RESPONSE TO THE CMA'S CONSULTATION:

"UPDATED GUIDANCE ON THE CMA'S APPROACH TO MARKET INVESTIGATIONS" (6 MARCH 2016)

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1. INTRODUCTION

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on the Competition and Markets Authority's (***CMA***) public consultation "*Updated guidance on the CMA's approach to market investigations*" of 6 March 2017 (the ***Consultation***).

1.2 Our comments are based on our experience of representing clients in all the market investigations before the CMA and its predecessor bodies.

1.3 We have confined our comments to those areas which we feel are most significant in terms of providing clarity and certainty for companies that might be subject to the market investigations regime. The comments in this response are those of Freshfields Bruckhaus Deringer LLP and do not necessarily represent the views of any of our clients.

1.4 We would be pleased to discuss any of the points made in this response further if the CMA would find it helpful to do so.

2. SUMMARY

2.1 We support reasonable and proportionate reforms to the market investigations framework, provided such reforms benefit key stakeholders – consumers and business – without adding unnecessary restrictions or rigidities to the system. However, we are concerned that some of the reforms the Consultation is proposing may:

(a) compromise the rigour and robustness of the CMA's analysis and subsequent conclusions;

(b) prevent stakeholders gleaning the "gist" of the CMA's thinking at a sufficiently early stage in the process to allow them to respond to the CMA's analysis before the CMA draws its final conclusions; and

(c) compromise the independence of decision-making within the CMA.

2.2 We are particularly concerned by the CMA's focus on remedies and their consideration from a very early stage in the market investigation process. This proposed change undermines the very purpose of market investigations – for the CMA to assess whether "*competition in the market is working effectively*"[1] – creating an expectation from the outset that remedies may be required. In effect, this approach could pre-empt the requirement for the CMA to establish a "*competition problem and identif*[y] *its causes*"[2] before considering the imposition of remedies. This approach may well shift the spirit of the market investigation process from investigative and inquisitorial to accusatorial, going

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1 CMA, *Guidelines for Market Investigations: their role, procedures, assessment and remedies* (***CC3 Revised***), para. 18.

2 *CC3 Revised*, para. 20.

against the CMA's own guidance.[3] We discuss the relevant reforms in further detail below (*see* paragraphs 3.1 to 3.5).

3. STREAMLINING THE MARKET INVESTIGATION PROCESS

3.1 **Earlier consideration of remedies.** The statutory purpose of a market investigation reference is for the CMA to "*decide whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services*" (i.e. an adverse effect on competition (***AEC***)) in the UK.[4] If the CMA makes a finding of an AEC, it may decide to take further action through the implementation of reasonable and practicable remedies.[5]

3.2 There is, therefore, an inherent contradiction in the CMA's suggestion to "*consider possible remedy options at the same time as assessing potential problems*"[6], i.e. before an AEC has been identified. Not only does this approach invert the logical order of the process, it also jeopardises the fairness of the process with potentially serious consequences:

(a) inherent intervention bias and prejudgement of an AEC. As the CMA's guidance states, the CMA will publish "*its final decision on the competition question and (if necessary) remedies together with supporting reasons and information,*"[7] once it has "*considered evidence of all kinds*" to arrive at a "*rounded judgment*."[8] The CMA's proposed approach has the potential to undermine the CMA's stated aim not to compromise the robustness of its processes;[9]

(b) reduced scrutiny of the underlying AEC, as the focus of market investigations shifts from debates over the very existence of an AEC to remedies (assuming an AEC) from the outset. As the CMA's guidance notes, market investigation references might be preferred where for example, "*the facts and issues underlying a perceived competition problem are complex…*"[10] These complex issues require thorough, detailed and often lengthy examination rather than the distraction of hypotheticals and theoretical remedies. Although the CMA states that "*no remedy can be imposed without a fully reasoned* AEC,"[11] in reality the CMA and stakeholders in market investigations have limited resources and this shift in focus may have serious repercussions on the robustness of the AEC finding;

(c) undermining the clear distinction between the finding of an AEC and the subsequent consideration of remedial action as set out in statute (and acknowledged by the CMA). By considering the AEC and remedies simultaneously, the CMA could be

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3 *CC3 Revised*, para. 21.

4 Enterprise Act 2002 (***EA 2002***), s. 134(1).

5 EA 2002, s. 134(4) and s.138.

6 *Consultation*, para. 2.5.

7 *CC3 Revised*, para. 86.

8 *CC3 Revised*, para. 319.

9 *Consultation*, p.3.

10 *CC3 Revised*, para. 24.

11 *Consultation*, para. 2.7.

interpreted as frustrating the legislative will behind the EA 2002 by discarding the order of the process clearly laid out in statute. The separation between consideration of the issues and consideration of potential remedies is equally as important in market investigations as in merger control;[12]

(d) distorting the basis on which remedies can be implemented. The Consultation states that including remedies discussions at an earlier stage will ensure that market investigations become "*more clearly focused on the potential improvements that could be made to markets.*"[13] However, as set out in paragraph 3.1 above, the test for introducing remedies is not whether the market can be improved but whether there is an AEC which requires remedial action.

(e) wasting the CMA's resources and reducing efficiency by considering the need for irrelevant and/or inappropriate remedies at a premature stage of the analysis when these remedies may be ruled out at a later stage of the analysis. As the CMA states, if a potential AEC is not found, the relevant remedy option will not be considered further,[14] wasting resources previously spent on it, which could have been invested in determining whether an AEC arose in the first place. This runs contrary to one of the CMA's stated aims of the proposed reforms, carrying out its "*work efficiently and effectively and to make the best possible use of resources.*"[15] Furthermore, remedies consideration is premature and inefficient when the features giving rise to the AEC have not yet been identified and the relative weight the CMA attaches to them is unclear;

(f) applying a disproportionate approach to a problem which has not yet been proven. As outlined above, the risks of considering remedies prematurely are considerable and are not justified by the alleged efficiency benefits; and

(g) worsening a perception and engagement problem, with stakeholders already believing that market investigations are increasingly putting them "in the dock" for behaviour that does not infringe standard antitrust norms and which would not be actionable in many other jurisdictions.

3.3 In addition, the prospect of remedies, and the media attention they often garner, can have a profound impact on the affected markets. It can lead to decision paralysis by stakeholders leading to investment freezes in the affected markets. This chilling effect on investment has precisely the opposite impact of the CMA's stated aim of supporting "*economic growth by improving productivity and increasing innovation*."[16]

3.4 We understand the CMA's desire to have more time to ensure that the final report contains "*sufficient detail on the nature and scope of remedies to provide a firm basis for subsequent implementation.*"[17] However, there are fairer and more proportionate ways of

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[12] *Consultation*, para. 2.6. *See* EA 2002, s. 134(4) and s. 138.

[13] *Consultation*, para. 2.15.

[14] *Consultation*, para. 2.7.

[15] *Consultation*, para. 1.11.

[16] *Consultation*, p.2.

[17] *CC3 Revised*, para. 86.

achieving this aim than those proposed in the Consultation. For instance, a narrower market investigation reference, informed by a more thorough market study, would enable the CMA to reach robust AEC findings earlier on in the process, allowing additional time for the remedies process. Similarly, given the enhanced information gathering powers for market studies, the CMA could look to frontload more of the analytical work to the beginning of the timetable.

3.5 The only scenario in which it may be appropriate for the CMA to consider remedies from the outset is when the CMA opens an investigation into a market which has been the subject of a market investigation within the previous 5 years and where the CMA is assessing the effectiveness of previously imposed remedies. Even in rare cases such as these, the CMA would need to give sufficient consideration to the AEC workstreams to ensure it had sufficiently robust findings to implement any new remedies.

3.6 **Reducing the number of formal consultations.** The current process is time-consuming and resource-intensive for both the CMA and stakeholders.[18] We welcome any reforms which provide "*appropriately consulted*" parties with "*adequate opportunities to scrutinise*" the CMA's findings resulting in "*fair, rigorous and robust outcomes.*"[19] To this end, we agree with the deletion of the Updated Issues Statement (which, in our experience, often shows limited development in analysis from the initial Issues Statement) so long as the "gist" of the CMA's thinking is clearly set out in subsequent publications with the underlying evidence including data (e.g. in working papers). We also agree with the merging of the first remedies consultation and Provisional Findings (***PFs***), given that, in practice, these two papers are often published at the same time and with the same deadline.

3.7 As set out above (see paragraphs 3.1 to 3.5), we consider the emphasis the Consultation's proposals place on remedies, particularly from such an early stage, inappropriate and prejudicial to stakeholders. We therefore strongly disagree with the Issues Statement covering possible remedies, as well as the omission of the Notice of Possible Remedies. Given the serious repercussions that the CMA's remedies can have for both stakeholders and sectors more broadly, we consider that more consultation on remedies is required before the Final Report (but not at the early stage proposed by the CMA).

3.8 In the Consultation, the CMA assures stakeholders that they will be given "*as much clarity as possible on the process the investigation will follow*" via the Administrative Timetable.[20] From our experience, the Administrative Timetable has not been sufficiently accurate up-to-date or detailed to enable stakeholders to plan for significant events. In future, the CMA should update the timetable and publish a letter explaining any changes, as soon as it becomes aware of the relevant delays.

3.9 **Increasing the opportunities for early engagement with parties.** We welcome the opportunity to engage with the CMA (at both a panel and working group level) regularly and interactively from an early stage in the market investigation process.

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[18] *Consultation*, para. 2.9.

[19] *Consultation*, para. 2.10.

[20] *Consultation*, para. 2.11

3.10 We have the following comments on the Consultation's proposals as set out in paragraph 2.14 and the timetable in Appendix A:[21]

(a) the main party hearings should take place at a later stage in the process when the CMA's thinking is more advanced and the underlying evidence is available and has been interrogated by the stakeholders (e.g. at least three working days after all the working papers have been published c. month 6/7 - see below). This amended timing will maximise the clarity and efficiency of the hearing for the CMA and ensure the stakeholders receive a fair hearing. It will also ensure that the formal interactions between the CMA and main parties are more evenly spaced, allowing an additional opportunity for contact as thinking evolves on both sides. The site visit and main party hearings within the same month would simply duplicate the interactions between the parties. Furthermore, there is no guarantee that it would be practically possible to schedule all these interactions so close together;

(b) multiparty hearings are ineffective and inefficient for discussing issues. Parties may feel inhibited from expressing their views in the presence of other stakeholders e.g. because the CMA's findings are based on competitively-sensitive, confidential information. In certain market investigations where there is a strong consensus among stakeholders, multiparty hearings may be appropriate fora for remedies consideration;

(c) while there have been too many working papers in the past, working papers are a necessary element for stakeholders to see the "gist" of the CMA's thinking. Their importance will only increase if there is a ten month gap between the Issues Statement and next publication – the Provisional Decision Report on the AEC. As the Competition Commission noted in its Guidance on the Disclosure of Confidential Information, earlier disclosure of its thinking, prior to the publication of provisional findings, can improve the efficiency of an enquiry or a particularly complex review as it gives parties the opportunity to comment before the publication or disclosure of the key documents.[22] As the Competition Appeal Tribunal has noted, disclosing the gist of the CMA's reasoning will often involve a high level of specificity.[23] In our experience, working papers are useful in allowing the CMA and parties to identify and address discrete but important issues, particularly when such a level of specificity is required in both the disclosure and the response. Working papers on issues directly related to the AEC and proposed remedies should therefore be reinstated as mandatory. Furthermore, the CMA should ensure that the <u>full</u> working papers are published in a timely fashion with sufficient notice for stakeholders ahead of main party hearings. It cannot be right not to deny main parties the opportunity to make their case orally on key issues in the case because the relevant work has not yet been published. Fundamentally the CMA needs to consider whether some analyses it might like to conduct in an ideal world remain tenable in the new shorter market investigation timetable. In practice, it is the late running working papers, rather than late remedies consideration, which creates strain in the process.

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21 *Consultation*, Appendix A, p.20.

22 Competition Commission, *Chairman's Guidance on the Disclosure of Confidential Information*, para. 7.2.

23 *BMI Healthcare et al v. CC*, [2013] CAT 24; para. 39(7).

(d) we would welcome the increased use of confidentiality rings over disclosure rooms. Confidentiality rings are more efficient and use up fewer CMA's resources than disclosure rooms. Whatever the CMA decides to use to allow stakeholders to interrogate the evidence, the same sets of undertakings should be used throughout the process where possible. In the Energy Market Investigation, the undertakings needed to be renegotiated for each separate disclosure room and confidentiality ring. This process was inefficient, unnecessary and a waste of resources for all parties concerned; and

(e) a more flexible approach to setting out the CMA's thinking is laudable. However, the chosen medium must: (i) be appropriate (e.g. not PowerPoints for data-heavy analysis which requires access to the underlying data to be properly interrogated); and (ii) sufficient to give the parties' the "gist" of the CMA's thinking.

3.11 Ultimately, it is critical that the CMA does not sacrifice the fairness of the process and the robustness and rigour of its analysis for a superficially streamlined process. If the reformed process leads to procedural errors and an increase in judicial review challenges, the "efficiency" gained by the Consultation's proposed reforms could transpire to be a false economy.

4. STRENGTHENING SYNERGIES BETWEEN MARKET STUDIES AND MARKET INVESTIGATIONS AND CLARIFYING BOARD/GROUP INTERACTIONS

4.1 **Strengthening synergies between market studies and market investigations.** In principle, the Consultation's proposals to maximise the synergies between market studies and investigations are welcome. In particular, the narrowing of the scope of issues for consideration in the market investigation would facilitate the front-loading of analysis by the CMA as proposed above (see paragraph 3.4).[24] Furthermore, the preparatory work by the market investigation team would enable it to function effectively from the date of the market investigation reference with a clear understanding of the market.

4.2 The Consultation mentions that "*the Group would be able to consider other issues outside of those identified by the market study, should these arise in the course of the investigation*."[25] However, the Consultation does not give any guidance as to how the Group could effectively expand the scope of the investigation. To ensure that the Group does not act *ultra vires*, the CMA should publish further guidance on this point e.g. on the process the CMA would need to follow and the criteria that would need to be fulfilled to warrant any expansion in scope.

4.3 **Clarifying the relationship between Board and Group.** The Consultation's proposal for the Board to issue an advisory steer on the scope at the start of the market investigation risks duplication as the CMA's Board is already required to approve market investigations (and by implication, its scope). The advisory steer also risks compromising the Group's integrity and independence. However, if the CMA is minded to pursue this proposal, the CMA should give guidance as to how the Group would be expected to take the Board's steer "*into account*" while preserving the independence of the Group.[26]

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[24] *Consultation*, para. 2.18.

[25] *Consultation*, para. 2.19.

[26] *Consultation*, para. 2.23.

5. CONCLUDING REMARKS

5.1 We welcome the CMA's continued commitment to a strong and vibrant market investigations regime, and to reducing the burdens of the regime on business. However, serious consideration must be given as to whether many of the current proposals will, in practice, achieve the CMA's objectives of working as efficiency and effectively as possible without compromising the fairness and transparency of the process.

5.2 We would be very happy to discuss any of the issues raised in this response, if that would be helpful.

Freshfields Bruckhaus Deringer

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