



Pinsent Masons

RESPONSE TO THE CMA CONSULTATION:

UPDATED GUIDANCE ON THE CMA'S APPROACH TO MARKET INVESTIGATIONS

1. INTRODUCTION

- 1.1 Pinsent Masons LLP ("Pinsent Masons") welcomes the opportunity to comment on the Competition and Markets Authority's ("CMA") consultation on proposals to make various changes to the way the CMA undertakes market investigations, in particular the proposed changes to the market investigations guidance (CC3: Guidelines for market investigations: Their roles, procedures, assessment and remedies (revised April 2013)).
- 1.2 As a law firm, Pinsent Masons has substantial experience of advising clients on the application of the UK rules and guidance on market investigation.
- 1.3 The comments made in this response paper are those of Pinsent Masons and do not necessarily represent the views of any of our individual clients or of individual partners of Pinsent Masons.
- 1.4 This response does not contain any confidential or sensitive information and we are content for it to be published on the CMA's website.

2. COMMENTS

- 2.1 Pinsent Masons appreciates the CMA's ambitions to make market investigations processes more efficient, cost effective and timely and we do recognise that there may be some benefits in implementing parts of the changes it proposes to make, including earlier discussions on remedies and more engagements between the parties and the CMA. However, we consider that it may be premature to carry out the review and also we do have some concerns in relation to certain parts of the proposed changes, which we set out below.

Timing of the review

- 2.2 Given that it is only three years since major legislative changes to market investigations were introduced through the Enterprise and Regulatory Reform Act 2013 ("ERRA13"), we consider that it may be too soon to review the procedures in question. We would question whether the ERRA13 reforms have settled in yet and whether the CMA has had the time to apply the new regime across a sufficiently diverse and representative portfolio of market investigations (in terms of scale and complexity) in order to take significant lessons from them.
- 2.3 Whilst the CMA has very recently completed the Energy and Retail Banking market investigations, we do consider these investigations to be of too exceptional a scale and complexity to be taken as evidential basis of any need for a review of the overall processes.
- 2.4 Whilst we do acknowledge that there may be some benefits to be gained in wanting to reinforce the efficiencies of the current processes, these may not require such significant changes as are being proposed.
- 2.5 The current system presents strengths and benefits that it would be crucial to preserve such as: the non-adversarial nature of market investigation processes, as opposed to

antitrust investigations, which require keeping the dialogue open between the CMA and the parties investigated on all aspects and stages of the investigation (the issues, the assessment of the adverse effects of competition ("AEC") and the remedies); and a clear gradual progression of the process (data gathering, issues, mid-way thinking, provisional findings, remedies, final report).

(A) Streamlining the market investigation process

Assessing potential remedies earlier

- 2.6 The CMA is proposing to consider potential remedies from the start of a market investigation, as early as the Issues Statement, alongside understanding the features of the market that give rise to adverse effects, so as to give the parties more time to consider remedies and to ensure early engagement between the parties and the CMA. We understand that decisions arising from the market investigation would still distinguish between AECs and remedies and that the proposal would not be prescriptive but would aim to provide greater flexibility in the approach taken depending on the specifics of each case.
- 2.7 Pinsent Masons is concerned, however, that focusing on remedies whilst the features of the markets are still being understood is likely to give rise to a risk of intervention bias and/or prejudgment of AEC findings, which we understand the CMA acknowledges (para. 2.7 of the consultation paper). Given that remedies are designed to address AECs, we question how potential remedies could realistically be envisaged before there is clarity on the features of the market and the existence of an AEC. That AEC findings are fully assessed and reasoned in a transparent way before any remedies are considered would appear to be particularly important for a process where any appeal would be subject to the judicial review standard.
- 2.8 Pinsent Masons recognises that there should be more time for remedies but that preliminary AEC findings must be concluded upon before remedies are fully considered; and, hence, it would be too soon to consider remedies as early as in the Issues Statements.
- 2.9 We consider that Working Papers could be utilised more in order to steer the discussion on remedies mid-way in the process.

Reducing the number of formal publications and consultations

- 2.10 The CMA is proposing keeping the Issues Statements (but covering both the issues and possible remedies) which would form the basis of an initial consultation; removing the Updated Issues Statement ("UISs") and combining the Provisional Findings and Provisional Decision on Remedies in one single Provisional Decision Report; retaining the Final Report. The Group would retain a discretionary option of publishing and consulting at other points during the market investigation.
- 2.11 We would question the benefit in removing the UIS, as the UIS is valuable for parties to understand the CMA's emerging thinking, thus resulting in a loss of transparency.

Increasing opportunities for early engagement with parties

- 2.12 The CMA is proposing to increase the opportunities given to parties to provide input to the CMA's analysis and inform its decision-making at an earlier stage in market investigations through e.g. roundtables, confidentiality rings, disclosure rooms, working papers, face-to-face informal meetings and hearings. This will involve different forms of engagement with parties at an early stage in the investigation, e.g. earlier hearings to help shape the issues and discuss possible remedies; making more use of multi-party hearings; greater use of roundtables; use of confidentiality rings for the sharing and publishing of results of analysis; publishing working papers.

PINSENT MASONS LLP

Response to the CMA's consultation: "Updated guidance on the CMA's approach to market investigations" (CMA61con)

- 2.13 Pinsent Masons agrees that there is merit in considering more engagement between the CMA and the parties earlier in the investigation to help shape the issues and discuss possible remedies.
- 2.14 However, we consider that it would be easier and more useful to hold more informal consultations early in the process than more formal ones, such as hearings, particularly before the CMA has refined any of its findings on any AEC.
- 2.15 Although we welcome the variety of forms of engagement the CMA suggests, we are of the view that, in relation to many markets, multi-party hearing may not always be the most adequate or effective mean to consult parties. Parties may, indeed, find themselves constrained in openly expressing their genuine views due to commercial sensitivities or confidentiality concerns.

(B) Strengthening synergies between market studies and market investigations

- 2.16 Where the CMA proposes to undertake a market study and has consulted on a possible reference, the CMA proposes in particular to ensure a smooth and efficient handover to the market investigations and work would be undertaken in the latter stages of the market study to explore explicitly the possibility of narrowing the scope of the issues for consideration in a market investigation; prepare and scope potential analysis to be completed in a market investigation and consider potential remedies.
- 2.17 The CMA also proposes to clarify the relationship between the Board and the Group with regard the scope of a market investigation. The CMA proposes that where the CMA has carried out the market study, the Board may wish to issue an advisory steer on scope at the start of the market investigation which would be annexed to the terms of reference. The steer would set out the Board's expectations regarding the scope of the market investigation and issues to be addressed following work undertaken in the market study.
- 2.18 Pinsent Masons recognises that there should be more engagement and a better handover from a market study to a market investigation but we do not consider that this requires such significant changes as those being proposed.
- 2.19 Although the steer from the Board may be helpful, it ought to simply remain a recommendation that particular lines of inquiry be explored rather than a steer on what the findings are likely to be. For example, the CMA suggests that the Group would be "expected" to take into account any steer from the Board on scope (para. 2.23 of the consultation paper), which we consider gives rise to a risk of independence between the two decision makers being lost to some degree.
- 2.20 If the proposal in question is adopted, we would welcome further clarity on the process for strengthening synergies between market studies and market investigations and would encourage the CMA to consolidate the relevant publications in the interest of transparency, rather than issuing multiple documents (i.e. Market Study report; Terms of Reference; and the 'steer').

We hope that the CMA finds this contribution helpful. Please feel free to contact us if you would like to discuss any aspect of our response.

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