



Market Studies and Market Investigations: Supplemental guidance on the CMA's approach

Consultation document CMA3con – July 2013

Herbert Smith Freehills LLP Response

Introduction

Herbert Smith Freehills LLP welcomes the opportunity to comment on the CMA's draft Supplemental Guidance on its approach to Market Studies and Market Investigations (the "Draft Guidance"). We note that it is intended that the Draft Guidance will supplement the existing guidance on the markets regime and should therefore be considered in conjunction with those documents. We do however strongly recommend that this guidance is consolidated into a single and updated document in order to ensure the guidance is sufficiently user friendly, reflects the changes introduced to the markets regime by the Enterprise and Regulatory Reform Act 2013 ("ERRA13") at all levels and uses consistent terminology throughout.

The comments in this response are those of Herbert Smith Freehills LLP and do not represent the views of our clients.

1. QUESTION 1

Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the CMA's conduct of market studies and market investigations? If not, what aspects do you think are missing?

- 1.1 We consider that the Draft Guidance broadly covers the main changes introduced by the ERRA13 to the CMA's conduct of market studies and market investigations. However, there are some relevant aspects introduced by the ERRA13 that we think it would be helpful to include in the Draft Guidance. We set out our suggestions regarding this below. In this document, unless stated otherwise, paragraph references are to paragraphs in the Draft Guidance and section references are to sections of the Enterprise Act 2002, as amended by the ERRA13.
- 1.2 Paragraphs 2.6-2.8: it would be helpful if the Draft Guidance could clarify when the CMA will depart from publishing a market study notice (as required under s130A) to exercise its powers and instead use the consultation process under s169 to refer a market, which does not envisage a market study notice being published. It would also be helpful to add context by indicating when a reference has previously been made without undertaking a market study and why (for example the statutory audit reference). Flowcharts would be helpful to



clarify the different routes to a market investigation, and the steps that the CMA envisages taking under these routes (see further below).

- 1.3 Paragraph 2.9: for completeness, the bullet points listed in this paragraph should also cover the statutory timetable under s131B(3) i.e. circumstances in which the CMA has decided not to make a reference and no representations have been made to the CMA that a reference should be made.
- 1.4 Paragraph 2.13: we suggest that the first bullet includes a reference to non-compliance including failing to provide information *in a form that the CMA specifies*. Small businesses, in particular, may not object to providing particular categories of information to the CMA, but may lack the resources to arrange it in a form specified by the CMA. We feel it is important that businesses recognise that failing to provide the information in a particular form could potentially lead to penalties, and therefore the Draft Guidance should clearly reflect this possibility.
- 1.5 Paragraph 2.13: the second bullet point states that it is a "*criminal offence for a person intentionally to alter, suppress or destroy information that he/she has been required by notice to produce.*" This wording suggests that it would be a criminal offence for an individual to suppress information, for example by not providing information held in that individual's head. This appears to be a very wide interpretation of the relevant statutory provisions s174A(4) and (9)(b). Whilst s174A(9)(b) extends the reference in s174A(4) of "*suppressing a document*" to include "*destroying the means of reproducing information recorded otherwise than in legible form*", it does not extend it to suppressing all information.
- 1.6 Paragraph 2.19: this paragraph notes that the full public interest reference route will be extremely rare, implying that public interest interventions are expected to be via the restricted public interest reference route. If this is correct it would be helpful for the Draft Guidance to note this explicitly.
- 1.7 Paragraph 2.22: in the list of events that end the possibility of the Secretary of State issuing an intervention notice, it would be helpful to also include (pursuant to s139(1A)(d)) that the possibility ends if the CMA's deadline for publishing a market study report has expired, without the CMA having published that report. The Draft Guidance should also reflect that in such circumstances the ministerial power to make a reference remains (s132(1)(b)). This ministerial power to refer markets where the CMA is not minded to refer them could generally be reflected more clearly in the Draft Guidance. For example, it is not mentioned in paragraph 1.20 that introduces the role of the Secretary of State. The section regarding public intervention and issuing intervention notices would also benefit from a clear statement to the effect that the section does not generally include guidance on the s132 power.



- 1.8 Paragraph 2.25: the paragraphs following paragraph 2.25 might be easier to follow if paragraph 2.25 begins by explaining what happens if an intervention notice is in force but the CMA does not propose to make a reference (s140(5)). It could then continue by noting that, however, if the CMA does propose to make a reference, the following provisions apply.
- 1.9 Paragraph 2.26: at the end of the second sentence we suggest adding (perhaps as a footnote) the possibility raised in s140B that the Secretary of State can (having consulted with the CMA if necessary) vary a restricted PI reference or a full PI reference. Some guidance as to how a reference may be varied and how likely it is that this power would be used, would also be welcome.
- 1.10 Paragraph 3.11: this paragraph is too simplistic in describing the approach that the CMA is required to take and needs to explain the balancing act approach to be undertaken pursuant to s141A(8) and (9). Additionally, it would be helpful if it could explain the CMA's proposed approach to addressing relevant customer benefits under s141A(10), even if it is only by reference to pre-existing guidance. Whilst the word "may" in that subsection provides the CMA with a degree of discretion in assessing these benefits, it would still be useful to understand the CMA's proposed approach.
- 1.11 Paragraph 3.13: it would be useful to understand how the CMA will take the expert's views into account following a full public interest reference where the Secretary of State has appointed an expert. Does the CMA envisage that there will be trilateral meetings between the expert, the CMA and relevant parties, or is the expert intended to advise the CMA purely bilaterally?
- 1.12 Paragraphs 4.2 and 4.11: we suggest clarifying when the Secretary of State, rather than the CMA, would be operating the undertakings/orders/interim measures powers, including using flowcharts to demonstrate this.
- 1.13 We also suggest that paragraph 4.11 refers to the possibility of interim measures being relaxed with the relevant consent (s157(2C) and s158(2C)) so that parties appreciate the possibility of opening negotiations on interim measures if their circumstances make it necessary to do so.

2. QUESTION 2

Do you consider that the Draft Guidance will facilitate your understanding of the markets regime when read in conjunction with the existing guidance documents?

- 2.1 The Draft Guidance does help to facilitate an understanding of the markets regime. However, it could be more helpful by addressing some of the points raised in this response.



- 2.2 Our main comment on the Draft Guidance is that we consider it should be collapsed, together with the existing guidance that the CMA Board intends to adopt, into one new guidance document. This would result in the following benefits:
- 2.2.1 Cross-referring between the different documents, in particular checking to see which parts of the pre-existing guidance have been superseded, is cumbersome and, in our view, likely to lead to misinterpretations. This could be avoided by generating one overall guidance document.
- 2.2.2 Providing the opportunity to replace any out-dated terminology in the pre-existing guidance and consider whether any of the legal aspects could be updated, such as the reference to the OFT's view that, for the purposes of the Chapter I prohibition, there is generally "*no appreciable effect on competition if the parties' combined share of the relevant market does not exceed 25 per cent*"¹ The OFT's Guidance refers to the shares of 10% and 15% set out in the European Commission's Notice on Agreements of Minor Importance.²
- 2.2.3 Enabling the CMA to provide examples from recent OFT market studies and CC market investigations to demonstrate how the guidance has previously been applied.
- 2.3 We have two minor comments on the pre-existing guidance that the CMA intends to adopt that (assuming composite guidance is not pursued) the CMA might consider including in the table at Annexe A of the Draft Guidance:
- 2.3.1 OFT511: By excluding s131(2)(a), s131(2A) provides that a cross-market reference can be made regarding "conduct" in, but not the "structure" of, a market. Therefore should paragraph 1.9 of OFT511 be amended to explain that distinguishing between these terms is no longer purely a matter of semantics?
- 2.3.2 CC3: Should paragraph 49 of CC3 be read together with paragraph 1.22 of the Draft Guidance, explaining that the CMA expects to have a degree of case team continuity? Perhaps the Draft Guidance could also explain which (if any) key members such as the "Inquiry Director" are expected to remain the same throughout the two stages.

¹ OFT 511, paragraph 2.28.

² OFT 401, paragraph 2.16.



3. **QUESTION 3**

Do you agree with the list in Annexe B of the Draft Guidance of existing markets-related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA?

- 3.1 As noted above, we think that it would be helpful to have all of the guidance related to the markets regime to be collapsed into one new guidance document.
- 3.2 OFT 1308 (amending paragraph 3.6 of OFT 511) is not referred to in Annexe B, which does however refer to adopting OFT 511. For clarity we suggest also referring to OFT 1308, and explaining whether the OFT will consult on provisional decisions not to make a reference where it has considered not to do so, but the circumstances do not fall within the three examples given in OFT 1308. That might, for example, be the case if the OFT receives and considers information from a Parliamentary Select Committee.

4. **QUESTION 4**

Do you consider that the Draft Guidance is user friendly in terms of its content and language?

- 4.1 We consider the drafting to be clear and user friendly. However, as noted above, it would be easier to follow if all of the relevant guidance were collapsed into one guidance document.
- 4.2 Additionally, it would be helpful to include a more comprehensive flowchart than the flowchart currently found on page 17 in the Draft Guidance to demonstrate how a market study/consultation/investigation would operate from start to finish, including possible public interventions and remedies.

5. **QUESTION 5**

Do you have any other comments on the Draft Guidance?

- 5.1 We welcome the approach in the new legislation in respect of the CMA's decision making process which ensures that key decisions in market studies and subsequent market investigations are made by separate groups within the CMA. Paragraph 1.22 of the Draft Guidance provides for a degree of case team continuity by retaining at least some of the market study team to work on the market investigation case team when the matter is referred. Whereas we agree that it is important to avoid unnecessary duplication in particular at the information gathering stage, it is also important that the market investigation team is in a position to approach the investigation with a fresh pair of eyes as is the case under the current system. It is therefore important that the decision making



process strikes the right balance between on the one hand avoiding unnecessary duplication and on the other ensuring full independence of the market investigation. One way of dealing with this would be to ensure that, while some of the junior members of the market study team may be retained for the market investigation, there should also be a number of new junior members on the market investigation team in order to bring a fresh perspective to the information gathering stage. At more senior level officials should in any case be replaced at market investigation stage. It is also important that parties who are subject to a market investigation have sufficient access to the panel decision makers and that there is full transparency as to the whole process in particular what happens with the vast amounts of information they provide and who this is passed on to.

5.2 The section in the Draft Guidance explaining possible preliminary work leading up to a market study notice (paragraphs 1.8-1.12) is welcome but could be expanded and clarified in the following respects:

5.2.1 The preliminary work in advance of formally launching a market study could be used by the CMA as a means of extending the time period of a market study, thereby weakening the statutory deadlines. This could result in parties being subject to a market regime based investigation for a far longer period than the legislation envisages. In light of this it would be helpful if the Draft Guidance could include estimated timescales for the preliminary work that is expected to be undertaken (which could be included in any flowcharts).

5.2.2 Given that this preliminary work (including calls for information) sits outside the formal market study process, it would also be helpful if paragraph 1.9 could be extended to explain that, given the CMA has no power to compel parties to provide information at this stage, there are consequently no penalties for failing to provide the information requested. However, the Draft Guidance should clarify the CMA's view as to whether the penalties for providing false/misleading information (pursuant to ss 117, 125 and 180) would apply to any information voluntarily provided in these circumstances, and, if so, state the penalties for breaching that duty.³

5.2.3 The CMA should also clarify how it will process the information obtained at this stage, and for what purposes it may be used. In particular, the CMA should clarify whether information provided (at this and other market study/investigation phases) would prejudice any future possible leniency applications.

³ Whilst paragraph 57 of CC3 highlights that voluntarily providing false or misleading information to the CC in the context of a market investigation is a criminal offence, parties involved at a preliminary, informal, stage may not be aware of their obligations at that stage.



- 5.3 It would also be helpful if the Draft Guidance could explain what investigatory gathering methods the CMA would be likely to use at the various stages of a reference being made using the consultation process but without publishing a market study notice (as envisaged by s169(6)(a)(i)).
- 5.4 There is currently no reference in the Draft Guidance as to the time the CMA expects to give parties to provide representations on a Market Study Notice (s130A(3)(b)). If the CMA has an anticipated initial consultation period in mind it would be helpful to include it in the Draft Guidance.
- 5.5 Paragraph 2.15 implies that the CMA expects its initial information requests to be informal rather than statutory. Could the Draft Guidance be amended to explicitly state this, if this is the CMA's intention?
- 5.6 The CMA envisages full public interest references being made on extremely rare occasions (paragraph 2.19), implying that a public interest reference would usually be "restricted". If this is the intention, could the Draft Guidance explicitly state this? Has the CMA considered what extra resources it will need to investigate public interest issues, and, if so, could the Draft Guidance explain more fully how the CMA expects to assess these issues? For example, does the CMA intend to rely completely on the Government-appointed expert (if there is one)?
- 5.7 It would be helpful if the CMA could provide further guidance as to how frequently, and pursuant to what level of threshold it expects to require parties to appoint and remunerate a third party to monitor and/or implement remedies and to deal with disputes (as referred to in the second bullet point of paragraph 4.10). It would also be helpful for the Draft Guidance to set out whether the CMA intends to implement any internal review system to consider the continued need for any trustees that have been appointed.

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