RESPONSE TO CMA CONSULTATION: REGULATED INDUSTRIES: GUIDANCE ON CONCURRENT APPLICATION OF COMPETITION LAW TO REGULATED INDUSTRIES

Baker & McKenzie LLP welcomes the opportunity to comment on the CMA Consultation: Regulated industries: Guidance on concurrent application of competition law to regulated industries ("the Draft Guidance"). Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on UK and EU competition law.

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 We welcome the revised requirement for Regulators to exercise their competition powers in favour of sectoral powers as to date, the Regulators (with the exception of Ofcom), have used their competition powers in very few cases. We agree that the proposed increased collaboration between the CMA and the Regulators should, over time, increase the number of competition cases brought by the Regulators and will allow the Regulators to draw on the CMA's experience of conducting competition investigations. To this end, we consider that senior officials within the CMA, preferably with expertise and experience of the regulated sectors, should engage with the Regulators.

1.2 However, in our view the Draft Guidance falls short of providing any actual substantive guidance on the circumstances in which it would be appropriate for the Regulators to exercise their competition powers. Greater clarity on the basis for this decision would be helpful. The CMA may wish to consider setting out clear criteria which will determine when the Regulators should use their competition powers. Where competition powers are exercised, the Draft Guidance could go further: for example, if a case is allocated to a Regulator, the Regulator could be required to consult with the CMA at every key stage of a competition case to ensure an overall cohesive approach to antitrust enforcement.

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 We agree that there is a need for the CMA and Regulators to work efficiently and effectively together. We agree that the list of factors set out in the Draft Guidance for determining case allocation is sensible. However, when taking the decision on case allocation, in our view, the CMA and Regulators should have to take into account the views of any parties likely to be materially affected by the decision - this should be expressly stated in the final Guidance.

Dealing with complaints/investigations

2.2 Under the current proposals, a decision on which body is best placed to deal with a complaint must be taken within 2 months of receipt of the complaint by the first authority to receive it. In our view this is too long and we see no reason why such a decision cannot be taken within 1 month. This would be in line with streamlining antitrust decision-making, which is one of the overarching principles behind the reform of the UK competition regime.

2.3 In addition, we consider that a complainant should have the right to request that a particular body deals its complaint. In the interest of transparency, the CMA and the relevant Regulator should also set out their reasons for case allocation to the affected parties.

2.4 Paragraph 3.23 of the Draft Guidance states that the CMA may decide in some circumstances to exercise its Part 1 concurrency powers in relation to case during the initial case allocation process where there is a dispute as to case allocation. It would be highly disruptive if the CMA were to exercise these powers and then the case was subsequently allocated to a Regulator. If this proposal is to be retained, measures will need to be implemented to ensure a smooth transition from the CMA to the relevant Regulator. Also the time taken to reach a decision on which body is well placed to deal with the case should be reduced (see paragraph 2.2 above).

Circumstances in which the CMA may exercise jurisdiction where a case has already been allocated to a Regulator

2.5 We agree that the CMA should have the ability to take over a case that has been allocated to a Regulator where this would promote competition in the UK, given that the CMA has significant expertise and experience in handling competition cases. However, a change of case team and regulator could be disruptive - we therefore consider that the CMA should only exercise this power in exceptional cases. In such circumstances, after the change, the CMA should nonetheless collaborate effectively with the Regulators in order to benefit from their specific sectoral expertise and knowledge.

2.6 It is appropriate for the CMA to consult with the Regulator, the undertaking concerned and other persons materially affected by the transfer. However, we are concerned that the CMA will have the ability to exercise jurisdiction at any stage before the Regulator issues a Statement of Objections. There is typically a significant period of time between the start of an investigation and issuing of a Statement of Objections. If a case can be transferred to the CMA when the investigation is well underway, there is a risk that this could lead to a longer investigation period. In our view there should be limited period within which the CMA must decided whether or not to take over a case.

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 We agree that it is important for the CMA and Regulators to work together in order to ensure consistent application of competition law. Given that, to date, the Regulators have exercised their competition powers relatively infrequently, there is a need to develop high standards of excellence in applying competition law and managing competition cases in the regulated sectors. We agree that such standards could be achieved through secondments and cooperative working with the CMA. The use of secondments in particular will allow the CMA to transfer its expertise and competition skills to the Regulators. Similarly, secondments of Regulator staff would allow for the transfer of sectoral knowledge and expertise to the CMA. However, in order to maximise the benefits, we think that at least some secondees should be at a senior level. This will ensure that the relevant organisations benefit from the knowledge of experienced individuals. It would be helpful to set out in more detail how secondments will impact the decision-making process. For example, it may be useful to have a secondee assigned to a case team for the duration of an investigation, with a more senior secondee getting involved at a later stage to review and challenge draft decisions.

3.2 We welcome the proposal that the Regulators may have access to the CMA's Procedural Officer to determine disputes/complaints. In our view the Draft Guidance should go further and state that the Regulators may have access to the Procedural Officer without first having to obtain the agreement of the CMA. However, we recognise that this could have resource implications for the CMA's Procedural Officer - an alternative possibility would be for the Regulators to create an equivalent role within their own organisations.

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 We agree that it is sensible for the CMA and each Regulator to have Memoranda of Understanding which sets out full details of information sharing arrangements and it would be useful to have sight of these Memoranda in order to comment fully on the proposed approach. In particular, it is important to understand exactly what information will be exchanged and who within the competent persons will receive that information. In our view, confidential information about a party should only be shared with the consent of that party. We suggest that the parties may specify, in any waiver authorising disclosure of confidential information to competent persons, how this disclosed information may be used. This will ensure that the parties retain a degree of control over the dissemination of their own data.

4.2 In particular, we are concerned that information received by the CMA or the Regulators using their Competition Act 1998 powers e.g. through a leniency application or a Section 26 notice, could be used by Regulators in relation to their other regulatory functions such as price determinations, enforcement of licence conditions etc. This would allow Regulators to make use of stronger antitrust enforcement powers (such as dawn raids) to exercise purely regulatory, non-competition related functions. This would be highly inappropriate. We therefore suggest that the Draft Guidance and Draft Concurrency Regulations explicitly state that information that is obtained by the CMA or the Regulators using their Competition Act 1998 powers will not be used by the Regulators when exercising their ordinary regulatory powers.

4.3 The Draft Guidance is also vague on the type of procedural safeguards that will be implemented to protect information. It is not clear how electronic data will be secured, nor what confidentiality obligations will restrict the distribution (e.g. to non-competent persons) and use of information received. The information that will be shared will undoubtedly be highly sensitive, insofar as it identifies the parties involved in a potential infringement and a description of the alleged infringements. It is therefore very important that robust safeguards are implemented to prevent disclosure to non-competent persons.

4.4 The Draft Guidance provides that a competent person who has information about a potential antitrust infringement must pass that information to other relevant competent persons within 10 working days. We agree with this proposed deadline which will ensure that information is passed on in a timely manner.

4.5 The Draft Guidance proposes that the CMA or relevant Regulator will share its draft Statement of Objections/Proposed Decision or Notice with each other competent person with concurrent jurisdiction in the case. We consider that the receiving party should be obliged to provide comments or guidance to the investigating competent person, otherwise the disclosure of these documents would seem to be unnecessary. Given that the receiving party would have had concurrent jurisdiction, it stands to reason that it should be in a position to provide some meaningful input. We assume that a key objective of sharing the information is to facilitate discussions between the competent persons and seek input on how to correctly approach a case. If there is no obligation to provide input, there is a risk that the competent persons could be tempted to adopt a passive approach.

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 We do not consider that additional categories of information need to be shared. We agree with the proposed timing of sharing the various categories of information outlined in the Draft Guidance.

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 agree with the type of information that is proposed to be included in the annual concurrency report, as this will encourage transparency and accountability.

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 have no comments on whether other categories of information should be included.

8. Do you agree with the Transition Team's proposed approach to transitional arrangements to account for the changes to competition concurrency introduced by Chapter 5 or Part 4 of the ERRA13? Please give reasons for your view.

8.1 We have no comments on the proposed transitional arrangements.

BAKER & McKENZIE LLP

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