

Response to BIS CMA Transition Team

***CMA10con: Regulated Industries: Guidance on concurrent
application of competition law to regulated industries***

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ALLEN & OVERY

ALLEN & OVERY LLP

CMA10con: REGULATED INDUSTRIES: GUIDANCE ON CONCURRENT APPLICATION OF COMPETITION LAW TO REGULATED INDUSTRIES

This response represents the views of law firm Allen & Overy LLP on the draft Competition and Markets Authority (CMA) guidance document *CMA10con: Regulated Industries: Guidance on concurrent application of competition law to regulated industries* (the **Draft CMA Concurrency Guidance**). 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
- CMA11con: Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders
- CMA12con: Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission guidance
- 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 consider that the Transition Team's proposed approach to dealing with the revised requirement that Regulators' exercise competition powers in favour of sectoral powers is clear and appropriate? Please give reasons for your view.**
 - 1.1 Chapter 4 (Regulators' other powers and duties) of the Draft CMA Concurrency Guidance, and in particular paragraphs 4.2 to 4.7, covers the relationship between the Regulators' powers under the Competition Act 1998 (**CA98**) and their other functions and powers contained in sector specific legislation. The Transition Team has amended adequately and clearly this section to deal with the procedural detail of the revised requirement that Regulators' exercise competition powers in favour of sectoral powers. Paragraph 4.4, for example, clarifies that a Regulator must consider which potential investigation and enforcement route would be most appropriate not only when it commences an investigation but also throughout the course of an investigation.
2. **Do you consider that the Transition Team's proposed approach to allocation of cases between the CMA and Regulators, or between Regulators, is clear and appropriate? Please give reasons for your view.**
 - 2.1 Paragraphs 3.20 to 3.35 of the Draft CMA Concurrency Guidance cover case handling. We consider that the Transition Team has amended effectively and appropriately the text of the Office of Fair Trading's (**OFT**) *OFT405: Concurrent application to regulated industries* (**OFT Concurrency Guidance**) to reflect the changes to case allocation made by the Enterprise and Regulatory Reform Act 2013 (**ERRA13**).
 - 2.2 In particular, we note that the Transition Team has updated the factors considered in determining which of the CMA or Regulators is better or best placed to deal with a matter. We agree that the

Draft CMA Concurrency Guidance should be amended to reflect the fact that the CMA, as well as the Regulators, may have relevant sectoral knowledge. We agree that the CMA may be best placed to act on a case in order to develop United Kingdom competition policy or to provide greater deterrent and precedent effect. We also agree that a relevant additional factor should be whether the case allocation will provide the best combination of competition and sector-specific expertise.

- 2.3 We consider the new sections on the circumstances in which the CMA may exercise jurisdiction where a case has already been allocated to a Regulator and the consequences of allocation of a case to the CMA or a Regulator to be clear. We consider it appropriate that the CMA expects the circumstances in which it would take over a case to be rare (paragraph 3.27), and that the CMA's decision to exercise functions is not irreversible but that any transfer back is likely to be exceptional (paragraph 3.28).
- 2.4 However, the introductory section of the Government's "Consultation on draft secondary legislation – part two" (SI Consultation 2) contains, at chapter 3, additional information on the circumstances where the CMA may exercise the power to take a case. Examples provided are where the CMA can make a decision that sets the appropriate precedent, and where the regulator lacks the necessary resources or is unable to take a decision in a timely manner. We believe the CMA could include these points in the Draft CMA Concurrency Guidance.
- 2.5 With respect to the procedure for agreeing which authority will deal with a complaint or investigation, we note that the Draft CMA Concurrency Guidance increases the time in which agreement will generally be reached as to which authority is best placed to deal from one to two months (paragraph 3.23). We query the justification for this lengthening of the process, in particular given the OFT Concurrency Guidance (at paragraph 3.15) states that experience is that agreement is reached much sooner.
- 2.6 Paragraph 2.5 states (as per the Draft Concurrency Regulations) that there is a difference between "Part 1 functions" and prescribed functions. It includes a helpful list of the type of activity which constitutes prescribed functions. However, it would be useful if the Draft CMA Concurrency Guidance could also give, for completeness, some examples of Part 1 functions that are not prescribed functions.
- 2.7 Related to the previous point, paragraph 3.23 states that where agreement cannot be reached between the relevant authorities as to who is better placed to act on a case, the CMA will decide upon the allocation. In such a situation, the CMA may "decide in some circumstances that it is to exercise Part 1 functions in relation to that case during the initial case allocation process". However, paragraph 3.29 states that "[n]either the CMA nor the Regulators may exercise any of the prescribed functions in relation to a case where it appears they may have concurrent jurisdiction" until the case has been allocated. We consider that paragraph 3.23 should be caveated to state that the CMA cannot carry out prescribed functions during the initial case allocation process. Clarity around these issues would also be improved if the Draft CMA Concurrency Guidance could set out more clearly which functions are "Part 1 functions" as opposed to "prescribed functions", as suggested above.
- 2.8 Footnote 23 of the Consultation Document and paragraph 3.16 of the Draft CMA Concurrency Guidance notes that the United Kingdom Competition Network (UKCN) Strategy Document, which will be annexed to the final version of the Draft CMA Concurrency Guidance, is currently being drafted. We would welcome an opportunity to review and comment on a draft of the UKCN Strategy Document prior to finalisation.

3. **Do you consider that the Transition Team’s proposed approach to secondments and cooperative working between the CMA and Regulators is clear and appropriate? Please give reasons for your view.**
- 3.1 In relation to the new section on cooperative working between the CMA and the Regulators (paragraphs 3.32 to 3.35), we note that the Regulator may request the use of the CMA’s Procedural Officer to determine any dispute or complaint. Will complainants also be given the opportunity to request access to the Procedural Officer’s decision-making function? We consider that the Draft CMA Concurrency Guidance should provide for such a scenario.
- 3.2 We would be grateful for an update on the progress of agreeing individual Memoranda of Understanding between the CMA and each of the Regulators as and when appropriate. When does the CMA expect to publish the final versions? These are likely to add further detail to the framework for cooperation and coordination between the CMA and each Regulator and so will be highly relevant to those involved in appropriate cases from the start of the new regime.
4. **Do you consider that the Transition Team’s proposed approach to information sharing between the CMA and Regulators, or between Regulators, is clear and appropriate? Please give reasons for your view.**
- 4.1 The new sections of the Draft CMA Concurrency Guidance on information sharing (paragraphs 3.40 to 3.53) are clear and comprehensive.
5. **Do you consider that the CMA and the Regulators should share additional categories of information, or share information of the type outlined in the Draft CMA Concurrency Guidance at different times? Please give reasons for your view.**
- 5.1 Paragraph 3.49 notes that the CMA and the Regulators may share additional information at any appropriate stage during an investigation, and lists examples of such information. Provision for information sharing is broad. However, we note that Part 9 of the Enterprise Act 2002 governs any such information exchange (as detailed at chapter 5 of the Draft CMA Concurrency Guidance), and that the exchange is subject to procedural safeguards (paragraph 3.53).
6. **Do you consider that the Transition Team’s proposed approach to the annual concurrency report is clear and appropriate? Please give reasons for your view.**
- 6.1 We consider the new section of the Draft CMA Concurrency Guidance on the annual concurrency report (paragraphs 3.54 to 3.61) to be clear and appropriate.
7. **Do you consider that the annual concurrency report should contain categories of information that is not envisaged in the Draft CMA Concurrency Guidance? Please give reasons for your view.**
- 7.1 We consider the lists of information at paragraphs 3.57 and 3.59 to be comprehensive.
8. **Do you agree with the Transition Team’s proposed approach to transitional arrangement to account for the changes to competition concurrency introduced by Chapter 5 of Pat 4 of the ERRA13? Please give reasons for your view.**
- 8.1 The transitional arrangements are sensible.