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Investigation Guidelines Review

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Dear Stakeholder

REVIEW OF CC MARKET INVESTIGATION GUIDELINES

1. The market investigation regime established by the Enterprise Act 2002 (the Act) has been in existence for over seven years. The purpose and structure of this regime was innovative in several key respects, notably in requiring the Competition Commission (CC) to investigate and identify features of a market having an adverse effect on competition and in conferring remedy powers on the CC.
2. The CC published market investigation guidelines (CC3) in June 2003. Since then, we have received ten market investigation references (MIRs) and published final reports in nine of these. Given this experience, we believe we should now start the process of updating our market investigation guidelines. In addition:
 - (a) We are well advanced in redrafting our merger assessment guidelines jointly with the Office of Fair Trading (OFT), and in November 2008 we issued new merger remedies guidelines. We need to consider how best to reflect our latest thinking on analytical techniques and remedies in our market investigation guidelines.
 - (b) The Competition Appeal Tribunal (CAT) has made judgments in respect of three MIRs. We need to reflect the lessons we have learned, particularly on remedies, as a result of those challenges.¹
3. The CC has already announced its plans to complete MIRs in a shorter timescale—18 months for a standard market investigation rather than the statutory time limit of two years.² The purpose of this letter is to seek your initial comments on the main issues we have so far identified for review and to canvass your views on any other issues you think we should be addressing in updating our guidelines. There will, of course, be further opportunities to contribute later in the process, but we would like to receive your comments at this early stage to help us to design our review process.
4. We shall separately be considering how best to cover procedural aspects of MIRs.

¹www.competition-commission.org.uk/press_rel/2010/feb/12-10.pdf.

²www.competition-commission.org.uk/our_role/speeches/pdf/cbi_note_070709.pdf.

Role and purpose of MIRs

5. The statutory framework for MIRs is set out in CC3 and is reproduced in [Annex A](#). In addition to continuing to include guidance on the statutory framework, we propose to provide additional explanation of the role and purpose of MIRs. This might include:
 - (a) explaining the distinction between MIRs and prohibition in competition law (under the Competition Act 1998 and Articles 101 and 102) applied by others, notably the OFT and designated sector regulators;
 - (b) emphasising that the CC is not a prosecutor and the purpose of an MIR is not to establish the 'guilt' or 'innocence' of the parties involved;
 - (c) explaining the CC's approach when considering whether there is an adverse effect on competition (AEC), in particular whether this requires the CC to find that there is a detrimental effect on consumers; and
 - (d) explaining the CC's approach when addressing the remedy questions.
6. In the following paragraphs we set out the analytical issues that we consider would be useful to cover in the revised guidance. We then consider the likely revision of guidance on remedies.
7. Drawing in particular on your experience of participating in market investigations, we would welcome your views and comments on:
 - (a) whether we have raised the right issues or whether there are other issues of particular concern;
 - (b) what aspects you would particularly like to see discussed in revised guidelines;
 - (c) any alternative approaches to any of the options identified; and
 - (d) other aspects of the existing guidance which you consider should be expanded or amended.

Analytical issues

Market definition

8. As part of the review we propose to consider both the purpose of market definition in MIRs and how markets should be defined to serve this purpose. We have identified several broad possibilities:
 - (a) Defining markets that are sufficiently broad that they include the products and areas under review, and sufficiently narrow that separate markets are defined whenever conditions are sufficiently different to require analysis. The statutory question the CC must decide requires it to be clear about the products and geographic areas affected by the feature(s), and to conduct an analysis of each market.
 - (b) Defining the market as a means of identifying the demand-side constraints that might ensure competition works well, regardless of supply-side constraints. This involves identifying the products that would compete with those under review if prices were at competitive, rather than current, levels. But a particular difficulty

with defining markets for this purpose is that doing so involves complex counterfactual analysis concerning the willingness of customers to switch between products at competitive prices.

- (c) Defining the market as providing a focus for evidence gathering and analysis by identifying those products that currently constrain the prices of the products under review. This approach to defining the market would look at substitution patterns at current, rather than competitive, prices. In analysing the way the market currently operates and the role of the candidate features, it will be important to understand the interactions with those other products that currently compete closely with the products under review.

Counterfactual

- 9. The Act does not set out a benchmark against which to assess whether 'any feature or combination of features' harms competition. However, existing guidelines refer to 'a fully competitive market' and the CC has developed the concept of the 'well-functioning market' as two possible benchmarks. Another possible benchmark could be a hypothetical counterfactual without the candidate features. We will be considering these and other options for the appropriate benchmark.

Features

- 10. We propose that the revised guidelines will include guidance on the identification of features, based upon the CC's experience. Possibilities may include barriers to customer switching, high barriers to entry, tacit coordination, networks of vertical restraints, high search costs and concentrated market structures. We have identified two related issues for consideration.
- 11. First, there is the issue of how best to distinguish features from outcomes. Should we consider features to be the underlying drivers that prevent, restrict or distort competition, resulting in poor outcomes for consumers?
- 12. The second issue is how best to distinguish features from other aspects of the market context that affect competition. (The AEC test requires that a feature has an adverse effect on competition.) The CC's practice has been to refer to these other aspects as market characteristics. We propose to review the basis for deciding which aspects of a market are to be considered as features. A possibility might be to identify as features those aspects, the removal of which would mean that competition was improved. Alternatively, the CC could select as features those aspects that can be addressed directly with appropriate remedies.

Theories of harm

- 13. We will consider whether to include explicit reference in the guidelines to the role of 'theories of harm' in market investigations. In our view, theories of harm set out the logical steps linking the candidate features to a prevention, restriction or distortion of competition, and as such help focus and guide the analysis during a market investigation. We might then go on to consider what guidance to include about the types of theories of harm that might arise in market investigations, affecting both price and non-price competition.

Indicators and measures of the extent of competition

14. We will consider whether to provide additional information about the interpretation of the market outcomes the CC may consider when assessing whether competition has been prevented, restricted or distorted. We will consider, for example, whether to provide additional guidance on:
- (a) the measurement and interpretation of profitability;
 - (b) the types of information that can be indicative of coordinated outcomes;
 - (c) whether there are additional measures that can provide information about the competitiveness of a market including comparative information from other markets without some or all of the relevant features; and
 - (d) the extent to which different measures are suitable for different markets or theories of harm.

Remedies

15. In the light of the experience gained in determining and implementing remedies, as well as the recent CAT judgments, we expect that the guidance on remedies will be significantly revised. Our main priorities will be:
- (a) To provide an explanation of the circumstances in which different types of remedy option (eg divestitures, informational remedies, recommendations) are likely to be substantially effective and practicable solutions to different types of AEC or their detrimental effects on customers. We will also aim to provide greater detail on the main risks and design issues associated with different categories of remedy (see also *Merger Remedies: Competition Commission guidelines, CC8*).
 - (b) To develop our assessment of proportionality incorporating the main lessons from the CAT judgments in *Groceries, PPI* and *Airports*. Important issues to be covered include identifying the various approaches that can be taken to evaluate the likely costs and benefits of different remedy options, the timescale over which benefits of intervention are likely to occur and the interaction between the consideration of proportionality and the evaluation of relevant customer benefits.

Target date for responses

16. We should be grateful for your inputs by Friday 14 May. In replying to us, please also provide us with a non-confidential version that you would be content to see published on our website.

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The statutory regime

1. As set out in CC3, the statutory regime requires the CC to decide:

whether any feature or features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the United Kingdom or a part of the United Kingdom

If any feature or combination of features has such an effect, this constitutes an adverse effect on competition under the Act. We refer to this question as the AEC test.

2. The Act defines features as:

(a) the structure of the market concerned or any aspect of that structure;

(b) any conduct (whether or not in the market concerned) of one or more than one person who, supplies or acquires goods or services in the market concerned; or

(c) any conduct relating to the market concerned of customers or any person who supplies or acquires goods or services.

Conduct includes any failure to act, whether intentional or not and any other unintentional conduct.

3. Where the CC decides there is an AEC, it is required to decide the following additional questions:

(a) whether action should be taken by the CC... for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;

(b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and

(c) in either case, if action should be taken, what action should be taken and what is to be remedies, mitigated or prevented.