

**Updated Guidance on the CMA's Approach to Market Investigations  
Santander Comments on Consultation Document Published on 6 March 2017**

**Introduction**

1. Santander UK plc (Santander) welcomes the opportunity to respond to the CMA's Consultation Document published on 6 March 2017 inviting views on the CMA's proposals to make various changes to the way it undertakes market investigations.
2. Recognising the CMA's need to comply with ERRA13, which came into force on 1 April 2014, and the changes it introduced to the market investigations framework (including, in particular, the truncated timetable from 24 to 18 months), we welcome and support the CMA's work to:
  - A. Streamline the market investigation process; and
  - B. Increase efficiencies between market studies and investigations, while maintaining independent decision-making.
3. In this paper we provide our comments on the key proposals. We set out our views as a scale challenger in UK banking: a bank that is small enough to have the appetite to innovate and win customers and with sufficient scale to genuinely challenge the incumbent Big Four banks. Our views are informed by our recent experience as an active participant in the CMA's market investigation into retail banking, which was a two-year market investigation (which included an extension to the statutory timetable of four months), following two years of related market studies by the CMA/OFT.
4. In light of the significant internal resource, time and cost expended on the retail banking market investigation and our experience in navigating the process, we believe we are well-placed to provide feedback to the CMA on where greater efficiencies could be achieved without compromising fairness.

**The need for holistic consideration when prioritising markets to scrutinise**

5. While we address specific consultation points below, as a general introductory observation, the CMA will be aware that the financial services sector is subject to significant scrutiny. In addition to the competition authorities, financial institutions are subject to regulation and oversight by the FCA, PRA, BOE, PSR, HMT, the ECB, and other authorities.
6. The increase in the number of projects to be delivered by 2019 (such as ring-fencing; IFRS 9; new models to determine mortgage risk weightings; Basel IV proposals; PPI; and CMA/FCA market study output) increases the operational risk of banks at a time when we need to manage an uncertain economic outlook and the UK's exit from the European Union.
7. We would welcome greater coordination between regulators at a senior level with a view to the development of a collective 'helicopter' view on the impact and prioritisation of the growing number of coterminous regulatory driven initiatives which banks are being required to deliver. As regards competition authorities such as the CMA, we would welcome proportionality regarding the need to conduct market studies or investigations and their

timing, given the risk particularly for scale challengers, that diversion of scarce resource on multiple projects may impact ability to invest and innovate to effectively compete to meet evolving consumer needs and win market share.

8. Our aim is to manage competing requirements and challenges with no disruption to our customers and, to help facilitate this, we would welcome effective collaboration between relevant regulators and authorities and evidence of a joined up approach when prioritising markets to scrutinise.

### **Santander's Comments on Proposal A**

9. In order to streamline its processes and improve the way it engages with parties, both of which aims we support, the CMA has proposed three related changes to the market investigation process. We set out below our thoughts on each in turn.

#### *Earlier consideration of remedies*

10. Currently, the Group on a market investigation assesses whether the market is working well by considering whether there are competition problems and, if so, what these are, before then focusing on what remedies might be applied and whether these are effective and proportionate. Parties' views on remedies are normally received after the Remedies Notice has been published, usually approximately 11-12 months into the investigation. The CMA is proposing that, in future, market investigations should consider remedy options at the same time as assessing potential problems.
11. We do not believe that remedies should be assessed at an earlier stage in the market investigation, alongside assessing any adverse effect on competition (AEC). In our view, this would increase the risk of intervention bias and/or prejudice any AEC finding (particularly in light of confirmation bias of those individuals working on remedies at the outset). The risk of bias in our view outweighs any benefits realised from assessing remedies at an earlier stage.
12. In addition, it is proportionate to first assess the evidence to determine whether there is any AEC before moving to consider remedies. The CMA has a statutory duty to remedy any AEC it identifies. Once the CMA has identified an AEC, it can then tailor remedies to address the issue. It is difficult to see how the CMA could discharge this duty by proposing remedies before thoroughly understanding the issues, including by gathering industry knowledge and views. It may also result in a broad brush approach to remedies, which is not in the spirit of making the market investigation process more efficient. In our view, the desire for speed and efficiency should not prevail over fairness and transparency to market participants particularly scale challengers (including scale challengers such as ourselves) who inevitably have fewer resources than incumbents.

13. [REDACTED]

- [REDACTED]
- [REDACTED]
14. In the event that, contrary to the above, the CMA determines that the process is not compromised by assessing remedies at an earlier stage, we note that the CMA recognises there may be some cases where there is a greater need to understand the issues in more depth before it is possible to consider potential remedies in more detail, and that the CMA's proposals are not prescriptive in this respect. This is likely to be the case in highly complex sectors such as the financial services industry in which we operate. We welcome greater flexibility in the approach taken depending on the specifics of the case and market.
  15. In all cases, the CMA should ensure that there is sufficient time available to develop and meaningfully consult on remedies. In some instances, it may be proportionate to extend the timeframe for consideration of remedies. The process should seek to ensure adequate time for interaction with other regulators such as the FCA to allow coordinated outcomes that will provide certainty to industry and avoid the need for multiple enquiries into closely related areas. This may also enable more timely implementation of remedies to address identified AECs.
  16. As a tangential point, where the CMA – a sophisticated expert authority - has rejected a particular remedy following a detailed review, we would welcome where possible the CMA's Final Report giving detailed reasons for rejecting the remedy. This would provide clarity for the industry and comfort that the same issues will not be traversed by other regulators in short order without due regard to the inevitably detailed consideration the CMA will have given. For example, in the retail banking investigation, we would have valued a more explicit dismissal of the mooted remedies of Account Number Portability (which, as we mentioned in our submissions, was described by an overseas regulator as a "golden sledgehammer to crack a nut") and partial switching. Detailed consideration was given to both of these but the Final Report could have been more definitive as to why these were not taken forward.

*Reducing the number of formal consultations*

17. [REDACTED]  
[REDACTED]  
[REDACTED] Therefore, we welcome the opportunity to actively participate in regulatory debate to seek to shape the markets we serve, and seek to respond to all consultations where possible. If there is scope to reduce the number of formal consultations around set piece publications in a proportionate way that permits more time to be allocated to assessment of evidence and, if necessary, remedies (while not diminishing opportunities for contributing to the debate or prejudicing the parties), we would welcome this.
18. One ancillary benefit of a reduction in the number of formal consultations would be a reduction in the amount of putbacks (which require significant time and resources to track and validate).

19. We have no objections to the proposal not to publish an Updated Issues Statement (currently published in months 5-9), which does not largely add to the issues set out in the Issues Statement (published in months 1-2). We recognise that the Updated Issues Statement is useful in informing parties where the CMA is no longer investigating a particular issue or has concluded that a particular issue does not give rise to an AEC. However, this could be achieved via a short press release/statement.
20. In the alternative, we could see a scenario where the market study process results in a document akin to the current Issues Statement published at the outset of the market investigation.<sup>1</sup> In that scenario, it might be possible to remove the Issues Statement and instead rely on the market study conclusion report to outline the issues which the CMA will focus on in the market investigation (supplemented by the Board Steer). The Issues Statement could then be published at the time when the current Updated Issues Statement is published, serving as a point of reference/consultation on the how the CMA's thinking has evolved. Depending on approach to earlier meetings with interested parties, the Issues Statement could then also reflect learnings from these.
21. We are less attracted by the proposal to replace the Provisional Findings and Provisional Decision on Remedies with a single Provisional Decision Report (which would contain the provisional decision on both AECs and remedies and would form the basis of a consultation). For the reasons detailed at paragraphs 11- 13 above, we think this risks intervention bias and pre-judging of outcome. In addition to those reasons, if not properly managed, we believe there is a risk that if adopted this proposal would affect the parties' rights of defence, including their right to respond to and challenge any provisional findings on AECs. We note that currently the Provisional Findings are published alongside the Remedies Notice in Month 11-12, and the CMA usually publishes the Provisional Decision Report in Month 16. This period could potentially be truncated to streamline the process.
22. If the CMA does proceed with its proposal to replace the Provisional Findings and Provisional Decision on Remedies with a single Provisional Decision Report, we would urge the CMA to ensure that there is sufficient time for market participants to respond fully to both limbs of the Provisional Decision Report, otherwise there is a risk that parties will prioritise a response to the remedies limb given the immediate business impact.

*Additional commentary on information requests*

23. We would like to take this opportunity to note that – from our experience in the retail banking investigation – regular and detailed requests for information place an extremely significant burden on businesses. For example, in the seven months between publication of the Provisional Findings (October 2015) and the Provisional Decision on Remedies (17 May 2016), in addition to responding to these documents, as well as the Remedies Notice, Supplemental Remedies Notice and Working Paper on SME remedies (and putbacks on each), Santander was required to respond to 29 information requests.

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<sup>1</sup> Currently the Issues Statement is closely tied to conclusions formed shortly prior in the market study conclusions/referral

24. [REDACTED]
25. Linked to this, we would welcome greater appreciation of the time required to respond to information requests, including data submissions. Data requests are typically not something businesses can pull 'off the shelf'. All companies' systems, operations, processes and records operate differently. We would welcome greater understanding of the purpose for which the data is requested. Where data or information required is very specific, we often have to caveat what we can provide or determine what we believe to be 'fit for purpose' if not exact. If every company is caveating the data provided there is a question mark over how comparable the final data provided will be in representing a true industry comparison.
26. Equally, most information requests will involve input from a number of different stakeholders, and may require sign off in accordance with internal governance procedures. While we recognise that the CMA is often working towards a tight timeframe, some of the deadlines were unrealistic in light of these facts.
27. In summary, we would welcome further consideration around prioritisation and proportionality of information requests to help ensure a full contribution without disproportionate business impacts from challengers, including scale challengers such as Santander, [REDACTED]. As part of this, whilst we recognise the timetabling constraints the CMA operates under, we would welcome further flexibility in the process either in the reduction of formal information requests or in provision of additional time where needed to respond.

*Introducing earlier, more flexible interactions with parties*

28. As stated above, we welcome the opportunity to participate in the development of the CMA's analysis and to help inform its decision making.
29. We welcome a flexible, tailored approach without undue rigidity that provides the opportunity for market participants to engage with decision makers as reasonably needed. In terms of the precise form this takes, we believe that consulting via roundtables can be helpful and we would welcome participation in roundtables once the CMA has gathered and analysed the evidence and the issues are reasonably well-framed.
30. Regarding 1:1 hearings, our preference is for an informal process at an early stage. We believe that formal 1:1 hearings are likely to be more appropriate towards the later stages of the assessment of evidence phase of the market investigation once the CMA has developed the theories of harm (if any) and digested written evidence and data. There may be market specific issues on which the CMA would find it helpful to have informal hearings with one or more market participants (for example in the retail banking market investigation around capital requirements) at an early stage and the process should permit flexibility around this.

31. We would also welcome the sharing of the CMA's analysis (including its economic analysis underpinning the assessment of the issues) with parties at an earlier stage using confidentiality rings. We consider that extending the period of time for which a data room is open will go hand in hand with changes to enable a virtual data room, accessible by parties' economic advisers from their respective offices.

#### **Santander's comments on Proposal B**

32. The CMA proposes to strengthen synergies between market studies and market investigations while maintaining independence of decision-making, and clarify the relationship between the CMA Board and Group.

#### *Strengthening synergies between market studies and market investigations*

33. Where the CMA is undertaking a market study and has consulted on a possible reference, we would welcome a smooth and efficient handover to the phase 2 team which will undertake the market investigation. We therefore agree with work being undertaken in the latter stages of the market study to: (i) explore explicitly the possibility of narrowing the scope of the issues for consideration in a market investigation; and (ii) prepare and scope potential analysis to be completed in a market investigation.

34. In addition, we agree that before a formal reference is made a preparatory market investigation team should begin preparing for the reference by understanding the nature of the market and the work that has been undertaken. One pragmatic suggestion around this is for part or all of the (inaccurately described) 'off-the shelf' information requirement which typically arrives shortly after the decision to refer, to be completed at an appropriate juncture in the lead up to a market investigation but prior to commencement of the timetable under ERRA13. This would front-load some of the collection of evidence and potentially free up some of the timetable for the phase 2 team to deal with the issues. We believe that it is essential for the team conducting the market investigation to have a good understanding of the sector that they will be investigating in order to improve engagement and ensure more robust outcomes. We would welcome the use of industry experts by the preparatory market investigation team, as well as the CMA Board and Group, to assist in understanding the specificities of the sector being investigated.

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

35. We are broadly supportive of the Board issuing an advisory steer on scope at the start of the market investigation given that the Board's views would be advisory only and that the Group should make its own decisions on the substance of a market investigation independently of the Board.

#### **Conclusion**

36. Santander welcomes the CMA's work on this issue and the opportunity to contribute. We are supportive of the CMA's aims, and in particular the need to amend current procedures to better meet the 18 month statutory timetable. We have provided comments which we think are important to ensure there is no prejudicial impact on relevant stakeholders from any amendments to the current procedures.

37. We do not believe that considering remedies earlier in the market investigation, alongside assessing the potential problem will improve engagement and result in more robust outcomes. A process whereby there is a risk that the outcome of the investigation is prejudged or there is a risk of intervention bias is unlikely to achieve a well-functioning market for consumers, business and the broader economy.
38. However, we welcome streamlining the market investigation process in other ways, such as reducing the number of formal consultations around set-piece publications and earlier, more flexible interactions with parties. We think these changes have the potential to improve engagement and result in more robust outcomes, provided that the parties have adequate opportunities to challenge the CMA's analysis and are appropriately consulted on provisional decisions.
39. We hope that you find this response helpful. Should you wish to discuss any aspect of our feedback, please do not hesitate to contact us at [REDACTED] in the first instance.
40. In the meantime, please note that we do not consent to the publication of this response, either in whole or in part, without prior written consent.