

Response to the CMA's consultation document regarding updated guidance on the approach to market investigations

Linklaters broadly welcomes the CMA's focus on streamlining the market investigation process and proposed synergies between market studies and market investigations. Given the desire to keep within the eighteen-month deadline, we agree that changes to the process would be beneficial to improve efficiency, and can see the benefit in much of what the CMA is proposing. Linklaters cautions, however, that care needs to be taken in drawing lessons from the CMA's recent experience in the energy and retail banking markets, given the particular complexities involved in those investigations. We have set out some general observations below, as well as comments on the various areas of consideration set out in the consultation document.

1 General points

The scope to streamline the market investigation process (particularly at the beginning of the process where the real inefficiencies appear to lie) relies significantly on refinements to the market study process. Currently, market studies are focused on meeting and evidencing the threshold for referral, rather than focused on narrowing the relevant issues. If the second half of the market study process was focused on filtering the key issues, there would be greater scope for achieving efficiencies at the beginning of the market investigation, which is currently focused on information gathering. Where the market study is carried out by a sector regulator, there may be less scope for such efficiencies, in particular where there is a need to consider a range of theories of harm in order 'clear the air'. However, to the extent that efficiencies are possible between the sector regulator and the CMA this would also be welcome, particularly regarding the transfer of information provided during the market study. The need to retain flexibility in the process, while managing business expectations as to procedure, may require a two track process depending on the origin of the market study.

Linklaters welcomes the increased focus on early engagement with the CMA, and the opportunity to provide input sooner in the process. We also consider it important to have access to the Panel early in the process (not limited to a formal hearing scenario) and to be able to input on the scoping of issues. While it is of course important to protect confidential information, we urge the CMA to ensure the changes lead to increased transparency on the analysis and decision making process and the CMA's conclusions to ensure due process.

Much will depend on the application of the updated guidance in individual cases. While ensuring greater flexibility of process to best suit the particular circumstances will be useful, the CMA must be mindful that it is important the process is not too fluid, with common parameters retained to allow predictability. Businesses must be able to plan resources and prepare key people for engagement in what can be a burdensome process.

2 Streamlining the market investigation process

2.1 Assessing potential remedies at an earlier stage

Given the complexities involved with the cost / benefit analysis on remedies (and the consequences of getting this assessment wrong) we agree that it would be useful for the CMA to start this process in some cases earlier than currently occurs, allowing greater input from the parties. However, one month into the process strikes us as too early: It would not be appropriate to consider remedies before the

Linklaters

CMA has had the opportunity to narrow the issues, as this would waste the resources of both the CMA and parties involved, in particular where the CMA's investigation is focussed on a wide range of topics/markets. Remedies have to be targeted to the specific adverse effects on competition ("AECs") in question. Therefore, we consider the CMA would need to publish its current thinking on the likely AECs (even if not in the form of a formal provisional findings paper) before engaging the parties in a discussion regarding remedies for these AECs.

Early consideration of remedies may also lead to less robust outcomes in some cases if the CMA does not remain cognisant of the risk of pre-judging AECs or their magnitude. Discussing remedies early should not become a settlement process, and the CMA's final conclusions on AECs should not be influenced by the relative ease of fixing those concerns.

Linklaters queries how fruitful early engagement on remedies will be in practice in some cases, in particular where the theories of harm are heavily disputed or where some parties have a great deal at stake (e.g. potential divestment remedy cases). In those scenarios, it will potentially be difficult for parties to engage on the scope or effectiveness of remedies in a meaningful way while still contesting the theory of harm. In particular, until parties have had the opportunity to consider and comment on the evidence on the extent of the problem, gravity of harm, who is affected etc., the proportionality of proposed remedies will be particularly difficult to comment on. This potentially raises procedural fairness issues, i.e. a party could either concede the theory of harm and focus efforts on negotiating a fair remedy or spend time disputing the AEC. By the time such parties do engage, the CMA's thinking on the remedies may be largely solidified.

Finally, Linklaters notes that discussing particularly disruptive remedies (such as divestments) too early might have a dampening effect on investment in the market, before an AEC is actually found and a remedy certain to be needed.

Achieving a more efficient process as a result of the amendments may lead to identification of AECs earlier in the process, allowing a greater period for input on remedies. However, Linklaters emphasises that further time to discuss remedies should not be afforded at the expense of proper process.

2.2 Reducing the number of formal consultations

Linklaters agrees with the CMA that the current interaction during market investigations between the CMA and the parties involved is as a whole too set-piece and formal, with the ability to provide meaningful input on findings available too late in the process. Given the time constraints, reducing the number of set-piece documents and consultations (including combining the provisional findings and the provisional decision on remedies) is sensible, and will save resources for both the CMA and parties. The opportunity for discussions between the CMA and parties, rather than the need to write formal papers, will not only increase efficiency on both sides, but will also ensure the parties and the CMA are able to fully understand and explore the points made.

Ending the provision of the Updated Issues Statement may likewise be sensible, provided that the CMA ensures there is transparency as to which theories of harm have been dropped, and which will be important moving forward. Working papers are a valuable resource to provide transparency in this regard, and these, together with other more informal means of engagement (such as webinars), should be used as an opportunity to provide greater transparency regarding the CMA's decision making, particularly on quantifying harm, economic profitability analysis and proportionality of the

Linklaters

intervention, than has been afforded under the CMA's more formal process previously. Delivering this transparency and consultation (including on methodology for assessment) as the CMA's thinking progresses is crucial for due process.

If the CMA has undertaken the phase I investigation and the referral document already provides a steer on scoping, it may make sense to instead publish a more focused Issues Statement later in the process, once the CMA has had an opportunity to carry out an initial review of the evidence and engaged with the parties at the outset.

2.3 Increasing the opportunities for early engagement with parties

We welcome the proposal to increase opportunities for the parties to input into the CMA's analysis and inform decision-making at an earlier stage in the market investigation. Linklaters particularly sees value in allowing the parties to have greater input at an early stage regarding scoping of the issues, the framework for key areas of analysis, as well as providing more time for dialogue on the CMA's thinking on substantive issues. Linklaters supports the CMA's reference to site visits being useful in many cases, as we see these as important to ensure the main parties have the opportunity to put across and discuss their views of the market / sector and to frame the issues at the outset in a less formal setting.

Multi-party roundtables have previously worked well, but may not be appropriate in every case. There remains a place for bilateral hearings which allow participants to speak freely regarding their views including providing confidential information. We would welcome less formal hearings. Having hearings take place earlier will be useful, provided the hearings later in the process are not necessarily sacrificed as a result. We would suggest input from parties is vital at the framing stage, again once the issues have been narrowed down and then again after the provisional decision, and meetings with the working groups should occur to discuss analysis in a more in-depth way. As set out above under 2.2, we wholeheartedly support the CMA's comments in regard to the aim of increasing opportunities to input into the analysis and decision making.

3 Strengthening synergies between Market Studies and Market Investigations and clarifying Board / Group interactions

3.1 Strengthening synergies between MSs and MIs

Linklaters sees the value in creating greater synergies between the market study and the market investigation, where possible, particularly in cases where the CMA has been involved in both phases. Some previous investigations have appeared to use very little of the information provided in the market study which can be frustrating to parties who have invested significant time and resources in this process. Where the CMA, rather than a sector regulator, undertakes the market study it would be better if the investigation was treated as an extension of the study, rather than starting afresh. If the latter part of the market study was used to get issues off the table, narrowing the scope of issues for the market investigation, this would allow the CMA to better focus at the start of the market investigation, saving time and resources for all. While Linklaters agrees 'a fresh pair of eyes' is important in particular where the sector regulator has undertaken phase I, synergies with phase II in this instance would also be welcome to the extent possible, particularly regarding the transfer of information provided during the market study.

Linklaters

Flexibility needs to be built into the process to allow a different approach according to whether or not the CMA carried out the first phase review, while still ensuring parties have predictability in how the market investigation will proceed.

3.2 Clarifying the relationship between Board and Group

Linklaters can see the value in the Board advisory steer (as opposed to intervention) on the scope of the market investigation, which would make better use of the work done during the market study. Parties should be afforded the chance to comment on this steer before it is finalised.

4 Conclusion

Overall, Linklaters welcomes the CMA's intention to streamline the processes and focus on greater efficiency for both the CMA and the parties involved. We caution, however, that greater flexibility in process and consultations should still allow parties to predict how the market investigation will run, and most importantly, should allow for the CMA to provide greater transparency and opportunity for input in all key stages of the process, including in framing the scope and methodology of analysis.

We are available to discuss this submission further should it be useful to the CMA.