Baker McKenzie.

RESPONSE TO CMA CONSULTATION: UPDATED GUIDANCE ON THE CMA'S APPROACH TO MARKET INVESTIGATIONS

Baker McKenzie welcomes the opportunity to comment on CMA's consultation on its Updated Guidance on the CMA's Approach to Market Investigations. Our comments are based on our experience of advising clients on UK market investigations.

1. 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?

1.1 We agree that it is appropriate for the CMA to review its Guidance on market investigations and to consider how to manage its resources in future investigations, in light of recent experience gained in its complex and sizeable market investigations into the energy and retail banking sectors. However, it should be noted that these were exceptionally large and complex investigations so the CMA should not base its future procedures solely on its experience of those two inquiries.

1.2 Market investigations require a considerable amount of time and resources, from both the CMA and parties, so the aim of streamlining the process is welcome. We support the proposal to reduce the number of formal consultations, namely the removal of the Updated Issues Statement. This should reduce the burden on both the CMA and the parties and create greater efficiency. However, it is essential that the removal of this step is not at the expense of transparency and early engagement with the parties. It is important that the CMA commits to providing parties with a steer on its thinking early on during the process and that parties have sufficient opportunity and information to challenge and respond to the CMA's views. This could largely be achieved by increasing the opportunities for parties to engage early on with the CMA, as set out in paragraph 2.13 and 2.14 of the Draft Guidance. However, we submit that the CMA should go further and explicitly state in the Draft Guidance that it will commit to providing parties with increased access to the inquiry group before the provisional decision is issued in order to discuss cost modelling and financial impact. In our experience, the inquiry group has not always been transparent on these issues and there has been a lack of dialogue with the parties. We strongly advocate an iterative process which allows the parties to fully engage with the CMA's economists.

1.3 We have concerns in relation to the proposal to assess potential remedies at a very early stage of the investigation, i.e. at the outset of the investigation. We consider that there is a real risk that this would cause the CMA to start its investigation with pre-conceived ideas and assumptions that a remedy will be required (which may not necessarily be the case) without having done a full AEC assessment. The CMA says that its reasoning will continue to be subject to detailed scrutiny but we believe that the proposal means that the CMA would effectively be judging the outcome before having considered all the issues at hand and listening to the parties' views, leading to a much more adversarial process. The CMA will be considering remedies on the basis of the findings of its market study rather than an AEC analysis, which is not appropriate.

1.4 Given that remedies can have potentially far reaching consequences, it is vital that fairness and robustness of decision making is not compromised. The assessment of any AEC can be

complex and we consider that it is highly unlikely that the Panel would have sufficient opportunity to fully get to grips with the evidence very early on the investigation e.g. during the first month. This in turn would make a proper assessment of potential remedies very difficult. The likely outcome is that the Panel would rely on Phase 1 findings when considering remedies, which is inappropriate.

1.5 If the CMA is minded to go ahead and consider remedies at an earlier stage, we suggest that this should be no earlier than three months into the investigation. In more complex investigations, six months may be a more appropriate stage. We also suggest that any early remedies discussions are kept confidential as between the parties and the CMA, as it could be detrimental to the parties if premature remedies are the subject of media speculation. Remedies should not be publicly consulted on until they are fully developed, which will be at a much later stage of the investigation.

2. 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?

2.1 We agree that it is sensible to strengthen synergies between market studies and market investigations. However, we have concerns about the proposals in relation to the role of the Board regarding the scope of the market investigation. We are concerned that allowing the Board to issue an advisory steer risks diluting the independence of the inquiry group. If the Board has the ability advise on the scope of the reference, this could imply an influence over the running and outcome of the investigation, particularly as paragraph 2.23 of the Draft Guidance states that the inquiry group would be expected to take into account any steer from the Board. We are concerned that the "fresh pair of eyes" in Phase 2 cases, a key feature of the UK competition regime, may be lost in these circumstances. In our view, a rigorous panel system is a vital feature of the UK regime as it facilitates robust decision-making by the CMA. The independence of the members is necessary to achieve this. We agree that in principle it is sensible to limit the scope of the reference but this should be independently decided by the inquiry group, without the influence of the Board.

3. 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?

3.1 The main potential benefits are efficiencies arising from a more streamlined process and a reduced regulatory burden on the parties and the CMA. We have however identified a number of possible risks with some of the proposals, as discussed in our responses to Questions 1 and 2 above.

4. 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.

4.1 We suggest moving the wording "*and inviting views on possible remedies*" from Months 1 - 2 to Months 3 - 6 in the table for the reasons explained in our response to Question 1.

4.2 If the CMA is minded to go ahead with the proposal for the Board to give an advisory steer on the scape of the investigation, we suggest deleting the words "*The Inquiry Group will be expected to take this into account*." for the reasons explained in our response to Question 2.

4.3 We suggest adding the following wording at the end of paragraph 26 for the reasons explained in our response to Question 1: "*The CMA will not consider possible remedies until at least three months into the investigation. For more complex references, consideration of remedies may not begin until at least six months into the investigation*."

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

5.1 We have no further comments.

Baker McKenzie

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