

## Updated guidance on the CMA's approach to market investigations

### Consultation

#### Response by Berwin Leighton Paisner LLP

- 1 Berwin Leighton Paisner (BLP) supports the Competition and Market Authority's (CMA) objectives to realise efficiencies in the market investigation (MI) process and conduct investigations in the most efficient and timely way as possible. Market investigations are resource intensive and impose a significant burden on the affected businesses diverting resources away from the day to day priority of serving consumers. Measures that can streamline the market investigation process are to be welcomed provided the fairness, integrity and transparency of the process is not undermined.
- 2 The CMA intends to streamline the MI process and amend its guidance – *CC3 Guidance for market investigations: Their role, procedures, assessment and remedies (revised April 2013)* to enable changes in two key areas:
  - (a) Streamline the MI process – measures include: considering remedies at an earlier stage in the investigation; reducing the number of set-piece consultations; and engaging in earlier and more flexible interaction with stakeholders (including holding formal hearings sooner, roundtables and confidentiality rings); and
  - (b) Strengthen synergies between Market Studies (MS) and MI – measures include carrying out preparatory work and consideration of remedies during the latter stages of a MS when they are likely to lead to a full MI; and introducing the option for the CMA board to give an advisory steer on the scope of the market investigation.
- 3 BLP considers that there is considerable merit in the CMA seeking to streamline its processes, especially given the 18 month time limit for MIs and the need to increase efficiencies. However, it is essential that the proposed measures do not pre-judge the outcome of the investigations and compromise the need for the CMA to continue to conduct MIs on an evidence-led basis and with an open mind before reaching any conclusions.

#### **EARLY CONSIDERATION OF REMEDIES**

- 4 The proposal to consider remedies at the formative stages of the MI represents a significant departure from current practice which provides for the MI Group and Panel first to identify whether there are any competition problems prior to consideration of any remedies.
- 5 Early consideration of remedies at the beginning of the MI process and at the same time as the assessment of competition problems risks undermining the evaluation and competition assessment stage and introducing confirmation bias into the process. Further, it is difficult to envisage that the relevant theory (or theories) of harm can be robustly developed in parallel to a consideration of remedies.
- 6 There is a risk that early consideration of remedies could result in an assumption of adverse effects on competition (despite the CMA's clear signal and statutory

requirement that remedies are dependent on the need to address any identified adverse effects on competition (AEC)).

- 7 Early consideration of remedies will also increase the burden on businesses given that additional resource will be required to assess the range of potential remedies prior to any adverse competition findings. Further, in the event of no AEC findings those resources will also have been diverted. Alternatively, the number of competition concerns may reduce or evolve as the MI progresses reducing the need to consider the full range of potential remedies that may have been considered at the beginning of the MI, also contributing to diverted resources.
- 8 BLP notes that the CMA proposes to allow a degree of flexibility in approach. Alternatives may include: (a) the development of a "fast-track" mechanism to allow voluntary consideration of remedies by the CMA and parties; or (b) expanding the consideration of undertakings in lieu of a market investigation reference in relevant cases.
- 9 Alternatively, it might be appropriate to bring forward consideration of remedies earlier in the process and not wait until the provisional decision in limited circumstances. For example, in more straightforward cases where a market study has uncovered clear theories of harm and potential anti-competitive effects, it may be appropriate to bring the remedies discussions forward in the MI (perhaps after 6 months or after the initial hearings). However, this should be considered carefully and on a case by case basis and may not be appropriate in "clear the air" MIs such as, the recent Energy Market Investigation.

#### **SYNERGIES BETWEEN THE MARKET STUDIES AND MI**

- 10 The proposals also seek to strengthen synergies between the MS and MI while maintaining independence in decision-making by allowing the CMA to consider remedies and undertake preparatory work for the MI during the latter stages of the MS.
- 11 One of key benefits of the MI process is that it provides a "fresh pair of eyes" from the MS and allows an independent and more in-depth look at the issues (or possibly wider review) that were subject to the MS. Whilst safeguarding this principle, in order to increase efficiencies and to streamline the process, the formation of a preparatory MI team to consider the potential MI reference could be helpful and is to be welcomed.
- 12 It would also be important to consider what information can be passed between the case teams to minimise the burden on stakeholders in responding to lengthy "first day" information requests when the CMA may already have some of the information (clearly, where a reference is made from a sectoral regulator this may not be possible).
- 13 It is not clear how the proposal for the CMA Board to issue an advisory steer on the scope of the MI will affect the current process. As part of the MS, there is already scope for the CMA to provide a view on potential issues/theories of harm for consideration as part of the MI and therefore it is not clear whether the "Advisory Steer" is necessary and there is a risk that this could become an additional procedural hurdle.

#### **PROCESS IMPROVEMENTS**

- 14 The CMA has also proposed to reduce the number of set-piece consultations. In principle, this does not raise concerns provided parties continue to have the

opportunity to comment on the issues statement, updated issues statement (if necessary to clarify thinking), provisional findings and remedies (as appropriate). The ability of the Group to retain the option of publishing and consulting at other points in the process (including working papers) to provide meaningful disclosure is also important.

- 15 In relation to working papers, and noting the need for greater efficiency, sharing emerging thinking via meetings and presentations may also be beneficial and may reduce the need for the CMA to publish all working papers for comment, especially if issues may not be contested. Furthermore, delaying the provision of views until the provisional findings may often be too late in the process and therefore more open sharing of thinking at an earlier stage in the process is to be welcomed.
- 16 Further, as part of this, the proposal to engage in roundtables and use confidentiality rings/disclosure rooms (provided adequate protections can be established to guarantee confidentiality) is also helpful and could be beneficial to allow further consideration of and debate on the key issues and evidence.
- 17 BLP welcomes the potential for earlier and more flexible interaction with parties. Consideration should also be given to engagement with the Panel outside of the formal hearings as this could allow for more informal engagement on specific issues as well as a more open dialogue as it is often frustrating for the only interaction for parties with the Panel to be limited to the formal hearings or in writing. It could also be worthwhile to consider whether a member of the Panel could also be available at working level meetings with the parties (outside of formal hearings) as this could also enable more informed discussion.
- 18 BLP recognises the need for the CMA to streamline its MI process and derive greater synergies from the MS process and deliver increased efficiencies. Many of the proposed procedural changes will promote this. However, any changes must continue to respect a key aspect of the MI process - that it is fresh process and is independent from the first stage - and the proposed measures must safeguard this. Early consideration of remedies is most concerning and risks undermining this by introducing confirmation bias and distracting early attention away from consideration of any adverse effects on competition towards consideration of "desired" outcomes and should be approached with considerable caution.

**Berwin Leighton Paisner LLP**

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