

## Summary: roundtable on the updated guidance on the CMA's approach to market investigations held on 29 March 2017

### Introduction

1. This note summarises the discussion among participants of the Competition and Markets Authority's (CMA's) roundtable on its proposed new approach to conducting market investigations (MIs). The roundtable was part of the CMA's public consultation on its proposed changes.<sup>1</sup>
2. The roundtable provided a forum for the CMA to explain its proposed changes to MIs, and to hear views from experienced practitioners within the competition community, including legal and economic advisers, in-house counsel and other regulators, as well as businesses and consumer groups.
3. Following a presentation on the proposed changes (which were set out in detail in the published [consultation document](#)), the roundtable discussion was divided into two parts:
  - (a) **Table discussions on proposal A:** Streamline the MI process by:
    - (i) assessing potential remedies earlier;
    - (ii) reducing the number of formal set-piece publications; and
    - (iii) introducing earlier, more flexible interactions with parties.
  - (b) **Plenary discussion on proposal B:** strengthen synergies between market studies and MIs while maintaining independence of decision-making; and clarifying the relationship between the Board and the Group.
4. Key aspects of the discussions are summarised in this note. The note does not set out the CMA's views or policies. While the note does not include all comments made, the CMA will carefully consider all the views and comments expressed at the roundtable as part of its consultation.

---

<sup>1</sup> The [consultation](#) was open from 6 March to 2 May 2017.

5. The CMA is grateful to all participants who engaged in and contributed to an open and informative discussion.

## **Table discussions on proposal A**

### ***Assessing potential remedies earlier***

6. There was some support for considering potential remedies at an early stage of an MI, with participants noting the benefit of allowing more time to develop, test and consult on remedies, and that doing so might encourage parties to engage more meaningfully with the CMA. It was also noted that the market study already gives some consideration to possible remedies, so this would be a continuation and development of that work. It was also noted that analysing possible remedies can lead to a better understanding of the possible competition issues in a market and also help to focus the scope of the MI and prioritise its analysis.
7. Some participants raised various concerns. Some felt that publishing a list of possible remedies early could give the impression that the CMA has pre-judged its findings on whether there are any adverse effects on competition (AECs). Some expressed a nervousness that an MI would no longer be a 'fresh pair of eyes' on competition in the market, and that there would be a risk of 'reverse-engineering', ie finding AECs in order to support remedies. Some felt it would be a waste of resources for the CMA and parties if early work on remedies was done that was later found to be irrelevant. There was also concern that in some cases it would be difficult to consider potential solutions before the problems had been found and clearly articulated.
8. It was noted that while many parties would be happy to engage on remedy discussions early, others will not engage if the CMA has not yet articulated its justification for a remedy, and they may think it weakens their case if they do engage. It was argued that larger companies may have more resource to engage with the CMA early on remedies than smaller companies, thereby giving them an advantage and potentially enabling them to steer the remedies. There was a concern about the chilling effect of the early announcement of more drastic potential remedies on business investments, and a suggestion that the CMA might instead share its potential remedies with the parties rather than publishing them more widely. Some concerns were also raised about how the CMA's thinking on remedies may develop significantly as its understanding of the market and potential AECs develops, therefore there may be a need for further consultation with parties on remedies prior to publication of its provisional decision (for example, through a working paper).

### ***Reducing the number of formal consultations around set-piece publications***

9. There was some support for reducing the number of set-piece formal consultations, and mixed views on the benefits of particular publications. Some participants felt the Updated Issues Statement is not that helpful and duplicative of working papers, which were more informative. Others saw some benefit in the Updated Issues Statement as it allows parties to start to see the CMA's overall thinking at an earlier stage, including issues that are not being considered further.
10. Some concern was expressed that in removing formal consultation phases and the associated hearings, the CMA would be removing an opportunity to discuss its analysis and thinking. It was also argued that there would need to be greater focus on the timely production of working papers if there are to be fewer set-piece formal publications.

### ***Increasing the opportunities for early engagement with parties***

11. There was broad support for this, with participants stressing the value to parties of earlier and more open engagement (including face to face) with the Group and staff team on the market and issues. This could result in a better understanding of the market and key issues earlier in an MI. Bilateral and multi-party hearings were welcomed by some, as appropriate, while others thought that some industry participants may be less willing to speak freely. Participants also favoured early engagement on data collection, methodology and results of analysis, and saw benefit in the CMA sharing the statistical models used to help parties respond quicker. Participants were also keen to move away from the use of physical data rooms, which were seen as costly and burdensome, in favour of alternative mechanisms including confidentiality rings.
12. It was noted that there will be more onus on the CMA to be clear about how it will engage, for example by publishing timetables. There was also some concern that the CMA should be sure to maintain a fair and equal process and that there was a risk the proposal could lead to unequal treatment between parties.

### **Plenary discussion on proposal B**

13. A few participants queried why the advisory steer from the Board was necessary, and what it would add in addition to the market study report and the Issues Statement. Some participants felt the reasoning for making a reference and the issues to be focused on at phase 2 should be in the market

study report (or the terms of reference) rather than in a separate advisory steer document appended to the report.

14. It was suggested that if the CMA wants to make the end-to-end process more efficient, it needs to make phase 1 a better springboard, for example through information gathering and more engagement with parties. It was suggested that parties may want to try to influence or comment on the proposed Board steer. Another participant suggested the market study report could be more like an Issues Statement, which would remove the need for an Issues Statement, and this could then be followed by early engagement with the Group so that the CMA can start the MI quickly and direct information requests appropriately.
15. One participant highlighted the risk of a two-speed process between market studies referred from the CMA (where the CMA would be more up to speed on the market and more able to leverage synergies between phase 1 and phase 2) and those from other regulators, although this could potentially be mitigated through more engagement with the other regulators prior to any reference.