CMA CONSULTATION ON UPDATED GUIDANCE ON THE CMA'S APPROACH TO MARKET INVESTIGATIONS: RESPONSE OF CLIFFORD CHANCE LLP

1. INTRODUCTION

1.1 Clifford Chance welcomes the opportunity to comment on the consultation of the Competition and Markets Authority (**CMA**) regarding the proposed updated guidance on the CMA's approach to Market Investigations (**MIs**). This response is not confidential and may be published as is.

1.2 We consider below each of the proposed reforms in turn. We welcome most of the proposals, as they are, in our view, likely to create considerable procedural efficiencies, but we have some reservations that the early consideration of remedies will be appropriate only in limited circumstances and may lead to the inefficient use of the CMA's resources and less robust findings on the presence of an adverse effect on competition (AEC).

Earlier consideration of remedies

1.3 While we recognise that earlier consideration of remedies may allow for shorter review procedures in some cases, we have some concerns that this change would be considerably more resource-intensive, both for the CMA and market participants, and that it would materially increase the risk that remedies are imposed without sufficient supporting evidence for an underlying AEC that would justify such remedies. We consider that it will therefore be appropriate only in certain, limited circumstances. In particular, it seems to us that this approach would:

1.3.1 result in inquiry groups devoting resources to the development of relatively detailed remedy proposals that are subsequently required to be abandoned when evidence of the underlying AEC is found to be insufficient. As will be evident from the CMA's experience in the private healthcare market investigation, it may not be apparent until a fairly late stage that the available evidence does not, in fact, support an AEC finding;

1.3.2 make inquiry groups materially more likely to find an AEC on the basis of weak supporting evidence, because: (i) they are reluctant to abandon that line of inquiry and concede that resources have been wasted in developing the relevant remedies; and/or (ii) resources that should have been devoted to analysing the presence of an AEC are diverted to the development of remedy proposals. In these circumstances, the timing efficiencies brought about by this changed approach would be illusory, as they would be considerably outweighed by the time and resources that the CMA would have to expend in defending appeals against those findings, and the increased likelihood that such appeals are successful; and

1.3.3 reverse the substantive test that the CMA is required to carry out. In practice, there would be a risk that inquiry groups will consider first the perceived benefits or features that a particular remedy may bring and then reverse

engineer the AEC so that it is, in effect, defined as being the absence of those benefits and features in the prevailing market conditions.

1.4 We do not consider that the fact that "no remedy can be imposed without a fully reasoned AEC"[1] addresses these risks. Moreover, even if it were clearly the case that this reform would allow for shorter MIs, we do not consider that the 18 month timetable for MIs will invariably necessitate it. The consultation appears to take as its starting point an assumption that shorter deadlines for market investigations that were introduced by ERRA13 have not achieved the objective of reducing overall timeframes for market investigations. However, that assumption is based on two unusually wide-ranging market investigations, one into the entire market for the wholesale and retail supply and acquisition of gas and electricity, and one for the supply of retail banking services to personal current account customers and small and medium-sized enterprises. These are two of the broadest and most complicated markets ever investigated under the market investigation regime. For most MIs, there will be sufficient time to consider remedies after the assessment of the AEC, and even for the most complex MIs, the proposals to facilitate scoping of MIs through the use of advisory steers should obviate any need for early consideration of remedies.

1.5 We do, however, accept that early consideration of remedies may be appropriate in some cases and, in particular, where there have been detailed discussions regarding undertakings-in-lieu at the market study stage, and a clear-cut potential AEC has been identified, but there is insufficient time to validate the effectiveness of the remedies in addressing that AEC. In that situation, if there is a consensus among market participants in favour of early consideration of remedies during an MI, then we agree that early consideration of remedies would achieve substantial procedural efficiencies while limiting the risks identified above.

1.6 If the CMA implements this proposal, we suggest the following safeguards:

1.6.1 remedies should not, as a rule, be included in the initial issues statement, but should be considered only after the site visits and hearings (which are typically in Month 3 in the CMA's revised timetable)[2], unless there has been substantial work on remedies at the market study stage and there is a consensus among market participants that this work should continue in the early stages of the MI;

1.6.2 the CMA should be prepared to devote additional resources to the earlier stages of the investigation to take account of the additional work that will be required to analyse remedies for unsupported AECs; and

1.6.3 after an appropriate period (of, say, two years), the CMA should take stock, to assess whether the changes have indeed resulted in the desired procedural efficiency.

Reducing the number of formal consultations

1.7 We agree that a reduction in set piece publications need not harm the effectiveness of the review process, provided parties are given appropriate information on inquiry

[1] Paragraph 2.7 of the consultation document.

[2] As set out in the table in the revised guidance in Appendix A of the consultation document.

groups' thinking and analysis, and opportunities to engage with the inquiry groups in that respect, whether through hearings, informal meetings or sharing of working papers. In particular, we have found that bilateral meetings, and the back and forth of views that they permit, are usually a much more productive form of engagement than written responses to consultations, which often necessitate repetition of previous submissions. While multi-lateral hearings and meetings can also be productive, we caution that they should not be at the expense of offering parties the opportunity to express their views in full in a bilateral meeting, as in our experience the multi-party format often does not permit parties to be fully open about their concerns.

1.8 In addition, while we do not object in principle to a different format of engagement, if these reforms were to result in less information being made available to parties, that would in our view materially reduce the effectiveness of the engagement process. In particular, our experience is that the annotated issues statement provides useful information that helps the parties to scope and tailor their engagement with the CMA, so that information should continue to be made available, even if a different mechanism and format of disclosure is used.

1.9 We also agree that it should be for inquiry groups to determine the most effective structure for such disclosure and engagement, in light of the requirements of each individual MI. In particular, we support the proposal to combine site visits with a more formal hearing in appropriate cases.[3] However, increased flexibility for the CMA in terms of the form and timing of its information disclosures must be matched by increased transparency about such disclosures in individual MIs, so that parties understand well in advance the scope of those disclosures and how and when they will be able to respond to them.

Increasing opportunities for early engagement with parties

1.10 In our view, the proposal for early engagement with the parties would give rise to substantial procedural efficiencies, and we strongly support it. In particular, where economic analysis is to be carried out, there should be early engagement on the methodology between the CMA's economists, in order to minimise the possibility of subsequent disputes once the analysis has been carried out.

1.11 In other situations, the most effective form of early engagement will usually involve members of the inquiry group, and we would welcome an express recognition of this in the revised guidance.

Strengthening synergies between market studies and market investigations

1.12 We broadly agree with the proposal to carry out considerable preparatory work at the market study stage in relation to the potential analysis, scope of issues and potential remedies to be considered at the MI stage. Formation of a preparatory MI team (including staff and potential Group members) would reduce wasted time, and allow an issues statement to be published at an early stage in the MI. However, we consider that such a team should not, at that preparatory stage, include staff members currently working on the market study, even though they are likely subsequently to form part of the staff working on the MI, once launched. In particular, interaction at the market

[3] Paragraph 21 of the revised guidance set out in Appendix A of the consultation document.

study stage between potential group members and the staff who are determining the conclusions of the market study would risk undermining the protection against confirmation bias that is built into the statutory MI regime.

Clarifying the relationship between Board and Group

1.13 We support the proposal for the CMA Board to issue an advisory "steer" on scope at the start of an MI, which the inquiry group is then expected (but not required) to take into account. In our response to the 2016 consultation of the (then) Department of Business, Innovation and Skills on options to reform the competition regime, we advocated a statutory amendment allowing MI references to specify the "features" of the market to be investigated during an ordinary MI, in the same way as is currently possible for cross-market references. To the extent that the proposed reform would have a similar (albeit non-statutory) effect, we agree that it would contribute to the CMA's stated aim, i.e. "to avoid duplication and realise the efficiencies from being a single competition authority".[4] However, we have some reservations that the non-binding nature of the steer may reduce its effectiveness as a mechanism to limit the scope of MIs, given that s.134 Enterprise Act 2002 (EA02) imposes a duty on inquiry groups to "decide whether any feature, or combination of features, of each market prevents, restricts or distorts competition" (emphasis added). In particular, it is not clear that this approach would create any additional narrowing of the issues that are addressed in MIs than the identification of potential AECs, and the assessment of the strength of evidence for those AECs, that already takes place in the market study report.

1.14 In our view, if the CMA Board is to issue an advisory steer, it is critical that this is done transparently, and with reference to the findings of the market study report. In particular:

1.14.1 it is important that market participants have the opportunity to comment on the contents of the advisory steer, and the CMA Board's reasons for it, before it is issued. In our view, the most appropriate mechanism for this would be to include a draft of the steer in the consultation on the market study notice that is carried out under s.131A(2) EA02. If the CMA Board has received, or otherwise taken into account, representations from government ministers on the scope of the issues to be addressed, those should be disclosed as part of this consultation;

1.14.2 if there is a consensus among market participants that a particular market feature would merit the scrutiny of an MI, there should be a presumption that it will be included in the advisory steer. The advisory steer should not be used to create pressure on inquiry groups to address populist issues at the expense of the primary concerns of the industry; and

1.14.3 the guidance should expressly clarify that the advisory steer will be limited to narrowing the issues that have been identified as material in the market study, and will not be used to introduce new issues that have not been identified as potential material concerns during the market study.

[4] Paragraph 2.22 of the consultation document.

Application of the guidance to the concurrent regulators

1.15 We recognise that the CMA's proposals for strengthening synergies between market studies and market investigations do not apply to MIs that are initiated by the concurrent sector regulators. However, our view is that such MIs would benefit equally from procedural efficiencies if the concurrent regulators were to implement similar reforms (subject to our comments above on those reforms). Accordingly, our view is that the CMA should encourage the concurrent regulators to adopt parallel revisions to their guidance, and to consult with the CMA Board before initiating MIs.

Clifford Chance LLP
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