Slaughter and May Response to CMA consultation: Updated guidance on the CMA's approach to market investigations

1. Overview

1.1 We welcome the opportunity to comment on the CMA's proposed new approach to market investigations (**MIs**) and the draft updated MI guidance (**Draft Guidance**).

1.2 We are generally supportive of the proposed changes. However, we have set out below some comments and suggestions on the detail of some of the proposals, in particular the proposal to assess potential remedies at an earlier stage of the MI process.

2. Question 4.1: 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?

Earlier consideration of remedies

2.1 We agree with the CMA that consideration of remedies should occur earlier in the MI process so as to allow sufficient time for the CMA to develop and consult on them. However, we not support the proposal for the CMA to start consideration of potential remedies in Months 1-2 of the MI process at the same time as the initial Issues Statement (as shown in the table under paragraph 6 of the Draft Guidance) for the following reasons:

(A) *Risk of actual and perceived confirmation bias*: The proposal risks undermining the key perceived benefit of the MI process in the UK, which is that the Group of members (**Group**) start the MI with fresh pairs of eyes and are open as to whether or not there are competition issues in the market and whether or not remedies may be required, with no preconceptions about the likely direction of travel. Whilst the consultation document (paragraph 2.5) suggests that it is normal procedure for other parts of government and regulators to consider possible remedy options at the same time as assessing whether there are potential problems, there are challenges in the CMA adopting such an approach for MIs. The reason for this is that a statement of possible remedies at such an early stage is likely to be perceived by the parties and the media as indicating that the Group consider it likely that remedies of some form will be required. There is also a risk of actual confirmation bias if panel members subconsciously become attached to some of the proposed remedies that they have suggested in the initial Issues Statement;

(B) *Not efficient to consult (again) on remedies at this stage:* The CMA (or a sectoral regulator) will have already consulted on possible remedies as part of the Phase I market study. The market study report should summarise the remedies considered and the view of the CMA team (or sectoral regulator) at Phase I on these remedies. This information is available to the Group members to consider from the outset of the MI. If not done already, we suggest that Group members are provided with a summary of the views expressed by interested parties at Phase I on possible remedies at the outset of the MI, together with the market study report.

2.2 We suggest that a better way forward would be:

(A) For Group members to be briefed at the outset of the MI by the Phase I market study team on the remedies considered and the views expressed by interested third parties. This will ensure that they are sighted of any potential remedies suggested or considered to date;

(B) The note of potential remedies is published later than proposed but earlier than under the current procedures, perhaps in Months 6-8 of the MI. This would allow more time for the remedies to be developed and consulted upon than the current system, whilst providing a significant period of time before this stage during which the Group can focus their attention (and be seen to be focusing their attention) on whether or not there are potential AECs that need to be addressed.

Reducing the number of formal consultations

2.3 We support the CMA's proposal to reduce the number of formal consultations during the MI process. However, we disagree with the CMA's proposal not to publish an Updated Issues Statement. Instead we suggest that the CMA does not publish an Initial Issues Statement but retains the Updated Issues Statement for the following reasons:

(A) *In order to leverage efficiencies from the Phase II transition process:* The CMA (or the sectoral regulator) will have considered the potential issues in the market in their Phase I market study report. Based on this, the CMA board (or the sectoral regulator) will have decided to make a MIR. At the outset of the Phase II process, the issues under consideration should therefore be the issues which were considered at Phase I and are set out in the market study report. There seems little benefit to be gained from the Group publishing an Issues Statement at this stage. The Group could simply invite parties, as they do now, to make an initial voluntary submission on the issues set out in the market study report and/or terms of reference.

(B) *An Updated Issues Statement would be more efficient way of focusing the MI:* As the Group familiarises itself with the issues, receives initial submissions and meets with parties, it may identify new issues or decide that some issues do or do not result in an AEC. Once the initial sifting process has been completed, this would be the most efficient time to invite comments on an Updated Issues Statement indicating the issues still under consideration by the Group, perhaps 3-4 months into the MI process. To avoid perceptions of confirmation bias, we suggest that this document does not include a list of potential remedies, although there would be no objection to the CMA indicating that parties are free to make submissions on potential remedies should they wish.

Increasing the opportunities for early engagements with parties

2.4 We support the CMA's proposals to increase the opportunities for early engagement between the CMA and the parties, which will help to ensure the Group and CMA staff are as well briefed as they can be on the market and the potential issues at an earlier stage of the MI.

3. Question 4.2: 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?

Strengthening synergies between market studies and market investigations

3.1 We agree with the CMA that the synergy between market studies and MIs should be strengthened. This should allow the scope of the reference to be kept as narrow as possible so as to ensure that it is manageable for the Group to investigate the issues, decide whether there are any AECs and, if appropriate, develop remedies by the statutory deadline. If a number of markets have been considered at Phase I, the CMA should consider splitting these into separate MIs to ensure that each is of a manageable size. For example, we observe that the most recent banking MI covering the supply of personal current accounts and banking services to SMEs was of much wider scope than the 2005 reference of Northern Ireland banking.

Clarifying the relationship between Board and Group

3.2 We are not convinced of the need for a separate advisory steer from the CMA Board on the scope of an MI, since we consider that such a steer could be incorporated into the terms of reference or even into the market study report itself. We do not see a legal barrier to the terms of reference identifying the feature or features which have been identified at Phase I. We are also not clear how the proposal would work for MIRs made by sectoral regulators: would the CMA be requesting that the Board of sectoral regulators provide an equivalent advisory steer? It would be unusual to have different procedural steps for MIRs originating from the CMA as opposed to from sectoral regulators.

4. Question 4.3: 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?

4.1 The potential benefits are to capitalise on synergies between the Phase I and Phase II processes and enable the Group to focus for longer on the issues and remedies through reducing the number of set piece consultations. As discussed at paragraph 2.1, there is a risk of undermining the benefit of the two-stage MI process if it is perceived that the Group has already made up its mind that remedies may be required at the outset of the MI.

5. Question 4.4: 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.

5.1 We consider the proposed guidance to be sufficiently clear in most respects. Paragraphs 14-16 of the Draft Guidance focus on the handover process where the Phase I market study has been carried out by the CMA. As market studies can be carried out by a number

of sectoral regulators, it would be useful for the Draft Guidance to clarify how the CMA intends the process to work in relation to MI references from sectoral regulators.

6. Contact Details

6.1 If you would like to discuss this submission, please feel free to contact:

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