CITY OF LONDON LAW SOCIETY COMPETITION LAW COMMITTEE

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

1. The CLLS represents approximately 15,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to competition law matters.

2. The Competition Law Committee members responsible for the preparation of this submission are:

   - Charles Bankes, Partner, Simmons & Simmons LLP (Chairman, Market Investigations Working Party);
   - Robert Bell, Partner, Bryan Cave LLP (Chairman, CLLS Competition Law Committee);
   - Ian Giles, Partner, Norton Rose Fulbright
   - Jenine Hulsman, Partner, Clifford Chance
   - Nigel Parr, Partner, Ashurst LLP

Introduction and Summary

3. The CLLS welcomes the opportunity to contribute to the development of the CMA's approach to market investigations.

4. The CMA's proposals are driven by the need to adjust its processes to meet the demands of the new shorter statutory timetable for market investigations ("MI") introduced in the Enterprise and Regulatory Reform Act 2013 ("ERRA"). We note that the CMA has completed only two market investigations since change in the timetable introduced by the ERRA – banking and energy. Both were unusually large. Whilst it is a good thing that the CMA should review its processes in the light of those inquiries, we urge caution in reaching procedural conclusions based only on the experience of those unusual complex inquiries.

5. The MI regime requires particular care to ensure that the processes are fair and appropriate. The regime can result in far reaching remedies being imposed which can substantially affect competitive conditions upon the relevant market or indeed the structure of the companies themselves that are the subject of the inquiry. These remedies are being imposed in circumstances where those companies have neither broken the law nor sought to bring about a change in market structure through a merger. Whilst this is not a reason not to undertake MIs, it does mean that the highest standards or process, transparency and analysis are required, particularly where the scope of judicial intervention is limited to a judicial review standard. In particular, it is vital that the highest standards are followed to reach a finding that there is an overriding public interest that justifies market intervention (and possibility mandatory sale of assets). A consideration of remedies before provisional findings are tested will make it much harder to reach that standard.

6. In conducting an MI the CMA should be particularly aware of the burden that an MI can place on smaller businesses. It should also keep under review the impact of any proposals on those not obviously already engaged in the process.

Streamlining the market investigation process

7. We recognise that the shorter statutory timetable means some adjustment to and streamlining of the MI timetable is probably necessary.

8. We are strongly in favour of the CMA's proposal for early engagement with the parties in an MI. We also agree with the proposal that the decision on the structure of this engagement is best left to the Group. We would general expect the members of the Group, as well as the CMA staff, to be involved in any early engagement and discussion.

9. We generally agree with the suggested reduction in set piece publications and agree that a greater emphasis on hearings, more informal meetings and paper sharing may be more efficient than set piece documents. That said, it is critical to parties' rights of defence to have a proper opportunity to comment on the development of the case in an MI. In this respect:

(A) While we agree that the combination of the Provisional Findings and Provisional Decision on Remedies may be helpful in terms of timetable, we have significant concerns about combining these two stages of the process. It is very important that the focus does not switch to remedies too early and without allowing proper reflection on the merits of any AECs identified;

(B) We note the proposal to remove the Updated Issues Statement from the process. In our view, this can be a helpful publication – and we assume not too time-consuming from the Group's perspective – as it allows participants in the MI to understand points that are no longer under consideration. If such changes in focus of an MI could be communicated effectively in another less burdensome format, that would be welcomed;

(C) We are pleased that there is no suggestion that Working Papers would be removed from the process or streamlined. In many cases, these papers present the best opportunity for parties to correct misunderstandings, or to present important evidence, before the Group forms and publishes its provisional views. Their importance will increase under the new procedures. In this context we would argue that every attempt should be made to increase the time made available to parties to respond to Working Papers, and for the CMA to consider such responses.

(D) The area where further streamlining might be encouraged is in respect of the confidentiality process prior to publication of set piece documents. Whether through greater use of confidentiality rings, or improvements in identification of confidential information when this is submitted to the CMA, our experience is that valuable time is lost in the MI timetable to the process of confirming redactions which reduces the time available to focus on the points of substance.

10. In respect of all of the above, transparency and process are vital in MIs. Greater flexibility and engagement with the parties on a basis which may vary from MI to MI will increase the need for transparency and clarity about process. Small, less well resourced parties who may be affected by an MI will potentially be significantly impacted by any lack of clarity about process or time adequately to consider and respond to each set piece publication.

11. We favour an early issues statement. Although we have some concerns about maintaining the boundary between a market study ("MS") and an MI, which are set out further below, we consider the MS conclusions are an obvious starting point. With appropriate use of concurrency, and coordination between regulators, we hope that this will not be limited to those cases where the market study has been carried out by the CMA. In a shorter process the issues statement will be particularly important.

12. We are concerned about the proposal for an earlier consideration of remedies:

(A) Remedies must flow from an adverse effect on competition ("AEC") finding by the MI Group and should not be based on MS conclusions. It is inappropriate for the Group to give any consideration to remedies before they have defined an AEC which requires remedying;

(B) Early consideration of remedies will give rise to the danger of the Group formulating AEC to fit the remedy, or placing too great reliance on the conclusions of the MS. Even an appearance or suggestion that this might be the case will undermine the validity of the outcome of an MI. We do not think that the CMA's observation in paragraph 2.7 of the consultation document that "*no remedy can be imposed without a fully reasoned AEC*" has any force in rebutting this important concern; and

(C) We see the CMA's comment in paragraph 2.5 that *"this is the general approach taken by other parts of government or regulators"* as offering no comfort. We cannot think of a similar process to an MI, and would be concerned if "*changes in policy*" were seen as appropriate drivers for remedies in MIs.

13. We are aware that provisional findings and provisional remedies are published at the same time in merger cases. However, we consider that the significant difference between the circumstances of a merger reference and an MI (and the different timetables) mean that this is an area where practice can and should legitimately diverge.

14. In conclusion, we would rather see a well-managed process early in an MI to allow sufficient time at the end for proper work on remedies, rather than early discussion of remedies.

Synergies between market studies and market investigations

15. We are generally happy with the idea of considerable preparatory work at the MS stage in relation to data and scope of reference. However, great care is needed around the danger of confirmation bias at the MI stage. Parliament has retained the two stage structure with an MI separate in process and structural terms from an MS for good reasons.

16. We agree that the CMA Board has an important role to play in the efficient delivery of an MI by:

(A) reviewing the scope of the reference to ensure that the scope of reference is appropriate for 18 month delivery; and

(B) supervising the transition from MS to MI to ensure appropriate distance but maximum efficiency.

17. We welcome the idea an advisory steer from the Board to the MI Group on the scope of the MI and the issues to be addressed, in order to encourage efficiencies and avoid duplication. We hope that the main parties would be offered an adequate opportunity to comment on such a steer before it is finalised, so that the steer is not based on information from those who conducted the MS alone. A

proper consultation at this stage should expedite production of the Issues Statement and progress of the MI.

18. We do not think that the steer from the CMA Board should be limited to those cases where the CMA carries out the MS. In the case of MI references from other concurrent regulators, it may be that a joint steer from the CMA Board and the referring regulator would be appropriate.

19. Given the clear need for synergies from an MS to be captured early in an MI process, thus ensuring the maximum time for appropriate procedures in an MI, we would encourage the CMA and other concurrent regulators to consider further how these may be achieved through such steps as:

    (A) The development of a statement of "best practice" to be agreed by all regulators for MI references;

    (B) An understanding that concurrent regulators will consult CMA Board when developing MI references; and

    (C) A review and (if found necessary) a strengthening of concurrency procedures around MI references.

Conclusion

20. We welcome the CMA's suggestion of early engagement with the parties in the course of an MI reference; and the replacement of some of the large set piece documents with a more flexible process. This change will require an emphasis on transparency and communication with all concerned. It remains of critical importance that sufficient time should be allowed for consideration and response to key documents by all parties, both large and small. This should include working papers which are likely to take on an enhanced importance in the new procedures.

21. We do not support any move to bring forward the consideration of remedies. We feel strongly that an MI must be structured sequentially – that is to say that the Group must consider AECs first and turn to remedies only when AECs have been found and carefully defined.

22. We support steps to realise synergies between MS and MI stages, so long as appropriate steps are in place to avoid any perception of confirmation bias. We agree that the CMA board has an useful role to play in this process.

23. We do not see why these synergies should be any less available following a reference by another regulator. We encourage the development of appropriate concurrency processes to ensure that this is the case.

City of London Law Society Competition Committee

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