

Response to the Competition and Markets Authority's Consultation

(1) Updated guidance on the CMA's approach to market investigations

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Simmons & Simmons

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The Simmons & Simmons LLP EU, Competition & Regulatory Group welcomes the opportunity to comment on the Competition and Markets Authority (CMA)'s proposals to amend its guidance on the CMA's approach to market investigations. Our response to the consultation is set out below.

As this response does not contain any information that is confidential to Simmons & Simmons LLP or our clients, we confirm that we are happy for it to be published on the CMA's website.

Updated guidance on the CMA's approach to market investigations

Introduction

1. We note that the Enterprise and Regulatory Reform Act 2013 ("ERRA") introduced new statutory time limits for market studies ("MSSs") and shortened the existing statutory time limits for Market Investigations ("MIs") to 18 months (as opposed to 24 months), with the option of extending this period by six-months for 'special reasons'. Additionally, the CMA has conducted two MIs since the introduction of ERRA. Therefore, we note the CMA proposes to amend its guidance to assist it with meeting the new statutory deadlines and to draw on its recent experiences from the two MIs (paras 1.10-1.11).
2. We welcome the CMA's continual review of its existing practise, in light of the reasons above and we set out below our specific comments on the proposals below.

Streamlining the market investigations process

3. As referred to above, we recognise the need to consider adjustments to the CMA's procedures in order to meet the new statutory deadlines, but have the following comments about the proposed changes:

Earlier consideration of remedies

4. We are concerned about the CMA's proposal to consider remedy options at such an early stage in the MI and concurrently while assessing potential problems. We consider there will be a real risk of "*intervention bias and/or prejudgment of any AEC [adverse effect on competition]* finding" (as referred to at para 2.7) and we think the independence/validity of an AEC finding may suffer as a result. Further, there is the risk that if the conclusions of the MS form the basis for which remedies are devised – considered during the early stages of the MI – the independence of the Group's AEC analysis may be challenged.
5. Given the serious repercussions for businesses and the competitive conditions in the structure of a relevant market as a result of an AEC finding, we think remedies should only be considered after reaching conclusions following rigorous preliminary analysis.
6. We do see scope, however, for greater discussion in the formal MS report of issues that appear no longer to be live, and of the matters which appear to the MS team to be worthy of further investigation, with an indication of what does not need to be redone. The emphasis of the final report of the MS team has been primarily targeted to the identification of an AEC; a fuller analysis at the end of the MS, whilst not restricting a fresh consideration of the issues, could assist the CMA Board in giving its steer, and it may deliver efficiencies at the MI stage, to the benefit of all participants and the CMA.

Reducing the number of formal consultations/ increasing the opportunities for early engagement with parties

7. We agree with and support the CMA's proposal to have earlier and more informal engagement with the parties. We think this represents an effective measure to meet stakeholders' wishes to be increasingly involved in the investigation process and additionally for the CMA to benefit additionally from the stakeholders' insight at an early

stage in the investigation. We also think it represents a more flexible and innovative means of investigation.

8. We also agree with the proposed reduction in the number of formal consultation procedures as a means of assisting the CMA to meet its new statutory deadlines. If informal meetings/procedures are conducted, it will be important to institute measures to ensure all stakeholders become aware of the outcome of more informal processes. However, we refer to the comments above concerning the early consideration of remedies and do not think these should be incorporated into an initial Issues Statement.

Synergies between market studies and market investigations

9. We recognise the CMA's valid motivations for wanting to strengthen synergies between market studies and market investigations (para 2.17). In particular, it is clearly desirable to encourage "*a smooth and efficient handover to the MI*" (para 2.18).
10. Our main concerns in relation to the nature of the handover are ensuring that the integrity and independence of the MI process is continually maintained. The nature of the handover will clearly depend on the scope of the market study (para 2.19), but we reiterate our concerns about, for example, early consideration of remedies by the Group and "*prejudgment of any AEC finding*" (para 2.7).
11. However, we consider an advisory steer from the CMA Board to the MI Group, in circumstances where the CMA has carried out the MS, would represent a useful means of ensuring the experience gained during the MS is efficiently used. We note that the steer would be "*advisory only*", but there would be an expectation that the Group would take account of it when making its decisions on the substance of an MI independently (para 22-23). We consider these measures strike a suitable balance between utilising the experience of the MS while maintaining the Group's independence. We also think that similar measures could be instituted in circumstances where an MS is conducted by a concurrent regulator (for example, through a joint steer by the concurrent regulator and the CMA Board).

Conclusion

12. We do not support the proposal for an early consideration of remedies prior to consideration of AECs. In general, while we support the CMA's attempts to streamline the MI process, we think that early consideration of remedies may diminish the integrity and independence of the MI process.
13. We support the CMA's proposals to attempt to streamline the MI process through early engagement and more informal consultation procedures, on the proviso that the results of these more informal sessions are suitably transparent for all stakeholders.
14. We support the proposed measures to encourage synergies between MSs and MIs, subject to ensuring that the MI process retains its necessary independence. To this end, we think an advisory steer from the CMA Board to the Group, following an MI, will be a useful mechanism. We would welcome similar measures when MIs are conducted by other concurrent regulators.

Simmons & Simmons LLP EU, Competition & Regulatory Group

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