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CMA'S CONSULTATION ON UPDATED GUIDANCE ON MARKET INVESTIGATIONS

RESPONSE OF ASHURST LLP

Introduction

Ashurst LLP welcomes the opportunity to respond to the consultation by the Competition and Markets Authority ("**CMA**") on its "*Updated guidance on the CMA's approach to market investigations*" (6 March 2017) ("**the updated guidance**"). This response contains our own views, based on our experience of advising and representing clients involved in market studies ("**MSs**") and market investigation references ("**MIs**"), and is not made on behalf of any of our clients.

Please note that parts of this response, indicated by highlighted text, are confidential and must not be published. We have separately provided a non-confidential version. We confirm also that we would be happy to be contacted by the CMA in relation to our responses.

1. **Do you agree with the proposed changes to MIs set out under proposal (A) (streamlining the MI process)? If not please explain why and whether there are any alternative changes that would achieve the stated aims set out in paragraphs 1.10 and 1.11?**

Introductory comments

1.1 There are many examples of markets where remedies adopted as part of an MI have fundamentally altered the conditions of competition. In some cases, remedies have included major divestments (for example, concentrated markets were broken up through divestments in **Supply of airport services by BAA** (2009) and a divestment package to create a new competitor was designed in **Aggregates, cement and ready-mix concrete** (2016) (although not implemented, following new entry through an EUMR-driven divestment). In other cases, fundamentally different supply structures have been created (such as the introduction of open banking following **Retail Banking** (2017)). Parties can be forced to divest valuable assets and have to restructure their businesses notwithstanding that they were not previously acting in any way unlawfully. Moreover, the right to appeal against MI outcome decisions is limited to judicial review and not a full merits appeal. There is a clear tension in MIs between the public interest in free and effective competition in markets and the private interests of the businesses concerned, with the public interest clearly taking priority.

1.2 As consequence, MIs must be conducted:

(a) to the highest standards of fairness (including proportionality) and transparency. The parties must be fully informed of the CMA's developing thinking and provisional conclusions and have full opportunity during the investigation both to present their case and rebut contrary arguments and evidence, as well as access to the decision-makers; and

(b) with a disciplined respect for the statutory requirement of separation of decision-making between the Phase 1 MS and the Phase 2 MI. Notwithstanding the proposals in the BIS consultation paper "*Options to refine the UK competition*

regime" (May 2016) to change the formation of the MI Group to include CMA personnel alongside Panel members, it remains the case that the MI decision-makers are entirely separate from and independent of the MS decision-maker. We wholly endorse the defining characteristic of the "fresh pair of eyes", which generates rigour and high quality in the MI regime.

Our response to this consultation is heavily driven by these two considerations.

Earlier consideration of remedies

1.3 The ultimate objective in designing remedies is that they are effective and comprehensive whilst also being proportionate. Whilst the proportionality of a remedy to the adverse effect on competition ("**AEC**") is not expressly referred to in the Enterprise Act 2002, it is well established (and accepted in the CMA's adopted guidance on MIs) that it is required:

> "*In light of the relevance of the Convention right in [Article 1 of Protocol 1] in this context, section 3(1) of the [Human Rights Act 1998] requires that sections 134 and 138 [of the Enterprise Act 2002] should be read and given effect in a way compatible with that Convention right, which means that any such remedies must satisfy proportionality principles*", **BAA v Competition Commission** [2012] CAT 3 at paragraph 20(2).

1.4 The statutory scheme of the MI regime is very clear: the remedy follows the AEC. The CMA's duty under section 138 to remedy AECs only engages if and when the CMA has published a report which includes a finding of one or more AECs. This clear statutory framework means that the CMA is constrained in its ability to structure the procedure for an MI as it wishes and cannot necessarily adopt "*the general approach taken by other parts of government or regulators when considering potential interventions or changes in policy*" (paragraph 2.5 of the updated guidance) of considering potential problems and possible remedy options at the same time. The legislation provides for a sequential approach.

1.5 We note that a sequential approach has been introduced into the Enterprise Act 2002 merger control regime since 2014. Parties are no longer required to consider hypothetical remedies before they know what the competition concerns are (or even whether any have finally been identified). These changes are considered to have created a fairer approach which is more focused and proportionate as regards both the procedure and the resulting remedies. For example, we consider it very unlikely that the hypothetical remedies approach would have generated the innovative toll manufacturing remedy accepted in **Müller/Dairy Crest** (2015) which was very closely matched to the detail of the CMA's adverse findings. Previously, the process of asking parties to propose remedies to potentially non-existent (and to some degree unknown) problems resulted in wasted time and costs for all concerned (for example, parties would commonly offer progressively wider remedies in a series of letters with each to be opened only if the previous offer was rejected). We would not support a retrograde change to the MI regime of requiring the parties to discuss hypothetical remedies before the AECs have been established and their scope understood.

1.6 A further lesson from the pre-2014 merger remedies regime is that parties which are still fully engaged in defending against an adverse finding are often not prepared to engage in discussions about remedies to a problem which they do not accept exists. In such a situation, the only fair way to oblige the parties to have early discussions about remedies would be to adopt a "without prejudice" approach, as used in the litigation sphere. Crucially, the discussions about the substantive issues and about remedies must be kept completely separate. The risk of bias and pre-judgment of the AEC issues can *only* be eliminated by ensuring that any such remedies discussions are kept confidential from the decision-makers (just as a judge has no knowledge of the parties' without prejudice settlement discussions). Potentially a different case team could conduct the remedies

discussions. However, it is far from clear that such an approach would be manageable, cost effective or efficient in practice, given the need for the remedies to be closely tailored and proportionate to the AECs. MIs are an investigative process, not an adversarial process.

1.7 However, that said, we acknowledge that in some MIs some aspects of the eventual AECs may emerge fairly clearly at an early stage. In such cases, if (but only if) the parties are willing to do so, it might be appropriate to start the consideration of remedies at an earlier point in the investigation. ***[Text deleted – confidential example provided]***

1.8 We would therefore support a degree of flexibility from the CMA as regards the consideration of remedies. This should not be imposed at the outset and in the abstract but be driven by the progress of the investigation. The approach to remedies should reflect how quickly and clearly any AEC finding is developing, how contentious any such finding is, and the willingness of the parties to discuss remedies ahead of the AECs being definitively stated by the MI decision-makers. Above all, any acceleration of the remedies discussion:

- must not undermine the clear statutory framework that the remedies follow the AECs; and
- must not risk generating confirmation bias such that the AEC findings are skewed by the early discussion of remedies.

Reducing the number of formal consultations

1.9 We are fully supportive in principle of a reduction in the number of formal consultations.

1.10 We accept that it is not necessary to produce an Issues Statement followed by an Annotated Issues Statement. However, we do not consider that the Issues Statement should be driven by the outcome of the preceding market study. A better approach would be to delay the publication of the Issues Statement to a slightly later point in the procedure, so that the process of honing it down and eliminating the weaker elements has been done. Essentially, we suggest eliminating the earlier version of the document and only publishing a document equivalent to the Annotated Issues Statement. For the reasons set out above, we do not consider that this document should include remedies discussions unless the parties are in agreement with accelerating the consideration of remedies to this extent.

1.11 As regards combining the Provisional Findings with the Provisional Remedies document, for the reasons explained above, we consider that a flexible approach should be taken, driven by the characteristics of the particular MI. Where the CMA's findings are very contentious, the parties may not wish to engage fully in remedies discussions until the AEC findings begin to settle.

1.12 We consider that the most important documents in the early investigative stage of an MI are the Working Papers. These allow for issues to be fully understood by the parties and facilitate a proper detailed debate between the CMA and the parties. In our experience, the Working Papers enable the parties to identify and address areas where the CMA's early understanding of market conditions is incorrect, or incomplete. This avoids wasting time on concerns founded on misconceptions. Moreover, comprehensive disclosure and discussion through the Working Papers typically means that the Provisional Findings document contains no surprises. This in turn facilitates pragmatic remedies discussions and reduces the risk of appeal against the eventual decision since the parties have already had the opportunity to thrash out contentious issues with the CMA staff and decision-makers.

Increasing the opportunities for early engagement with the parties

1.13 We are fully supportive of the proposal to increase the opportunities for early engagement between the CMA staff, the decision-makers and the parties. For the reasons explained above, this should not extend to remedies discussions until appropriate, given the progress of the MI in question. Parties should not be obliged to consider remedies at a point in the MI at which the AECs are being heavily contested.

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)? If not please explain why and whether there are any alternative changes that would achieve the stated aims set out in paragraphs 1.10 and 1.11?**

Strengthening synergies between MSs and MIs

2.1 We agree that it is sensible for an MS to inform the MI and efficient for the learning to be transferred across to Phase 2, to avoid duplication. We note that this is achieved in the merger control context by a limited transfer of staff from the Phase 1 team to the Phase 2 team. However, the driving principle of the "fresh pair of eyes" at Phase 2, enshrined in the Enterprise Act 2002 MS and MI framework, must be respected.

2.2 We do not consider that the MS (over which the CMA Board has control) should be used to fetter or shape any resulting MI (over which the Board does not have control). In particular:

(a) we do not agree that, where an MS has preceded the MI, the MI Issues Statement should draw mainly on the MS work. As noted above, we consider that it would be preferable for the Issues Statement to be published later, once the MI Group has started to refine its own views about the appropriate focus of the MI;

(b) it is not acceptable that the MS phase should be used to shape the MI remedies discussion. For the reasons explained above, the statutory framework provides that the MI remedies are driven solely by the MI AEC findings. They cannot be predetermined by the MS analysis.

Clarifying the relationship between Board and Group

2.3 We note that the only two MIs to have been conducted to date under the post-2014 regime are **Retail Banking** (2017) and **Energy** (2016). These were both broad MIs with very wide terms of reference. The majority of past MIs have been into smaller markets and often with more defined terms of reference (for example, **Personal current account banking services in Northern Ireland** (2007) compared to **Retail Banking** (2017) which covered all personal current account and SME banking in the UK). We make this point because it is important not to treat the post-2014 MIs as typical, in particular as regards their impact on CMA resourcing. That said, we agree that one lesson to be drawn from those references is that it would be sensible and efficient to seek to refine the scope of the MI from the outset, rather than leaving such refining to be undertaken as part of the MI itself.

2.4 We consider that there is scope for an MI to be more tightly defined in the terms of reference. The CMA may consider that the Enterprise Act 2002 does not allow it to restrict a reference to specific issues, but it is clear that the Act enables the CMA to draft a "description of the goods or services" to which the suspicion of a prevention, restriction or distortion of competition relates. Such a description might be quite specific and – notably – does not need to correspond to an entire product or service market.

2.5 As the CMA notes, any steer provided by the CMA Board to the MI Group would have no legal force. Indeed a decision by the MI Group to fetter its investigation by reference to the steer would invite a judicial review challenge. However, it is difficult to envisage that the Board would go to the effort of providing the steer if it did not consider that it would have some influence on the Group's approach. Moreover, the employment relationship between the CMA Board and the MI staff cannot be overlooked. The CMA must respect the statutory separation of decision-makers between Phases 1 and 2 of the markets regime and not seek to circumvent or undermine it. We would therefore encourage the CMA to consider writing more tightly defined terms of reference where possible, as being a more appropriate and transparent way in which to shape the scope of the MI than a steer document.

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?**

3.1 Our comments on these points are incorporated into the responses above.

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.**

4.1 We have no particular comments.

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

5.1 We have no particular comments.

5.2

5 May 2017
Ashurst LLP