ADDLESHAW GODDARD

Response to the consultation on the CMA's updated guidance to market investigations

2 May 2017

Introduction

- Addleshaw Goddard LLP welcomes the opportunity to comment on the updated guidance to the CMA's approach to market investigations**.**

- The comments expressed below are given on behalf of Addleshaw Goddard LLP and do not necessarily represent the views of the firm's clients.

- We note that by updating the guidance, the CMA is seeking to balance valid but competing objectives, namely the efficient management of the 18 month process and the need for meaningful interaction with the parties during that process.

Responses (to questions at 4.1- 4.5 of the consultation document)

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?

We set out our comments on the main proposed changes in proposal (A) below:

- Considering remedies earlier in the market investigation (MI) process is sensible, given the 18 month timeframe, however doing so in month 1-2 is in our view too early and seriously risks prejudging the outcome of the CMA's AEC analysis. Further, on a practical level the parties would likely be unable to engage in a meaningful manner on remedies at such an early stage in the process, without having more information on the likely AEC focus. As a result, we would recommend that the CMA start to consider remedies in more detail from around month 6, from which point both the CMA and the parties would be able to engage in a two way exchange of information on likely direction of the AEC findings, and any potential remedies. This could take place across various forms of correspondence and face-to-face meetings, and there would still be 12 months in the process left to run from that initial engagement on remedies. We would recommend that the proposed timescales set out at paragraph 6 of Appendix A be adjusted to reflect this more practical approach.

- Equally, setting the initial interaction on remedies at month 6 would not prevent the CMA from encouraging parties to raise potential remedies earlier in the process if they are able. The CMA could put a prompt in the guidance and in the Issues Statement to explain that the parties are free to raise potential remedies earlier, and that the CMA will consider high level argument on remedies at an early stage without prejudice to the AEC analysis and findings.

- Earlier engagement with the CMA panel is welcomed, however the form this engagement takes will dictate how meaningful it is in practice. Again, engaging with the panel before the CMA has shown what direction it is heading in terms of the likely AEC (within the possible theories of harm) would bring limited response from the parties, as the focus of the inquiry would be too broad for any meaningful targeted response.

- Further, whilst we note that stakeholders have expressed support for more face-to-face meetings, in our view the use of multi-party hearings tends to deliver less meaningful engagement than the use of single party hearings (where clients typically fell able to speak more freely) or requesting responses to working papers/analysis that set out the CMA's thinking as it progresses.

- Earlier engagement with the panel should not come at the expense of engagement at a later stage in the MI, and we welcome the CMA's assurance at 2.14 of the consultation paper that that would not be the case.

- The removal of the Updated Issues Statement is understandable given the CMA's aim of improving efficiency within the 18 month timeframe and reducing the number of formal consultations, however this will leave a gap in the process given its role in part as an indication of the CMA's developing thinking (having itself replaced the CC's "emerging thinking" statement). Therefore its removal could be acceptable provided the CMA commits in return to a timeframe for the circulation of working papers and analysis which set out the CMA's developing approach and to which the parties can meaningfully respond.

- On a related note, the move away from a standard menu of working papers and towards a more selective model (e.g. using slide decks elsewhere) is welcome overall, however as noted above working papers or an equivalent should still be used to illustrate the matters previously covered in the Updated Issues Statement, so that this information is not lost to the parties.

- Combining the Provisional Findings and Provisional Decision on Remedies into a single Provisional Decision Report containing both aspects would not pose any issues in our view, provided the timeline for engaging on remedies is updated as outlined above.

- Using confidentiality rings rather than data rooms for the release of data is welcomed.

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?

We set out our comments on the main proposed changes in proposal (B) below:

- The overall objectives of strengthening synergies between market studies (MS) and MI, and clarifying the relationship between the Board and the Group, are welcome.

- However, the proposed use of an 'advisory steer' seems contradictory to the requirement to maintain the Board and the Group as independent decision making bodies. Further, an 'advisory steer' does not in our view add anything in terms of content or procedural efficiency beyond the existing statutory terms of reference and the MS report itself, and would serve to add complexity rather than clarity to the process. The Board currently sets out its thinking in terms of areas of

focus in the MS report, and the Group is able to continue that focus or to reopen the scope of the MI based on its own assessment.

- The preparatory MI team containing Group members could help the Group come to the decision of whether to narrow the scope, rather than an 'advisory steer' from the Board, although the members of such a team would need to be wholly separate to the Board to maintain their independence.

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?

- Please see 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.

- We would propose updating the timescales at paragraph 6 of Appendix A as per our response at 1 above, setting out that the parties' views on remedies are formally requested at around month 6 (but are welcome earlier).

- Again per our response at 1 above, we recommend a separate subheading in the guidance on "*Working papers*" with a proposed timeframe for the publication of the CMA's developing thinking (perhaps after paragraph 30). This is in order to compensate for the removal of the Updated Issues Statement.

- To avoid the risks outlined in our response at 2 above, we would propose removing references to the 'advisory steer', i.e. removing paragraph 16 in full and cutting the end of the third sentence of paragraph 22.

- For greater clarity we propose adding the following to the last sentence in paragraph 39:

  "The report will, if it confirms the finding of an AEC, contain a fully reasoned explanation of the AEC finding and sufficient detail on the nature and scope of remedies to provide a firm basis for subsequent implementation of remedies by the CMA."

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

- No.