

COMPETITION AND MARKETS AUTHORITY (THE "CMA")

MARKET STUDIES AND MARKET INVESTIGATIONS: SUPPLEMENTAL GUIDANCE ON THE CMA'S APPROACH

1 INTRODUCTION AND EXECUTIVE SUMMARY

1.1 Berwin Leighton Paisner LLP ("**BLP**") welcomes the opportunity to comment on the CMA's consultation paper on its draft supplemental guidance on the CMA's approach to market studies and market investigations (the "**Draft Guidance**").

1.2 BLP has considerable experience of representing clients on the basis of the existing Office of Fair Trading and Competition Commission markets-related guidance and believes that the CMA's proposals for reform represent a useful contribution to improving the existing guidance. However, there are certain aspects in respect of which we believe the proposals may be improved.

1.3 These comments do not necessarily reflect the views of any of our clients.

2 **Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the CMA's conduct of market studies and market investigations?**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?

2.1 Yes - we consider that the Draft Guidance covers the main changes introduced by the ERRA13.

3 **Do you consider that the draft Guidance will facilitate your understanding of the markets regime when read in conjunction with the existing guidance documents?**

3.1 Yes - the Draft Guidance will facilitate our understanding of the markets regime when read in conjunction with the existing guidance documents. We have, however, indicated below areas where further clarity could be provided.

Market study notices

3.2 It would be helpful to understand whether there is a corresponding obligation on the CMA to publish a notice indicating that an investigation has been dropped or closed.

Investigatory powers for market studies

3.3 We support the introduction of information-gathering powers at the market study stage, provided that the information required is specific, proportionate and relevant, as this may place a significant burden on the companies involved.

Cross-market references

3.4 We consider that it is important that the CMA sets out the scope of any cross-market references at as early a stage as possible in order to provide clarity and certainty to the parties involved.

- 4 **Do you agree with the list in Annex B of the Draft Guidance of existing markets-related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA?**
- 4.1 Yes.
- 5 **Do you consider that the Draft Guidance is user friendly in terms of its content and language?**
- 5.1 Yes.
- 6 **Do you have any other comments on the Draft Guidance?**
- 6.1 Paragraph 1.12 of the Draft Guidance notes that the CMA's preparatory work does not fall within the scope of the statutory time limits: accordingly, it appears that any decision by the CMA not to launch a market study as a result of such preparatory work will also fall outside the formal process.
- 6.2 We support the CMA's efforts to avoid unnecessary duplication and facilitate an efficient process (noted in paragraph 1.21 of the Draft Guidance). It would be helpful to have more detailed guidance as to how the CMA will decide which and how many members of the market study case team will form part of the market investigation case team when a reference is made, and to what extent this decision will be informed by the size of, and any other factors related to, the market investigation.
- 6.3 We note the CMA's proposals (noted in paragraph 1.24 of the Draft Guidance) to form separate groups within the CMA Board to ensure that the decision to refer is taken by different Board members from those Board members who might be expected to participate in the market reference group in the market investigation. Such measures are to be welcomed insofar as they reduce the risk of confirmation bias.
- 6.4 Paragraph 2.3 of the Draft Guidance notes that OFT511 remains applicable after 1 April 2014: will the CMA replace or publish a revised version of OFT511?
- 6.5 Paragraph 2.3 of the Draft Guidance notes that CC3 remains applicable after 1 April 2014: will the CMA replace or publish a revised version of CC3?

Berwin Leighton Paisner LLP
6 September 2013