

Response to BIS CMA Transition Team

***CMA3con: Market Studies and Market Investigations:
Supplemental guidance on the CMA's approach***

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This response represents the views of law firm Allen & Overy LLP on the draft Competition and Markets Authority (CMA) guidance document *CMA3con: Market Studies and Market Investigations: Supplemental guidance on the CMA's approach* (the **Draft Guidance**). We have also responded separately to the following consultations:

- Competition Regime: Consultation on CMA priorities and draft secondary legislation
- CMA2con: Mergers: Guidance on the CMA's jurisdiction and procedure
- CMA4con: Administrative Penalties: Statement of Policy on the CMA's approach
- CMA6con: Transparency and disclosure: Statement of the CMA's policy and approach

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 Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the CMA's conduct of market studies and market investigations? If not, what aspects do you think are missing?**
 - 1.1 Yes, we consider that the Draft Guidance covers the main areas of changes to the markets regime that are introduced by the ERRA13. We set out our comments on particular aspects of the Draft Guidance in response to the questions that follow.
- 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 Do you consider that the Draft Guidance will facilitate your understanding of the markets regime when read in conjunction with the existing guidance documents?**
 - 2.1 Overall, the Draft Guidance helps us to understand the changes introduced to the markets regime. However, we can envisage some confusion in that post-April 2014 there will be four key guidance documents (OFT511,¹ OFT519,² CC3³ and the Draft Guidance (once finalised)) which cover the CMA's conduct of market studies and market investigations. This also makes the guidance much less user-friendly and awkward to apply. We understand that as the amendments to the markets regime are arguably more limited than in other areas (e.g. mergers) it perhaps makes sense at this stage for the Draft Guidance to "complement" rather than replace the existing OFT and CMA guidance documents. In the medium to long-term however, we consider that the clarity of the CMA guidance on market studies and market investigation would be facilitated greatly by the adoption of a consolidated guidance document covering all aspects of the markets regime.
 - 2.2 In the meantime, and in order to reduce the risk of confusion as much as possible, the CMA should ensure at the very least that there are clear warning notices on its website against each of OFT511, OFT519 and CC3 (on the assumption they are adopted by the CMA Board) that certain sections have been superseded or should be read in conjunction with the new CMA3. If the CMA were able to include notes to this effect in the body of the relevant OFT and CC guidance, this would be even more helpful. If not, then the table at Annexe A of the Draft Guidance which cross references the existing guidance with the new CMA3 should be made prominent on the CMA website.
- 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?**

¹ OFT511: *Market investigation references*

² OFT519: *Market Studies: Guidance on the OFT approach*

³ CC3: *Guidelines for market investigations: Their role, procedure, assessment and remedies*

- 3.1 Subject to our comments in response to question 2, we agree with the list set out in Annexe B except for one notable omission, *OFT953 OFT Prioritisation Principles*. What is the CMA’s plan for this document? Will it be adopted or is the CMA planning a replacement? We consider that it helpfully illustrates the factors that the OFT takes into account when deciding on projects and programmes of work to take forward, so improving transparency and certainty for business. It is also clearly followed by the OFT. The consultation on the draft ministerial statement of strategic priorities for the CMA (the **Draft Steer**)⁴ notes the CMA’s freedom to prioritise its own resources and annual plans of activity (paragraph 2.1). This ability should be crystallised in a published guidance document that goes beyond setting out and consulting on an annual plan for each coming year. The Draft Steer itself anticipates that the CMA will set prioritisation principles (paragraph 6).
- 3.2 We also note that this is a good opportunity for the CMA to replace or render obsolete certain guidance that has been in place since the current EA02 was adopted in 2004, such as *OFT528 Overview of the Enterprise Act* and *OFT530 Practical information – everything you need to know about the Enterprise Act*. We welcome the CMA’s steps in this regard.
- 3.3 It would be helpful for the CMA to publish a document similar to Annexe B but listing all OFT and 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. 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.
- 4. Do you consider that the Draft Guidance is user friendly in terms of its content and language?**
- 4.1 Yes. In terms of language, the Draft Guidance is clear and concise, and written in a plain-English style that makes it easy to read and understand. With regard to content, for the most part we consider the Draft Guidance to be user friendly when informing the reader about the changes to the markets regime introduced by the ERA13. However, we refer to our comments in response to question 2 – overall it would be more useful to have a single consolidated set of guidance which relates to market studies and market investigations as a whole.
- 4.2 Also see our response to question 5 below where we set out some specific areas where the Draft Guidance could be clarified.
- 5. Do you have any other comments on the Draft Guidance?**
- 5.1 There are a number of areas where we believe the Draft Guidance would benefit from greater clarity:
- (a) It would be helpful if the CMA gave some additional detail on how it expects to use its statutory investigation powers during a market study. At paragraph 2.15 we welcome the statement that the CMA will adopt a “flexible approach”, depending on the individual circumstances. But it would be useful to know if, as a general rule, the CMA will request information or documents initially on an informal basis, turning to its statutory powers in cases where responses appear incomplete or late (i.e. in line with the CC’s current approach in market investigation references).
 - (b) Sanctions for non-compliance with the CMA’s statutory investigation powers during a market study are set out at paragraph 2.13. The Draft Guidance describes non-compliance as “failures” (emphasis added) to attend interviews or meetings, to provide evidence or to produce documents. This implies that the CMA is likely to impose a financial penalty only in cases of repeat non-compliance. The CMA should clarify if this is indeed the case.

⁴ *Competition Regime: Consultation on CMA priorities and draft secondary legislation*

- (c) Paragraph 3.2 states that “a market investigation is one possible outcome of a market study”, and then sets out the test that must be satisfied for the CMA to make a market investigation reference. This could give the impression that a market investigation must always follow a market study which, as confirmed at footnote 12, is not the case. Under the new markets regime, it will still be possible for a market investigation reference to be made even where a formal market study has not taken place, provided the test for reference is met. We suggest that the text of footnote 12 is placed in the main text of the Draft Guidance, and that this point is reiterated in section 3.
- (d) The CMA sets out, at paragraph 4.7 of the Draft Guidance, the situations when it is most likely to extend the six-month period for implementation of remedies by up to a further four months. This paragraph could usefully be clarified by adding examples. For example, “complex practical issues” may be a reason for an extension – could a reference to a previous market investigation be included here by way of illustration?

- 5.2 The transitional arrangements for market studies and market investigations are sensible. In particular, we welcome the condition that the new investigatory powers will not apply to market studies that are ongoing as at 1 April 2014.
- 5.3 Post-April 2014 the CMA will start to build practical experience of applying the new and revised powers described in the Draft Guidance. We encourage the CMA, after an appropriate period (say, 12 months), to “take stock” of what it has learned and consider whether its guidance should be updated to reflect this experience, e.g. on particular issues relating to cross-market references, or on the time limit for implementing remedies. This work could be done as part of a consolidation of the existing guidance mentioned in response to question 2.