EVERSHEDS SUTHERLAND

EVERSHEDS SUTHERLAND (INTERNATIONAL) LLP

RESPONSE BY EVERSHEDS SUTHERLAND (INTERNATIONAL) LLP TO THE COMPETITION AND MARKETS AUTHORITY'S CONSULTATION ON ITS UPDATED GUIDANCE ON ITS APPROACH TO MARKET INVESTIGATIONS

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1. Introduction and Executive Summary

1.1 Eversheds Sutherland (International) LLP (**"Eversheds Sutherland"**) welcomes the opportunity to respond to the "Updated guidance on the CMA's approach to market investigations – Consultation document"[1] (**"Consultation Document"**) published by the Competition and Markets Authority (**"CMA"**) on 6 March 2017.

1.2 Eversheds Sutherland has represented clients including market leaders and new entrants/smaller competitors in a number of market studies (**"MSs"**) and market investigations (**"MIs"**). Most recently, we represented main parties in the CMA's Energy, Private Healthcare, Payday Lending and Private Motor Insurance MIs.

1.3 The comments and observations set out in this response are ours alone and should not be attributed to any of our clients.

1.4 For the most part, we are supportive of the CMA's proposed changes and we welcome the CMA's proposals to streamline the MS/MI process. However, the proposals do raise certain difficult issues, which should be considered in more detail, as explained further below. In particular, we consider that:

1.4.1 There are merits in considering remedies at an earlier stage of the MI process. However, we believe that considering them at the outset of the MI is too early:

1.4.1.1 At this stage, the CMA will not yet have identified potential features of the market that it considers may prevent, restrict or distort competition (i.e. it will not have identified any potential adverse effect on competition **"AEC"**), and of course will not have carried out any analysis that might allow it to refine the potential AECs or assess any consumer detriment. Since the purpose of remedies in an MI is to remedy, prevent or mitigate any AECs and/or any consumer detriment, it may be premature to consider remedies before the CMA has made a preliminary assessment of what the AECs and consumer detriment may be. We suggest that remedies should start to be considered at around Months 6 to 8, in order to give the CMA sufficient time first to carry out its initial analysis of potential AECs;

1.4.1.2 As the CMA acknowledges, there is a risk that the consideration of remedies at an earlier stage of the MI could lead to confirmation bias;

1.4.2 There may be benefits to reducing the number of formal consultations. However, in doing so, it is essential that the CMA maintains a fair and transparent process. It will be essential that the CMA continues to make good use of ad hoc consultations;

1.4.3 With regard to multi-party hearings (and roundtables), in our view, the CMA will need to ensure that each party has adequate opportunity to have its position heard by both key decision-makers and the staff team, and that each party's confidential information is protected; and

1.4.4 In seeking to strengthen synergies between MSs and MIs, the CMA must ensure it preserves independence of decision making between MSs and MIs which, as the CMA acknowledges, is an important aspect of the two-phase markets regime.

1.5 We set out below our responses to the questions raised in Section 4 of the Consultation Document.

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[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/596665/consultation-document-market-investigations-updated-guidance.pdf

2. **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?**

2.1 We agree that there are changes that could be made to streamline the MI process to enable the CMA to conclude an MI within the 18 month statutory timeframe whilst ensuring that the outcome is still robust. Our comments on the CMA's specific proposals are set out in the following sections.

Earlier consideration of remedies

2.2 The Consultation Document proposes to amend the MI process to enable the CMA to consider remedies at the same time as it assesses whether the market gives rise to competition concerns. It proposes to enable the CMA to consult on possible remedies in the initial Issues Statement.

2.3 We agree that there may be benefits to considering remedies earlier in the MI process, so that the CMA has sufficient time to develop remedies and consult on them, and to take account of stakeholder responses. Under the current timetable, particularly for the more complex remedies or those that face greater opposition during the MI process, there may be insufficient time to finalise key aspects of the remedy prior to issuing the Final Report. This means that too much is left for the remedies implementation phase, by which point the CMA is constrained by its decision in the Final Report. In recent MIs, certain key remedies required significant clarification during the implementation phase, some of which went to the scope of the remedy and might have been better addressed prior to issue of the Final Report.

2.4 By considering remedies earlier in the process, we hope it will be possible for the CMA to refine the final remedies to a greater extent prior to issue of the Final Report and address all key issues of scope in the Final Report. It should also give the CMA more opportunity to consider practical implementation earlier in the process, which may influence the scope of a given remedy or ultimately even whether that remedy is an effective and proportionate solution to the AEC/detriment.

2.5 However, we consider it is too early to consider remedies at the outset of an MI.

2.6 As noted above, at the outset the CMA will not have identified potential AECs or carried out any analysis that might allow it to refine the potential AECs or assess any consumer detriment. The purpose of remedies in an MI is to remedy, prevent or mitigate any AECs and/or any consumer detriment. At the outset of an MI, the CMA will be dependent on any potential AECs identified in the decision to make a market investigation reference (the **"MIR"**). Considering remedies before the CMA has started to assess what those remedies are trying to fix may result in wasted time and resource for both the CMA and the parties. This concern is supported by the fact that in numerous MIs, the CMA has narrowed and refined the potential AECs as the MI has progressed.

2.7 As the CMA acknowledges, there is also a risk that it could lead to confirmation bias resulting in the CMA finding AECs in unproblematic areas.

2.8 Additionally, at the start of an MI, parties have to devote a substantial amount of time and resource to responding to the CMA's extensive information requests (First Day Letter and questionnaires) and any consultations on the CMA's analysis of AECs. The CMA should not underestimate the level of resource required, which can involve a sizeable project team devoted to the MI as well as substantial input from management and those individuals within the business with an in-depth understanding of how the business has operated over the period covered by the MI. Consideration of remedies requires significant input from those same individuals; it is neither a small nor a discrete exercise. Under the current timetable, this already gives rise to significant challenges for parties. If remedies are considered at the outset – before any refining of potential AECs and before the parties and their advisors have had the opportunity properly to consider the potential issues – our view is that this challenge could be considerably greater.

2.9 We propose that the CMA starts to consider remedies after it has carried out sufficient analysis to refine the potential AECs referred to it in the MIR, whilst still allowing sufficient time to consult with the parties prior to publication of the Provisional Decision Report. Under the current regime, an appropriate point may have been around publication of the Updated Issues Statement. In the proposed new process, it is difficult to say exactly when this consultation should be carried out; to fit within the new timetable it would probably need to be carried out at around Months 6 to 8.

Reducing the number of formal consultations

2.10 The Consultation Document proposes to reduce the number of formal consultations on set-piece publications by not publishing an Updated Issues Statement (**"UIS"**) and by combining Provisional Findings and the Provisional Decision on Remedies.

2.11 In principle, we agree with this proposal. Within the 18 month timetable, in any MI raising complex or wide-ranging issues, it is near impossible to make time for the current set-piece publications, each of which takes a number of months for the CMA to publish and parties to respond to.

2.12 However, in removing some of the set-piece consultations, it is essential that the CMA does not compromise the need for a fair and transparent process.

2.13 The initial Issues Statement will be published relatively early in the process before the CMA has carried out any substantial analysis of the issues set out in the MIR. In practice, it often closely reflects the issues in the MIR and goes little beyond this. It does not give the parties any real insight into the CMA's thinking in the MI. Whereas by the time the Provisional Decision Report (**"PDR"**) is published at Month 12, the CMA's thinking will need to be very far advanced and – based on our experience under the current process – we expect that only in exceptional cases would the CMA make fundamental changes to its findings between the PDR and Final Report. Therefore it will be essential that the CMA carries out meaningful consultation in the period between publication of the initial Issues Statement and the PDR.

2.14 One benefit of the UIS that may be lost under the proposed changes is the opportunity for the parties to see and comment on how the CMA's thinking all fits together. Under the proposed changes, the first time parties will be formally consulted on this is at PDR stage. The CMA should ensure there is adequate opportunity for this in the ad hoc consultations during Months 2-11.

2.15 Paragraph 2.11 of the Consultation Document states that the CMA would retain the option to publish and consult at other points during the MI.

2.16 In our view, even under the current regime, and especially if the CMA reduces the number of set-piece consultations, the use of ad hoc consultations is essential. These consultations could take various forms, as the CMA identifies. We have observed that in recent MIs, the CMA has held more face-to-face (and telephone) consultations between the CMA staff and the parties/their advisors than in earlier MIs. We consider that these have the potential to help iron out factual and technical issues more quickly than written consultations/submissions alone.

2.17 However, the Consultation Document indicates that the ad hoc consultations would be discretionary, and we are concerned this may result in the CMA not consulting where timescales make it challenging to do so. Whilst it may not be necessary (or possible) to prescribe in the CMA's guidelines what these consultations should cover, we propose that at the earliest opportunity in every MI – which might be both at the outset and on an ongoing basis – the CMA should give the parties advance notice of, and the opportunity to comment on, its planned consultations.

Increasing the opportunities for early engagement with parties

2.18 The Consultation Document proposes to increase the opportunities given to parties to input into the CMA's analysis and inform decision-making at an earlier stage in an MI. This will

take different forms of engagement with parties, as set out in paragraph 2.14 of the Consultation Document. In principle, we support increased early engagement with the parties. We have the following concerns about certain forms of consultation.

2.19 As regards holding hearings earlier in the MI, which would replace the later formal hearings that currently take place prior to publication of Provisional Findings:

2.19.1 We refer to our comments above on the timing of consideration of remedies. Any early hearings to help shape the issues and discuss potential remedies should only take place once the CMA and the parties have had the time to consider the potential AECs any remedies would be seeking to address;

2.19.2 Parties should be given sufficient opportunity to put forward their views on the potential AECs. If, as the CMA proposes, these early hearings would cover both issues/potential AECs and possible remedies, the CMA will need to ensure the issues/potential AECs are given adequate coverage and that remedies do not become the primary focus of these hearings.

2.20 As regards making more use of multi-party hearings (and roundtables), we note that:

2.20.1 Each party will have its own views and experiences. The CMA will need to ensure that each party has sufficient opportunity to set out its position; and

2.20.2 The CMA will need to consider how to address confidentiality issues. In principle it may be possible for parties to raise only non-confidential points in a multi-party hearing. In practice, we consider there is a risk they will not be able to do so as effectively as in a bilateral hearing, and therefore that multi-party hearings may be of less use to both the parties and the CMA.

3. **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?**

3.1 Whilst we consider that the proposed changes could give rise to certain benefits as set out by the CMA in paragraph 2.24, we consider they increase the risk of confirmation bias as between an MS and an MI. In our view, the CMA will need to consider further what additional safeguards may be needed to preserve independence of decision making between MSs and MIs which, as the CMA acknowledges, is an important aspect of the two phase markets regime.

4. **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?**

4.1 In our view, the main potential benefits of the changes proposed in the Consultation Document are that they will help the CMA to complete MIs within the 18 month statutory timescale, which is a challenging timescale particularly for large and complex MIs of the kind recently completed by the CMA; and that they may allow for more effective, proportionate and workable remedies. It is less clear whether the changes will make the MI process any less burdensome or disruptive for parties.

4.2 Please refer to section 2 above, which sets out the risks that we have identified from the proposals and our suggestions for addressing them. We hope the additional safeguards we have proposed will help to ensure robust outcomes.

5. **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.**

5.1 On the whole, we consider that the updated text of the CMA's Guidelines for market investigation (CC3) (**"Updated Guidelines"**) is sufficiently clear and adequately reflects the proposed changes.

5.2 One notable exception is paragraph 25 of the Updated Guidelines which states that the CMA may publish not only summaries but also transcripts of hearings, whereas the current guidelines state that transcripts will not be published – only summaries will (paragraph 78). This proposed change is not mentioned in the Consultation Document. In our view, bilateral hearings currently allow for a frank discussion on key issues between the CMA and the respondent and, notwithstanding the ability to make confidentiality redactions, there is a risk that this would be compromised if the CMA was able to publish full transcripts. The CMA will therefore need to consider carefully when it may be appropriate to publish a transcript and should make this clear to attendees in advance of a hearing.

6. **Do you have any other comments about the proposed changes and the resulting amendments to the Updated Guidelines?**

6.1 We have no further comments on the proposed changes and the resulting amendments to the Updated Guidelines.