

SSE response to CMA consultation on “Updated guidance on the CMA’s approach to market investigations” (CMA61con)

1. Introduction

1.1 This paper provides the response of SSE plc (*SSE*) to the consultation on “*Updated guidance on the CMA’s approach to market investigations*” (*CMA61con*) of Competition and Markets Authority (*CMA*) issued on 6th March 2017.

1.2 As a result of concerns over the timescales and costs associated with CMA Investigations, there are proposals designed to streamline the Market Investigation (*MI*) process and to strengthen synergies with Market Studies (*MS*). There are also proposals designed to clarify the relationship between the CMA Board and the Group.

1.3 Following the extended timetable required by the Energy Market Investigation (*EMI*) which published its Final Report on 24th June 2016, SSE shares concerns over the timescales and costs of the MI process. However, we do not believe that the proposals for streamlining the process set out in the consultation paper represent an appropriate solution. In particular, the proposal to consider remedies in advance of establishing robust evidence of an Adverse Effect of Competition (*AEC*) would risk prejudicing the findings of future investigations and lead to poor regulatory outcomes to the detriment of customers and competition.

1.4 We believe the focus of reform of the process should be in the following areas:

- Establishing a realistic scope and timescale for each investigation.
- Ensuring a more targeted approach to collection of salient data.
- Taking a more realistic approach to risk and uncertainty.

1.5 We elaborate on these points in our answers to the questions raised in the consultation which are set out in the rest of our response.

2. SSE Responses to CMA Questions for consideration

Question 1. Do you agree with the proposed changes to MIs set out under proposal (A) (streamlining the MI process)?

- 2.1 We believe that the early tabling of remedies could prejudice the findings of investigations. As a case in point, the EMI surprised many external commentators because perceived “problems” with the market identified within the first few months¹ were found to be misplaced following further examination. An example of this was the case for the liquidity and transparency of wholesale markets. In addition, the original “Theories of Harm” regarding vertical integration, potential market power in generation, “over-compensation” of generators and tacit coordination between domestic suppliers were dismissed once they were tested against the evidence².
- 2.2 Had there been a set of remedies under development to tackle these perceived problems, it would have been very difficult to then persuade stakeholders that they were not required after all. Design of remedies in advance of robust evidence is likely to lead to further badly targeted regulation. The health care investigation in 2013, where initial proposals for price controls were ultimately dropped, shows that unintended consequences are an important feature of the judgement on remedies.
- 2.3 We would draw a distinction between advance design of remedies (which risks prejudicing the findings from an investigation) and the compiling of customer survey data to test customer attitudes to alternative policy interventions. This we would view as sensible collection of behavioural evidence if conducted properly.
- 2.4 Reducing the number of formal consultations and set piece publications could be helpful but only if the ambition of CMA on sensitive analytical matters is adjusted accordingly (particularly with regard to the treatment of risk and uncertainty). For instance, the EMI publications on profitability changed dramatically over the course of the inquiry as successive tranches of flawed analysis were exposed in the consultation process.
- 2.5 We agree that earlier, more flexible interactions with parties, in particular earlier hearings with parties, consulting on the approach to analysis and

¹ “Energy market investigation issues statement” (24 July 2014), https://assets.publishing.service.gov.uk/media/53d0a169e5274a642e000003/Energy_Issues_Statement.pdf

² “Energy market investigation provisional findings report” (7 July 2015), https://assets.publishing.service.gov.uk/media/559aacbee5274a1559000017/EMI_Notice_of_PFs.pdf

sequentially sharing or publishing analysis would be a progressive development.

Question 2. Do you agree with the proposed changes set out under proposal (B) (strengthening synergies between market studies and market investigations, and clarifying the relationship between the Board and the Group in relation to the scope of MIs)?

2.6 We believe considering remedies at the MS stage would be premature for same reasons set out in our response to 2.1 (ref 4.1 in the CMA consultation).

2.7 Undertaking preparatory work for the MI during the latter stages of MSs could be a sensible efficiency gain particularly if it is focussed towards establishing a fundamental factual base covering market definitions, key milestones in the history of the market, data definitions and sources etc. Hopefully this would not then require replication at the MI stage.

2.8 Introducing the potential for the CMA Board to issue an advisory steer on the scope of an MI (in cases where the CMA has undertaken the MS) would be a sensible development. We would urge that this includes an assessment of the potential workload that may be required in relation to different facets of an investigation. Our view is that the combination of a very wide scope and the pressure for a compressed timescale led to an unrealistic timetable for the EMI from the outset. This led to the CMA being unable to meet its own milestones and deadlines through the course of the investigation. Ultimately, it culminated in the announcement of an extension to the timetable at a late stage of the original timetable.

2.9 Part of the reason given for the extension was the need to explore in more depth the issue of Prepayment tariffs. This has been controversial in the retail market for decades so it certainly indicates a flaw in the overall programme that it was not recognised as a priority area for analysis at an earlier stage.

Question 3. What do you consider to be the potential benefits arising from the changes? Are there any possible risks arising from the proposals, and how could these be mitigated?

2.10 We recognise the desire to operate with greater speed and at lower cost than under the current regime which feels procedurally cumbersome and is certainly very expensive. A review of how to streamline the practices for greater efficiency is wholly appropriate. Unfortunately, we believe the current proposal is not the right approach and is likely to undermine the quality of findings from CMA investigations as well as having unintended consequences for customers and competition.

2.11 In our view, the areas where improvements in cost effectiveness should be focussed are as follows:

- Getting a realistic scope for the investigation. For instance, in the case of the EMI there was a need to either narrow the scope or extend the timeframe from the outset.
- Ensuring a more targeted approach to collection of salient data. For instance, it was not necessary to collect the vast amount of customer and pricing data used in the EMI “gains from switching” exercise to establish that customers who regularly switch supplier to the cheapest deal in the market will realise significant savings. This would have been easily established early on and at negligible cost. In contrast, the more pertinent issue of comparability with other markets in terms of switching rates, discounts and drivers of customer preferences was poorly evidenced.
- CMA investigations would benefit from a more realistic approach to risk and uncertainty. This problem dogged the EMI work on profitability and customer detriment where the approach shifted significantly from one stage of the investigation to another. For instance, the major flaw in the CMA approach to measuring the efficiency of energy purchases at the Provisional Finding (*PF*) stage (July 2015) which relied on a company “picking the winner” (established ex-post) was eventually dropped by the Provisional Decision on Remedies (*PDR*) stage (March 2016).

Question 4. Is the updated text of the guidance sufficiently clear and does it adequately reflect the proposed changes? If there are particular aspects of the amended text where you feel greater clarity is necessary, please be specific about the aspects concerned and the changes you would propose to improve them.

2.12 We believe we have understood the intention of the proposed changes. Our concerns are with the content of the proposal as currently framed for the reasons detailed in this response.

Question 5. Do you have any other comments about the proposed changes and the resulting amendments to the guidance?

2.13 We would strongly urge that these proposals are put to one side and that there is a more extensive debate on how the efficiency of the investigation process could be genuinely improved by: (a) greater attention to scope and realistic timescales; (b) a more parsimonious and targeted approach to evidence and data; and (c) better treatment of risk and uncertainty.

3. Concluding comments

3.1 SSE shares the CMA's concerns over the timescales and costs of the MI process. However, we do not believe that the proposals for streamlining the process represent a satisfactory solution for any of the parties impacted. In particular, the proposal to consider remedies in advance of establishing robust evidence of an Adverse Effect of Competition (AEC) is likely to lead to prejudice the findings of investigations and lead to poor regulatory outcomes with unintended consequences for customers and competition.

3.2 We believe the focus for improving the process should be in the following areas:

- Establishing a realistic scope and timescale for each investigation.
- Ensuring a more targeted approach to collection of salient data. This could include survey data to test customer responses to alternative interventions.
- Taking a more realistic approach to risk and uncertainty.