

**Remedies: Guidance on the CMA's approach to the variation and termination of merger,
monopoly and market undertakings and orders (CMA11con)**

Response of Herbert Smith Freehills LLP

INTRODUCTION

- 1.1 Herbert Smith Freehills LLP is grateful for the opportunity to respond to the consultation CMA11con *Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders* and the draft Competition and Markets Authority ("CMA") guidance it annexes ("**Draft Guidance**").
- 1.2 The comments contained in this response are those of Herbert Smith Freehills and do not represent the views of our individual clients.

COMMENTS ON THE DRAFT GUIDANCE

2. PARAGRAPH 3.3 DRAFT GUIDANCE

- 2.1 In relation to requests for the variation or termination of undertakings or orders by the party(ies), paragraph 3.3 sets out what the submissions making such requests should include.
- 2.2 We have experience of the OFT requiring, after provision of the initial submission, the parties to provide justifications as to why a review of the undertakings/order in question meets the OFT's prioritisation principles. If this is an issue on which the CMA will require submissions from the parties, then it would be helpful if this was made clear within the Draft Guidance, in order to ensure the process is as efficient as possible. This is particularly the case given the Draft Guidance indicates that the CMA may decide not to proceed with a review on prioritisation grounds.

3. PARAGRAPHS 3.6, 3.8, 3.14, 3.22, 3.25 AND 3.31 DRAFT GUIDANCE

- 3.1 Prior to issuing an invitation to comment (or placing a review opening announcement on its website), the CMA should inform the party(ies) of the proposed form and content of publication in order that any representations on confidentiality can be sought and taken into account.
- 3.2 Similarly, before putting back any working papers to other parties or interested persons, or publishing a provisional or final decision, confidentiality representations should be sought.
- 3.3 We believe that this process should be explicitly reflected within the Draft Guidance.



4. **PARAGRAPHS 3.7 AND 3.10-3.11 DRAFT GUIDANCE**

- 4.1 In relation to CMA own-initiative reviews, we believe that the CMA should at least actively consider of its own initiative whether to conduct a review when any recommended review date set out within the undertaking, order or report is imminent, even if the CMA ultimately decides not to carry out a review in light of its prioritisation principles and/or in light of a lack of evidence that there has been a change of circumstances .
- 4.2 In relation to a request for a review made by the parties, we believe that if the CMA decides not to proceed with a review, despite the submissions put forward by the parties, it should be open to the parties to refer such a decision to the Procedural Officer.

5. **PARAGRAPHS 3.19-3.23 DRAFT GUIDANCE**

- 5.1 In terms of the CMA's assessment, we have had experience of the OFT/CC "outsourcing" some of the information gathering and market review process to a third party consultancy firm.
- 5.2 If this is a step which the CMA may consider undertaking, then this should be made clear within the Draft Guidance, together with an indication of the process that would be followed, for example what exactly the role of the consultancy would be and how confidentiality would be dealt with.

6. **PARAGRAPH 3.40 DRAFT GUIDANCE**

- 6.1 In relation to time-expired, lapsed or superseded undertakings or orders, when these are removed from the register we consider that specific notice should be given to the undertakings concerned in addition to this being published.

Herbert Smith Freehills LLP

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