

---

Centre City Tower, 7 Hill Street, Birmingham B5 4UA  
21 Bloomsbury Street, London WC1B 3HF

The Market Investigations Review team  
7th Floor  
Competition and Markets Authority  
Victoria House  
37 Southampton Row  
London WC1B 4AD

2 May 2017

Dear Sir or Madam

## **Updated guidance on the CMA's approach to market investigations – CMA consultation**

This letter is the response of the Water Services Regulation Authority ('Ofwat') to the Competition and Markets Authority's ('CMA') Consultation document: *Updated guidance on the CMA's approach to market investigations* dated 6 March 2017 (CMA61con) (the 'consultation document').

This response does not contain any information which is sensitive and that may not be published.

This response makes some introductory remarks and then addresses some of the questions set out in the consultation document.

### **Introductory remarks**

Under the Enterprise Act 2002, the CMA and Ofwat may, in relation to the water and sewerage sectors in England and Wales, undertake market studies ('MS'), and may make market investigation references to the Chair of the CMA for the constitution of a CMA group to conduct an in-depth market investigation ('MI') into single or multiple markets for goods or services in the UK (the 'market provisions'). The purpose of these MIs is to examine the market(s) and (where required) implement appropriate remedies where the CMA determines that the structure of the market(s) or the conduct of the suppliers or customers is harming competition.

Ofwat and the CMA have a duty to consult each other before exercising these concurrent functions under the market provisions.

In addition, as with other sectoral regulators with concurrent competition powers, we have agreed a Memorandum of Understanding with the CMA setting out practical details of how the CMA and Ofwat will work together within the framework of competition law<sup>1</sup> ('the MoU between the CMA and Ofwat'). It provides for cooperation including matters such as information sharing and pooling of resources.<sup>2</sup> It includes working arrangements between the CMA and Ofwat in relation to their concurrent powers under the market provisions.<sup>3</sup> It also includes a provision that where the CMA undertakes an MS which relates to a sector other than water and sewerage but which may have a significant impact on water and sewerage, the CMA will inform Ofwat and share appropriate information relating to that MS with Ofwat to the extent permitted by law.<sup>4</sup>

As noted in the MoU between the CMA and Ofwat, the cooperation between the CMA and Ofwat provided for in it does not extend to conduct that could reasonably be expected to impair the impartiality or the fairness of the CMA panel in conducting market investigations.

This framework of cooperation is very helpful and will be equally important going forward in relation to the CMA's proposed approach to market investigations. This applies both in respect of MSs and MIs in the water and sewerage sectors in England and Wales and in relation to other MSs/MIs in relation which Ofwat has an interest.<sup>5</sup>

## Questions

**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**

---

<sup>1</sup> *Memorandum of understanding between the Competition and Markets Authority and the Water Services Regulation Authority – concurrent competition powers* (26 February 2016)

<sup>2</sup> The MoU between the CMA and Ofwat is to be read alongside other provisions concerning the relations between the CMA and Ofwat, including: the Water Industry Act 1991; the Competition Act 1998; the Enterprise Act 2002; the Enterprise and Regulatory Reform Act 2013; the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004; the Competition Act 1998 (Concurrency) Regulations 2014; the CMA's markets guidance; the CMA's guidance on concurrent application of competition law to regulated industries; and any other applicable sector-specific legislation from time to time.

<sup>3</sup> Primarily set out in Part B.

<sup>4</sup> Paragraph 22

<sup>5</sup> An example of this might be the CMA's work on digital comparison tools, such tools being relevant to many sectors of the economy.

**any alternative changes that would achieve the stated aim set out in paragraphs 1.10 and 1.11.**

*Earlier consideration of remedies*

The CMA proposes that in the future MIs should consider possible remedy options at the same time as assessing potential problems, but also notes, in order to allay concerns that this will increase the risk of intervention bias and/or prejudgment of any adverse effects on competition ('AEC'), that no remedy can be imposed without a fully reasoned AEC. The consultation document notes that this is the general approach taken by other parts of government or regulators when considering potential interventions or changes in policy.<sup>6</sup> Ofwat supports this approach. When Ofwat is seeking to achieve more competitive outcomes, it can do so using various tools, including competition law powers under the Competition Act 1998 and the market provisions, but also through other tools such as direct regulatory action including through enforcement of licence provisions. In deciding which tool to use, a key consideration will be the range of outcomes a tool can achieve. This means that the availability of possible remedies through various tools are considered at an early stage by Ofwat, including when considering whether an MS or an MI is appropriate in a particular case.

*Reducing the number of formal consultations*

The CMA is proposing to reduce the number of formal consultations on set-piece publications and to adopt a revised process for MIs. As under the previous process, the Group on an investigation would retain the option of publishing and consulting at other points during the MI, but this would be discretionary. We support a reduction in the number of formal consultations, particularly where this allows for additional time to engage with interested parties. We also think that this flexibility to take account of the circumstances of the case is important

*Increasing the opportunities for early engagement with parties*

The CMA notes that it proposes to increase the opportunities given to parties to input into its analysis and inform decision-making at an earlier stage in an MI. We think that this is a sensible proposal. Our experience, for example in relation to price reviews which we conduct, is that earlier and fuller involvement in the analysis and

---

<sup>6</sup> Paragraph 2.5

methodologies we use is beneficial for us and the water companies we regulate and that we intend to continue to adopt this approach in the future.

**Do you agree with the proposed changes set out under proposal (B) (strengthening synergies between MSs and MIs 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.**

*Strengthening synergies between MSs and MIs*

The CMA notes that where it is undertaking an MS and has consulted on a possible reference, the CMA proposes that, to ensure a smooth and efficient handover to the MI, work would be undertaken in the latter stages to:

- Explore explicitly the possibility of narrowing the scope of the issues for consideration in an MI (this would be to inform the advisory steer on scope that the Board may wish to append to the terms of the reference);
- Prepare and scope potential analysis to be completed in an MI; and
- Consider potential remedies (which the MS team currently already need to do as part of a reference decision).

The CMA notes in the consultation document<sup>7</sup> that in certain cases there may need to be a broader MI which looks at all the potential issues in the markets referred because, for instance, there is perceived to be a need to 'clear the air' through a broader review of the market and/or where there is limited opportunity for the CMA to be involved in shaping the work prior to the MI. The CMA notes that this may be the case in, for example, references from regulators or super-complaints. We note that as well as 'clear the air reviews', regulators may also seek more targeted reviews, and it is helpful that the CMA acknowledges that there may be different types of review needed.

In terms of shaping the work prior to the MI, in accordance with statutory provisions and the Memorandum of Understanding between the CMA and Ofwat there should be consultation and discussion on any MI reference by Ofwat and in cases where Ofwat does not carry out an MS but has a significant interest, there should also be information sharing and discussion.

---

<sup>7</sup> Paragraph 2.19

The CMA also notes in the consultation document that even with a narrowly scoped MI, the Group would be able to consider other issues outside of those identified by the MS, should these arise in the course of the investigation. Ofwat supports this.

#### *Clarifying the relationship between CMA Board and Group*

The CMA proposes that where the CMA has carried out the MS, the CMA Board may wish to issue an advisory steer on scope at the start of the MI (annexed to the reference decision). This steer would set out the Board's expectations regarding the scope of the MI and issues to be addressed following work undertaken in the MS. The Board's views would be advisory only, but the CMA believes that it is right that the Board should have the opportunity of providing a steer to the Group on scope to avoid duplication and realise the efficiencies from being a single competition authority.

While there is no role envisaged in the consultation document for Ofwat in this respect, the relevant statutory provisions noted above and the Memorandum of Understanding between the CMA and Ofwat would continue to apply and Ofwat would anticipate that the CMA would keep it informed about and discuss scoping matters as appropriate pursuant to these arrangements.

We do not have any further comments to make on the remaining questions below.

**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?**

**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.**

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

Yours faithfully

**Richard Khaldi**  
**Senior Director, Market Outcomes and Enforcement**