
**RESPONSE TO CMA CONSULTATION
ON ITS
UPDATED MARKET INVESTIGATIONS GUIDANCE**

May 2, 2017

CLEARY GOTTlieb STEEN & HAMILTON LLP

**Response to CMA Consultation on its
Updated Market Investigations Guidance**

This submission sets out the response by Cleary Gottlieb Steen & Hamilton LLP to the CMA's consultation of March 6, 2017, on its updated Market Investigations Guidance.

I. SUMMARY

1. We welcome the CMA's efforts to improve the efficiency of its Market Investigation procedures. In particular, we welcome the CMA's proposal to engage with parties earlier in a Market Investigation, and to provide parties with greater access to the CMA's economic analysis. Some of the proposals nevertheless have the potential to prejudice the decision-making process, including those that would involve consultation on remedies before the CMA has identified and articulated its competition concerns. In summary, our views on each of the CMA's proposals are as follows.

- **Earlier consideration of remedies.** We do not support the proposal that the CMA begin its consultation on possible remedies at the outset of a Market Investigation, before it has determined what (if any) features of the market have an adverse effect on competition (an "AEC"). This approach risks prejudging the CMA's substantive analysis, which could result in over-enforcement.
- **Reducing formal consultations.** We do not support the CMA's proposal to consult on possible remedies in the Issues Statement, nor do we support the proposal to combine the Provisional Findings Report and Provisional Decision on Remedies into a single Provisional Decision Report. Both proposals risk prejudging the CMA's substantive assessment of possible AECs, and therefore the effectiveness and proportionality of any remedies imposed. As to the CMA's proposal not to publish Updated Issues Statements, it is essential that parties are able to understand the CMA's developing thinking before it reaches a provisional AEC decision. If the CMA decides not to publish Updated Issues Statements in future, it must ensure that these rights of defence are protected in other ways (*e.g.*, through Working Papers).
- **Earlier and more flexible engagement.** We support the CMA's proposals to engage with parties earlier in the process and to use other forms of stakeholder engagement, provided parties are not deprived of their rights to engage with the CMA on an individual basis (*e.g.*, main-party hearings). We would also encourage the CMA to create opportunities for more meaningful dialogue between main parties and the Inquiry Group.
- **Synergies between Market Studies and Market Investigations.** We support the CMA's objective to facilitate a smoother transition from a Market Study to Market Investigation. We would nevertheless discourage the CMA from forming a Market Investigation team unless and until the CMA Board has

agreed the Market Study Report and reached a decision to refer, to avoid the risk of prejudging (or appearing to prejudge) the Board's decision.

- **Advisory steers to Inquiry Groups.** We support the CMA's objective of narrowing the scope of Market Investigations. We do not believe that introducing a separate advisory steer from the CMA Board is the best way to achieve this, however. Rather, we would encourage the CMA to explain its thinking on the appropriate direction and scope for a Market Investigation in its Market Study Report.

2. We explain each of these points in more detail below.

II. EARLIER CONSIDERATION OF REMEDIES

3. Under the CMA's proposal, the Inquiry Group would consider possible remedies from the outset of a Market Investigation, at the same time as assessing whether there are features of the market resulting in an AEC.

4. The CMA's intention is to allow more time to be spent on the consideration of remedies. The consultation paper also suggests that thinking about the way markets could work better may provide practical insights into the nature of possible AECs. In order to achieve this, the Inquiry Group would begin a consultation on possible remedies when it publishes its Issues Statement. The CMA accepts that this proposal could raise concerns about prejudging the outcome of its substantive AEC assessment, but notes that the Inquiry Group would still be required to provide reasons for its decision on AECs separately from its decision on remedies, and that both decisions would be subject to detailed scrutiny.

5. In our view, the fact that the CMA is required to give reasons for its decisions on AECs and remedies separately is not, of itself, sufficient to remove these concerns. A number of considerations are relevant:

- It is impossible to have a meaningful discussion about remedies without making assumptions as to the "problems" that need to be addressed. This, in turn, creates the risk of confirmation bias around the assumed AECs, the need for remedies at all, and what types of remedies are appropriate.
- When faced with the threat of specific remedy proposals, parties will inevitably focus their limited resources on challenging the design and details of those remedies, in an attempt to minimise the potential impact on their businesses. They will be able to dedicate less attention to the substantive assessment (especially if they believe the CMA has already decided to reach an AEC finding). This will affect the quality of evidence available to the CMA when carrying out its AEC analysis and, as a result, the robustness of its decisions.
- Unless the AEC finding is properly articulated and reasoned, it is difficult to design remedies that address the concerns in an effective and proportionate manner, potentially leading to over-enforcement. By way of comparison, the CMA's phase 1 merger review process has recently been adjusted precisely to

allow the merging parties (and other interested parties) to understand the nature of the CMA's competition concerns before proposing remedies.

- The only independent scrutiny of the CMA's assessment is judicial review by the Competition Appeal Tribunal, applying the standards of Wednesbury unreasonableness. This allows the CMA a considerable margin of discretion, and provides only a limited check on the CMA's substantive analysis.
6. For these reasons, we would discourage the CMA from proposing remedies for consultation at the outset of a Market Investigation. We nevertheless recognise the potential benefits for the CMA (and for parties) in considering possible remedies earlier in the process. We also recognise that consideration of possible remedies can, in some circumstances, provide insight into the underlying theory of harm. If it proves impossible to design an appropriate remedy (for example), this may indicate that the CMA is pursuing the wrong theory of harm.
 7. We would therefore encourage the CMA to allow parties to make submissions on remedies from the beginning of a Market Investigation if they wish to do so, and to engage with parties on those submissions. This flexibility should be distinguished from the current proposal, under which the CMA would identify remedies for consultation before it had reached provisional views on the AEC.

III. REDUCING FORMAL CONSULTATIONS

8. Under this proposal, the CMA would reduce the number of formal consultations it carries out with interested parties throughout the Market Investigation process. Specifically, the CMA would:
 - continue to publish an Issues Statement, but would extend this to include a consideration of possible remedies;
 - no longer publish an Updated Issues Statement; and
 - combine the Provisional Findings Report and Provisional Decision on Remedies into a single Provisional Decision Report.

Issues Statements

9. For the reasons explained above, we do not agree that the CMA should begin a formal consultation on remedies at the outset of a Market Investigation. We therefore do not agree that the Issues Statement should include a consideration of possible remedies.
10. More generally, we would encourage the CMA to use the Issues Statement as much as possible to clarify and (if appropriate) narrow the scope of the Market Investigation. For this reason, we welcome the CMA's recent use of Issues Statements as a way of articulating the specific theories of harm it intends to explore.

Updated Issues Statements

11. The Updated Issues Statement provides parties with insight into the CMA's developing thinking. It allows parties to focus their submissions on the areas of interest to the CMA, and avoid irrelevant submissions. Unless parties have the ability

to comment on the CMA's developing thinking (before the CMA reaches a provisional decision), there is a real risk that misunderstandings will go unchallenged. The Updated Issues Statement also allows the CMA to confirm any changes in the scope of its investigation (*e.g.*, theories of harm that it is no longer pursuing).

12. While we believe the Updated Issues Statement serves a useful purpose, we understand that consulting on an Updated Issues Statement creates additional burdens for the CMA, which can be difficult to accommodate in the statutory timetable. We accept that there may be other, more efficient, ways in which the CMA could provide parties with the same insight into its developing thinking (*e.g.*, through Working Papers).

Provisional Decision Report

13. Combining the Provisional Findings Report and Provisional Decision on Remedies could harm parties' rights of defence and reduce the robustness of the CMA's decision-making process in a number of ways.

- As described above, it is essential that parties have the opportunity to understand the CMA's substantive competition concerns before they are required to engage in any detailed discussion of remedies. If the CMA publishes a provisional decision on remedies at the same time as its provisional AEC findings, this opportunity may be denied.
- Similarly, under this proposal, the CMA would have to reach a provisional decision on remedies without the benefit of detailed representations that have been informed by its provisional AEC findings. Parties' submissions on remedies would have to rely on assumptions about the outcome of the CMA's AEC analysis, which may turn out to be inaccurate.
- The proposed approach could allow complainants undue influence over the CMA's conclusions. Complainants will have strong incentives to advocate for highly intrusive remedies ahead of any Provisional Decision. By contrast, the parties potentially affected by those remedies would be hamstrung in their ability to respond until after the CMA had already reached a provisional decision.
- Parties have limited resources available to respond to the CMA's consultations. Forcing parties to respond to provisional findings on the AEC and on remedies at the same time will inevitably affect their ability to prepare comprehensive submissions. Moreover, when faced with a provisional decision on remedies, it is highly likely that affected parties will focus their efforts on challenging the proposed remedies, and spend less effort challenging the AEC findings. This, in turn, could undermine the robustness of the CMA's AEC finding and result in over-enforcement.

14. More generally, we would encourage the CMA to re-consider its approach to provisional findings (on both AEC and remedies), to ensure they provide a genuine opportunity for consultation. At present, we understand that the CMA takes the position that the once it has published a provisional decision, it will not change its position unless new evidence comes to light. Not only does this constrain parties in

their ability to respond, it is also an inefficient use of the statutory timetable: the CMA is effectively forced to complete its analysis earlier in the process than necessary.

15. We would therefore encourage the CMA to consider replacing provisional decisions with “interim reports” or “preliminary reports.” Rather than reaching a firm conclusion on all points, the CMA would be able to highlight issues for further consideration and analysis. This approach would enhance parties’ rights of defence, allow the CMA more time to complete its analysis, and improve the quality of decision making.

IV. EARLIER AND MORE FLEXIBLE ENGAGEMENT

16. Under this proposal, the CMA would try to engage with parties earlier in the investigation process, and introduce additional ways of engaging with parties (*e.g.*, roundtable meetings and multi-party hearings). The CMA would also introduce sequential sharing of its economic analysis through the use of confidentiality rings and disclosure rooms.

17. We support the CMA’s proposals, and make the following observations.

- We strongly agree that main-party hearings should be held earlier in the process. It is important for parties to be able to explain their views and present evidence when the Inquiry Group is gathering information and formulating its preliminary views.
- We agree that different forms of consultation can be beneficial, including (for example) industry roundtables. It is nevertheless crucial that these additional forms of engagement should not replace the consultation rights already afforded to main parties (*i.e.*, the parties potentially affected by the CMA’s decisions). Parties will not be free to discuss all aspects of the investigation – including confidential material – at a multi-party hearing or roundtable. Similarly, parties may have to make submissions that are adverse to other industry players, which can be made to the CMA only in private.
- We strongly support the CMA’s proposal to share its economic evidence and analysis with interested parties and their advisers. Wherever possible, this should be done by means of confidentiality rings rather than disclosure rooms (which are burdensome for the CMA and the parties involved). Where information cannot be shared by means of a confidentiality ring, we would encourage the CMA to consider sharing data by means of a virtual dataroom rather than a physical disclosure room.
- At present, considerable time can be taken up trying to understand and re-create the CMA’s models before it is possible to test the accuracy and robustness of the CMA’s analysis. In order to make this process more efficient, we would encourage the CMA to explain its economic models to parties’ advisers when it discloses the data.

18. Finally, we would encourage CMA to find ways of allowing parties to engage in more meaningful bilateral discussions with Inquiry Groups. At present, CMA Hearings are inquisitorial in nature and, apart from brief opening and closing statements, are

dominated by questions from the CMA team. The CMA recognises this in its published Guidance: “*The primary purpose of these hearings is to enable the [CMA] to test the evidence and explore key issues with the parties.*”¹

19. Allowing parties to make more meaningful oral representations to, and engage in dialogue with, the Inquiry Group would be a more efficient way of developing the CMA’s understanding of the issues, and would give parties greater comfort that their views have been heard by the CMA decision makers.

IV. SYNERGIES BETWEEN MARKET STUDIES AND MARKET INVESTIGATIONS

20. Under the CMA’s proposal, a preparatory Market Investigations team (including staff and potential Inquiry Group members) would be formed before the CMA Board makes a Market Investigation Reference (an “MIR”). This team would begin preparing for the reference by understanding the markets and the work already undertaken in the Market Study.
21. We support the CMA’s objective to facilitate a smoother transition from a Market Study to a Market Investigation. We also understand that, in practice, at least some members of the staff team working on the Market Study will form part of the Market Investigation team, which should itself facilitate this transition.
22. We are nevertheless concerned that the decision to establish a preparatory team – including Inquiry Group members – too early in the process could risk pre-judging the decision whether to make an MIR. At the very least, it risks giving the appearance of pre-judgement.
23. We would therefore suggest that the CMA refrain from forming a Market Investigation team until the CMA Board has agreed the Market Study Report and made its decision on reference. This may happen several days before the Report is published, and before the formal terms of reference for the Market Investigation are signed.

V. ADVISORY STEERS TO INQUIRY GROUPS

24. Under this proposal, the CMA Board would have the ability (but not the obligation) to issue an advisory steer to the Inquiry Group conducting the Market Investigation at the end of a CMA Market Study. It would have no power to give an advisory steer in the case of other MIRs, *e.g.*, where an MIR is made by one of the sectoral regulators. An advisory steer would not be binding on the Inquiry Group, but the Inquiry Group would be expected to have regard to that steer in its investigation.
25. The objective of this proposal, as described in the CMA’s consultation document and at its roundtable discussion on March 29, 2017, is to narrow the scope of Market Investigations by, for example, eliminating market features and potential theories of harm that have already been explored and dismissed in the Market Study from further investigation.

¹ *Guidelines for market investigations: Their role, procedures, assessment and remedies*, CC3 (Revised), April 2013, paragraph 77.

26. We welcome the CMA's intention to narrow the scope of Market Investigations where it is clear that market features or theories of harm do not raise competition concerns. More focused Market Investigations should improve efficiency and eliminate unnecessary duplication of effort. We are not convinced that the introduction of an advisory steer by the CMA Board would be the best way to achieve this objective.
27. Where the CMA has conducted a Market Study, the Market Study Report already provides a steer to the Inquiry Group. The Market Study Report sets out the CMA's findings in detail. It also sets out (and is obliged to set out) the reasons for making an MIR, including a description of the market features that the CMA suspects result in an AEC.² It is unclear what the CMA Board would be able to add beyond the substantive reasoning in the Market Study Report.
28. A separate Board steer that reached different conclusions from the Market Study Report (and which could not be supported by the same depth of reasoning) would cause confusion. A Board steer that simply repeated the conclusions of the Market Study Report would be otiose. For these reasons, we would encourage the CMA to explain its views on the scope of the Market Investigation in its Market Study Report. That way, the CMA's views would be presented in a single document, with consistent and coherent reasoning.
29. The efficiency of the Market Investigation also depends on the Inquiry Group providing interested parties with clarity on the scope of the investigation as early as possible in the process (whether or not it accepts the steer given by the CMA's Market Study Report). As discussed above, we support the CMA's efforts to use the Issues Statement as a way of clarifying the theories of harm it intends to investigate and those that are out of scope.
30. Finally, we would encourage to the CMA to consider other ways in which it can limit the scope of MIRs. One possibility would be for the CMA to consider accepting undertakings in lieu of an MIR with respect to some features of a market, even if they would not address all features of the market that justify an MIR.³ This would allow parties to offer remedies that remove some of the concerns identified by the CMA's Market Study without the need for an in-depth Market Investigation, and allow the Market Investigation to focus on the concerns that remain.

² Enterprise Act 2002, section 131B.

³ Enterprise Act 2002, sections 154 and 156.