex B list of documents to be adopted. As paragraphs 3.3 and 3.17 of the Draft Statement indicate, these principles have a role to play where investigations are opened, and where they are closed on the basis of administrative priorities. We would therefore welcome confirmation that OFT 953 is up to date, in which case it should be added to the list in Annex B, or, if the priorities have changed, that it will be updated ahead of the new regime taking effect.

**Simmons & Simmons LLP**
**EU, Competition & Regulatory Group** **06 September 2013**