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Our ref: CJG/ADCM

2 May 2017

Dear Sirs

## CMA Market Investigations

### 1 Introduction

- 1.1 We welcome this opportunity to respond to the CMA's proposed changes to the way it undertakes market investigations (the Consultation).
- 1.2 Our competition team has first-hand experience of the procedural issues and challenges that arise in market investigations. Members of our team have represented clients in a number of market investigations, including private motor insurance, statutory audit services, groceries, BAA Airports and home credit.
- 1.3 We attended the CMA's stakeholder roundtable event on 29 March 2017. In preparing this submission we have taken into account the views exchanged in that forum.
- 1.4 If you have any questions in connection with this response, please contact:

**Adrian Magnus**  
Partner

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Senior Associate

### 2 Executive summary

- 2.1 We are supportive of the CMA keeping its processes under review and making changes, where necessary, to improve processes and outcomes. It is not surprising that, faced with a shorter statutory timetable for market investigations, the CMA is looking to make changes to how it undertakes market investigations.
- 2.2 At the same time, we caution against making changes to the market investigation process solely due to challenges that arose in the recent energy and banking market investigations. Those

investigations were atypical; as the CMA's Chairman notes in the Consultation, they were two of the largest and most complex market investigations ever undertaken by the CMA. There are undoubtedly procedural improvements that would benefit all cases, including the largest and most complex. But those atypical cases should not be the driver of change.

2.3 At a high level, on the CMA's two proposed areas of change:

- (a) We are, in principle, supportive of changes to streamline the market investigation process. However, we have real concerns about the CMA's proposal to bring forward the consideration of remedies to the early stages of the market investigation process. Put simply, it puts the cart before the horse. In addition to raising serious questions about due process and parties' procedural rights, we are also concerned that such a change would not actually improve the efficiency or speed of investigations.
- (b) We are supportive of attempts by the CMA to strengthen synergies between market studies and market investigations. We agree that efficiency enhancing improvements can be made while at the same time balancing the need for independent decision making in the market study phase and to avoid confirmation bias tainting the market investigation.

2.4 In essence, the Consultation proposals appear to be driven by a desire to ensure that the latter stages of a market investigation, which tend to involve engagement on remedies, are not squeezed. That is a worthy consideration, as remedies can have very significant consequences for stakeholders and the markets they operate in. However, the Consultation proposals are, in our view, flawed as they focus predominantly on the remedies aspect of the process. In our view, better improvements can be made by undertaking a more holistic assessment of all aspects of the process. By doing so, we think that the CMA could make changes to other aspects of the process, which should ensure sufficient time for proper consideration of remedies, but without compromising the overall process.

**3 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?**

3.1 The three aspects to the CMA's proposal A are:

- (a) assessing potential remedies at an earlier stage in the investigation;
- (b) reducing the number of formal consultations around set-piece publications, in particular combining the Provisional Findings and Provisional Decision on Remedies into a single Provisional Decision Report, and removing the Updated Issues Statement; and
- (c) introducing earlier, more flexible interactions with parties, in particular earlier hearings with parties, consulting on the CMA's approach to analysis and sequentially sharing or publishing analysis.

#### **Assessing remedies at an earlier stage**

3.2 We oppose the first aspect of the proposed streamlining changes. In our view, the proposal, as indicated in the draft amendments to the Guidance, to start consideration of potential remedies in the first to second month of a market investigation would adversely affect the integrity of the market investigation process without any likely efficiency gains.

- 3.3 Past experience shows that market investigations can lead to the imposition of very intrusive remedies (for example, in the BAA Airports market investigation). In a context where a party has not been found to be in breach of competition law, the imposition of remedies needs to be subject to strict rules and be arrived at through a careful and well designed process, without any apparent presumption of an AEC.
- 3.4 That is reflected in the legislative framework provided in the Enterprise Act 2002, which the CMA interprets as requiring any remedies to be both effective at addressing the AEC identified and proportionate.<sup>1</sup> These cumulative tests can only be satisfied once there is sufficient certainty and clarity as to the AEC. We are concerned that introducing remedies, even on a preliminary basis, into the early stages of the market investigation process introduces a greater risk of mismatch between any remedies imposed and any final AEC identified by the CMA. In particular, certain remedies may emerge as a "consensus" solution as the market investigation process evolves when they may not truly satisfy the criteria of effectiveness and proportionality.
- 3.5 This proposal also runs contrary to the procedural rights of parties involved in market investigations, and broader principles of natural justice. By tabling remedies for stakeholder engagement before the CMA has even reached preliminary views on AECs, the process contravenes the basic principle of a presumption of innocence (although market investigations do not involve breaches of competition law, the potential for onerous remedies to be imposed means that the principle is relevant). Further, at a time when stakeholders are focused on engaging with, and responding to, the CMA on potential AECs, requiring them to focus simultaneously on remedies represents an unreasonable burden. Worse still, it puts a stakeholder in the invidious position of having to focus its efforts on mitigating the consequences of early proposed remedies, rather than engaging on potential AECs.
- 3.6 Putting these concerns to one side, it is difficult to see how the proposal will make the market investigation process more efficient:
- (a) If, as proposed, the CMA publishes views on remedies essentially at the same time as it sets out the theories of harm it intends to investigate, that is likely to involve a relatively large number of potential remedies.
  - (b) That will place additional burdens on both the CMA to come up with a suite of potential remedies, but also for stakeholders who will be required to engage on a potentially wide range of remedies.
  - (c) That, in turn, is likely to delay meaningful progress being made on identifying potential AECs at the outset of the market investigation, which ought to be the main focus.
- 3.7 Perhaps more concerning is that at least some of the inefficiencies and distraction from focusing on a careful assessment of AECs will be irrelevant to the final outcomes of the market investigation. It has been quite common in previous market investigations for theories of harm featuring in the initial issues statement to then be refined or found not to give rise to an AEC. For example:
- (a) in retail banking, of the original three theories of harm, remedies were only imposed to address AECs relating to one theory of harm;

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<sup>1</sup> CC3 (Revised), Guidelines for market investigations: their role, procedures, assessment and remedies, Part 4 remedial action.

- (b) in private motor insurance, of the original five theories of harm, remedies were only ultimately imposed to address AECs arising from two theories of harm; and
- (c) in movies on pay TV, no AECs were identified;

3.8 Therefore, while we support refinements to the CMA's process to ensure sufficient time for the consideration of any remedies, moving the opening discussion on remedies to the initial issues statement is a flawed and inappropriate way to achieve this. As outlined below in response to proposals (b) and (c), we consider that improvements to the market investigation process can be made which should ensure sufficient time within an 18 month process for a proper assessment of, and engagement on, remedies.

#### **Reducing the number of formal consultations**

- 3.9 We agree with the CMA's proposal to reduce the number of formal consultations on set-piece publications. However, we have a slightly different view to the CMA on which formal consultations ought to be streamlined.
- 3.10 In our view, the process would best be made more efficient by removing the initial Issues Statement, instead of the Updated Issues Statement. As discussed below under section 4, we consider that the CMA panel could simply confirm whether they intend to pursue the theories of harm in the market study reference decision.
- 3.11 The Updated Issues Statement provides a useful indicator for stakeholders of how the CMA's thinking is evolving. In cases where initial theories of harm can be discounted at a relatively early stage of the process, it makes the investigation process more efficient for parties to have clarity and certainty as to which issues remain under consideration.
- 3.12 We agree with the proposal to replace the Provisional Findings and Provisional Decision on Remedies with a single Provisional Decision Report covering both provisional findings on AECs and remedies.

#### **Introducing earlier, more flexible interactions with parties**

- 3.13 We fully endorse enabling earlier, more flexible interactions, with parties.
- 3.14 Market investigations often involve complex market dynamics, In our experience, clients often feel that they do not get the opportunity to engage with the CMA, to tell them about how the markets work and what they see as the issues, until quite late in the market investigation process.
- 3.15 We agree that earlier engagement with stakeholders should improve the efficiency of market investigations. While the format of hearings is important, as heavily structured town-hall style hearings are rarely sufficiently interactive, in principle holding hearings earlier in the process ought to make for a more efficient and better informed approach to identifying issues. It will be important for panel members to be involved in these earlier hearings.
- 3.16 In addition, we consider that an initial meeting with the key stakeholders in the first weeks of a market investigation could improve the efficiency of the initial information gathering phase. A meeting with the senior members of the staff team to discuss what information will assist the CMA to assess the issues referred to it and the availability of such information should make the CMA's information gathering process much more targeted.

- 3.17 The initial phase of the market investigation and early interaction on the issues would also benefit from a more fluid and concise approach to, for example, working papers (which we understand to be part of the CMA's proposals). While it is important for the stakeholders to understand the CMA's views and analysis, we believe that does not always require lengthy working papers. On some issues that will be appropriate, for others shorter reports may suffice.
- 3.18 In our view, these changes, coupled with improved synergies between market studies and market investigations (discussed below in section 4), will help streamline the initial phase of the process. Even within an 18-month process, there should be adequate time for engagement by introducing remedies when the provisional report is released (which with a more streamlined initial phase should be achievable earlier than 12 months into the investigation). That would be a markedly superior outcome than introducing remedies into the early stages of the market investigation process.
- 4 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?**
- 4.1 We agree that measures to strengthen the synergies between market studies and market investigations could ensure a smoother transition and, in particular, reduce the risk of unnecessary duplication.
- 4.2 Our support is caveated in two respects:
- (a) first, we would caution against a split approach, depending on whether the market investigation was being referred by the CMA or one of the sectoral regulators (as the latter will generally offer less scope for synergies between the market study and market investigation phases); and
  - (b) secondly, consistent with our opposition to the CMA proposal to bring forward the consideration of remedies, we do not regard further work on remedies, beyond that required for the reference decision, to be warranted at this early stage.
- 4.3 We are not entirely clear what the proposed "advisory steer" from the CMA Board to the market investigation panel would offer above and beyond a well articulated reference decision. Moreover, in attaching a CMA Board "steer" to the reference decision, legal issues such as whether the "steer" formed part of the decision would need to be clarified.
- 5 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?**
- 5.1 The main benefits we see from the proposed changes are:
- (a) the prospect of making the market investigation process more efficient and streamlined, particularly in the initial phase over the first four to six months; and
  - (b) the potential to provide greater interaction between stakeholders and the CMA, especially the CMA panel members.

5.2 The risks with the proposals all stem from the proposal to bring consideration of remedies into the early stages of the market investigation process. Those risks are not merely possible; they are almost certain to materialise and would jeopardise any net improvement to the process.

**6 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.**

The updated text is clear on the proposals, as outlined in the Consultation. However, a significant number of changes would be required to reflect the changes from the Consultation proposals that we advocate in this submission.

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

All of our comments on the proposed changes are covered in the above responses.

Yours faithfully

Dentons UKMEA LLP