

**MARKET STUDIES AND MARKET INVESTIGATIONS: SUPPLEMENTAL GUIDANCE ON
THE CMA'S APPROACH
(CMA3CON, JULY 2013)**

RESPONSE BY FRESHFIELDS BRUCKHAUS DERINGER LLP

6 September 2013



Freshfields Bruckhaus Deringer

**RESPONSE TO THE CMA’S CONSULTATION ON MARKET STUDIES AND MARKET
INVESTIGATIONS: SUPPLEMENTAL GUIDANCE ON THE CMA’S APPROACH
(CMA3CON, JULY 2013)**

1. INTRODUCTION AND SUMMARY

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on the draft for public consultation (the **Consultation**) of “*Market Studies and Market Investigations: Supplemental Guidance on the CMA’s approach*” (the **Guidance**).

1.2 Our comments are based on our experience of representing clients in most of the market investigations conducted by the Competition Commission (**CC**) and market studies conducted by the Office of Fair Trading (**OFT**) since the Enterprise Act 2002 (the **EA 2002**) came into force, together with a significant number of sector-wide inquiries conducted by other competition authorities worldwide. We rely on this breadth of experience to provide these comments on the proper and effective conduct of market studies and market investigations.

1.3 We have confined our comments to those areas which we feel are most significant in terms of effective operation of the regime and providing clarity and certainty for companies that might be subject to investigation. The comments in this response are those of Freshfields Bruckhaus Deringer LLP and do not necessarily represent the views of any of our clients.

1.4 We welcome the Competition and Markets Authority’s (**CMA**) review of existing guidance on the conduct of market investigations and market studies to ensure that it remains fit for purpose and is properly adapted to the institutional structure provided for the Enterprise and Regulatory Reform Act 2013 (**ERRA 2013**).

1.5 However, it appears to us that the CMA has missed the opportunity to provide adequate guidance in relation to certain important areas of the conduct of market investigations and, in particular, market studies. We believe that it is important that the CMA remedies this as a matter of priority – in the final version of the Guidance or, in some cases where resource constraints may make giving immediate further guidance difficult, by publishing additional guidance as soon as possible. This is of particular significance given:

- (a) the exhortation by HM Government in its draft “Strategic Steer” to the CMA that there is a “*need to improve transparency and certainty for businesses*”¹ in the conduct of market studies and market investigations;
- (b) a lack of transparency in relation to key issues at an early stage will lead to increased costs for those involved in market studies and investigations, and, we believe, to increased costs for the CMA itself; and
- (c) that any delay in developing the processes for conducting inquiries is likely to lead to *ad hoc* and opaque procedures – leading to anomalies and inconsistencies which may expose the CMA to criticism.

¹ Paragraph 6 of the draft Strategic Steer.

1.6 The key areas which require attention are:

- (a) guidance on the CMA's approach to the pre-market study phase;
- (b) guidance on the objectives of a market study;
- (c) procedures and timetable for market studies and market investigations in light of the new statutory deadlines for both;
- (d) guidance on public interest reviews; and
- (e) guidance on cross-market reviews.

1.7 We also note more generally that, regarding the scope of the Guidance vis-à-vis market studies, the introduction to the Guidance indicates that it is “*structured to reflect the key stages in a market study that results in undertakings in lieu (UILs) of a market investigation or in a market investigation*”². Whether or not this is intentional, it is certainly a curious limitation on the stated scope of the Guidance, as it means that the Guidance fails to explain how a market study would be conducted that did not result in either of these two outcomes (as has often been the case to date).

2. PRE-MARKET STUDY PHASE

2.1 Work undertaken by the OFT in advance of the launch of a market study appears to have become increasingly important in the past few years. That work can take a number of forms including the issue of a call for evidence³ or a detailed consultation on the scope of the proposed market study⁴. The Guidance reflects this in its comment that it may be “*helpful to seek views of stakeholders in advance of the launch of a market study*”⁵.

2.2 Initial work, though, may be burdensome for market participants. For example, the OFT undertook a three month call for evidence in advance of its 12 month market study on private motor insurance, which itself preceded the current market investigation. The call for evidence was thus a material part of the overall burden that this lengthy scrutiny has placed on the industry. While we note that the Guidance suggests that pre-market study work may enable the CMA to progress the market study phase more quickly⁶, which is welcome, we believe that this should not lead to an undue elongation of the phase before the statutory time limit becomes effective.

² Paragraph 1.2, Guidance.

³ For example, the call for evidence that preceded the OFT's private motor insurance market study. We note that the Guidance indicates that a call for evidence need not be followed by a market study (paragraph 1.9, Guidance).

⁴ For example, the request for views on scope that has preceded the OFT's present retail banking market study.

⁵ Paragraph 1.10, Guidance.

⁶ Paragraph 1.12, Guidance.

2.3 It is important, therefore, that the CMA adopts a proportionate approach to the pre-market study stage, even where it may be tempting, given subsequent mandatory time limits, to undertake significant information gathering at this point. This is consistent with the direction given to the CMA in the Government's Strategic Steer:

*“the CMA should...increase the number and speed of cases...while avoiding undue burdens on business.”*⁷

2.4 We believe that it is necessary both in terms of efficiency and in terms of providing transparency and hence confidence in the system for businesses for the CMA to provide further detail on how a call for evidence or other preparatory work will be conducted, together with an indication of timing expectations and a commitment to a proportionate approach to the pre-market study phase.

3. THE OBJECTIVE OF A MARKET STUDY

3.1 Prior to ERRA 2013, market studies have had no statutory objective. They have been, in effect, bounded only by the loose limits of section 5 EA 2002. This contrasts with the clear statutory question addressed by the CC in a market investigation: whether a feature, or combination of features of a market prevents, restricts or distorts competition⁸.

3.2 The ERRA 2013 changes this position, setting out what is in practice a statutory objective for market studies, in the form of the conditions for the issue of a market study notice:

“(a) to assess the extent to which a matter in relation to the acquisition or supply of goods or services of one or more than one description in the United Kingdom has or may have effects adverse to the interest of consumers; and

*(b) to assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects.”*⁹

3.3 The distinction between this test and that for market investigations is important and, at a high level, understandable, given that market studies may address issues other than competition (e.g. consumer issues).

3.4 However, it is striking that the Guidance contains no further elucidation of the terms of this test, and the significance of its different formulation from that of the market investigation test.

⁷ Paragraph 6 of the draft Strategic Steer.

⁸ Section 134(1) EA 2002. A similar test is addressed by the OFT when making a market investigation reference to the CC, where it has to consider whether it has reasonable grounds for suspecting that the same conditions may be met (section 131(1) EA 2002).

⁹ Paragraph 1, Schedule 12 ERRA 2013, inserting new section 130A(2) EA 2002.

4. MODES OF ANALYSIS IN THE CONTEXT OF A MARKET STUDY

4.1 The CC has published detailed guidance on the modes of analysis that it will apply in a market investigation – that is, the factors that it will consider and the analytical tools that it will employ¹⁰. In a shorter format, the OFT has provided guidance on the modes of analysis it will apply in considering whether to make a market investigation reference¹¹.

4.2 By contrast, the OFT published guidance on market studies themselves lacks any detail on the modes of analysis that it employs in the course of such a study¹². This is particularly important for market studies that are not focused (or solely focused) on competition issues (which are necessarily the focus of a market investigation reference and of the market investigation itself, given the statutory tests). This has long been a significant lacuna in the regulators' suite of guidance.

5. PROCEDURES AND TIMETABLE

5.1 The new statutory timetable for market studies and the reduced statutory timetable for market investigations are important developments in ERA 2013. The CMA will want to ensure, of course, that these time limits do not lead to any loss of rigour in its market studies and market investigations.

5.2 We are sure that the CMA does not underestimate the scale of this challenge – particularly at the market investigation stage. To the best of our knowledge, there has been no market study under the EA 2002 which has been completed within 18 months – indeed, the large majority have taken over 23 months.

5.3 We are therefore surprised that the Guidance contains no indications on how the CMA will reform market investigation procedures to meet this challenge. The only measure that is mentioned that could contribute to this is the proposal for some degree of case team continuity between the market study and market investigation stages. However, we would be surprised if this made such a significant difference that it enabled the CMA to reduce the length of market investigations by around a quarter.

5.4 We assume that the CMA has been considering this issue, and we believe that the final version of the Guidance should contain details of the process reforms (whether at the market study phase or at the market investigation phase) that we assume will inevitably be required to address the issue. In particular, if the implication of the new statutory timetable for market investigations is that there will be a materially greater data gathering burden at the market study phase, it would be appropriate to signal this in the Guidance. This would help parties to work more effectively with the CMA at this stage, so improving overall efficiency. If this were to be the case, it would also be important for the CMA to indicate its continued

¹⁰ See in particular, Section 3 of Chapter 3 of CC3 – *Guidelines for market investigations*.

¹¹ See in particular Part II of OFT 511 – *Market investigation references*.

¹² This guidance would complement measures taken to address the issues around the lack of clarity on procedural reform which are noted in Section 5 below.

commitment to a proportionate burden on market participants in the market study phase, consistent with the Government's draft Strategic Steer. While we acknowledge that each investigation may differ to some extent in terms of timing and process, it seems to us that there are likely to be common features of good practice which will help the CMA to meet its statutory timetable, and which merit inclusion in the Guidance.

5.5 Furthermore, while we support the CMA's objective of increasing efficiency and avoiding unnecessary duplication by ensuring some continuity of personnel between market study and market investigation phases, we have concerns regarding the CMA's proposal to retain *"at least some of the market study team to work on the larger market investigation team when a matter is referred"*.¹³

5.6 Lord Currie has stated that the CMA will *"ensure that [it] respect[s] the importance of phase separation, preserving the role of the independent panel at phase 2 in mergers and markets cases, and safeguarding – even beyond such separation – against risks of confirmation bias."*¹⁴ However, we are concerned that the transferral of key case team members from market study to market investigation may undermine this separation and will result in confirmation bias.

5.7 In order to mitigate the risks of confirmation bias in the unitary authority, we suggest that the CMA includes measures in the Guidance that identify precisely which, as well as how many, members of the market study case team could transfer to the market investigation case team. We propose that the CMA should offer comfort in the Guidance against this risk by providing that:

- (a) no members of the "senior" market study case team will transfer to the market investigation case team (i.e. specifically the inquiry director, senior economist, and other key influencing team members should be new personnel in a market investigation case team); and
- (b) only a minority of the "junior" members of the market study case team will transfer to the market investigation case team.¹⁵

5.8 We believe that by restricting both the number, seniority and professions of CMA personnel that can transfer from the market study to the market investigation process, the CMA will be able to mitigate the potential for confirmation bias, without undermining the CMA's well-received attempts to minimise duplication between the phases. Moreover, we consider that the potential for duplication between the two case

¹³ Paragraph 1.22, Guidance.

¹⁴ Opening remarks of Lord David Currie at the launch of the consultation on part 1 of the CMA guidance, 24 July 2013 available at <https://www.gov.uk/government/speeches/competition-and-markets-authority-guidance-consultation-launch>.

¹⁵ We think that once the CMA has had the opportunity to clarify typical market study and market investigation team structures, it will be better able to prescribe which team members should be allowed to transition across from the market study phase to the market investigation phase. In the meantime, best principles should dictate that no senior, opinion-forming team members should transition across to the market investigation phase.

teams can be mitigated operationally at the CMA through new, improved IT systems of the unitary body.

5.9 We do not consider that there should be any impediment to the inclusion of greater detail on both of the above points in the final version of the Guidance.

6. PUBLIC INTEREST REVIEWS

6.1 The reform of the public interest reference regime – to incorporate for the first time a “full public interest reference”¹⁶, whereby the CC will itself consider public interest issues alongside competition issues – is an important change to the markets regime.

6.2 We appreciate that this regime is novel, and that each such reference might make distinctive demands of the CMA. It is understandable in that respect that the Guidance presents only high level information on this element of the new regime¹⁷. However, it would not seem satisfactory were the CMA (and BIS) to wait for such a reference to be made before giving details of how it would work in practice. We therefore urge the CMA to work with BIS¹⁸ to develop guidance on the circumstances in which such a reference might be made and on the CMA’s process and modes of analysis following such a reference.

7. CROSS-MARKET REVIEWS

7.1 A further significant innovation under ERRA 2013 is the possibility for “cross-market reviews”¹⁹. We believe that this new cross-market regime presents some particular challenges. The CMA will be aware that a similar regime, which operated under s.78 of the Fair Trading Act, was not regarded as a success: only three such reviews were undertaken in the 26 years for which it existed. The Monopolies and Mergers Commission (as it then was) acknowledged some of the peculiar problems of the regime in the *Full-line forcing* review. It commented that the problems it identified were too granular and too context-specific to address in a proportionate way in the context of such an investigation. From a process point of view, it observed that it would have needed a far more detailed investigation than was realistically possible to reach a robust conclusion and that to do so would have extended the duration of the inquiry unduly²⁰.

7.2 Those same risks are liable to arise also under the ERRA 2013 regime. We recognise that the CMA indicates in the Guidance that it will use this power in a “targeted” way. We agree that it should be: the circumstances in which the regime

¹⁶ Section 35, ERRA 2013.

¹⁷ Guidance, paragraph 2.17 *et seq.*

¹⁸ We note that the Department of Trade & Industry published detailed and useful guidance in relation to the circumstances in which the Secretary of State might make a public interest intervention in merger cases in relation to media plurality. Similar guidance, and guidance on the subsequent approach of the CMA, would materially assist parties in a market investigation context.

¹⁹ Section 33, ERRA 2013.

²⁰ See paragraph 1.9 of Monopolies and Mergers Commission, *Full-line forcing*, March 1981.

can be used in way that is proportionate and robust to address genuinely cross-market issues will, we believe, be rare.

7.3 The Guidance does not, though, give details of any additional procedural safeguards or reforms that are likely to be necessary to address adequately the challenges of a cross-market review. To give just one example, a cross-market review is likely to involve a multitude of market participants whose views must appropriately be taken into account by the CMA; this will pose some acute challenges for the CMA in terms of balancing due process with a newly reduced timetable. It would not be satisfactory for the CMA to wait until it embarks on such a case before giving details of how this will work in practice.

8. CONCLUSION

8.1 We welcome the additional clarity provided by the CMA in the Guidance. However, the Guidance appears to be a missed opportunity to address a number of issues that will be of significance as the new markets regime is implemented. Some of these issues can and should be addressed in the final version of the guidance (e.g. additional detail on the CMA's procedures to address the abrogated timetable for market investigations, and for personnel transfer – see section 5 above). While others may require further consideration by the CMA, given understandable resource constraints, we consider that they should be addressed as a matter of priority within the new regime.

8.2 We would be happy to discuss any of these issues further with the CMA at any time.