RESPONSE TO COMPETITION AND MARKETS AUTHORITY

Consultation document: Mergers: Exceptions to the duty to refer

11 June 2018

This response represents the views of the law firm Allen & Overy LLP on the Competition and Markets Authority (**CMA**) draft for consultation *Mergers: Exceptions to the duty to refer (CMA64con)*, dated 11 June 2018 (the **Draft Guidance**).

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

Response

'De minimis'

1. We note that the section of the Draft Guidance on markets of insufficient importance has not been substantively changed from the CMA's current guidance in *Mergers: Exceptions to the duty to refer in markets of insufficient importance*, dated 16 June 2017. In particular, the CMA has confirmed the current thresholds. Whilst we do not consider that a change to the level of the thresholds would be helpful at this stage, we suspect that as a new post-Brexit UK merger control regime starts to crystallise there would be value in reviewing the need for a further uplift or change to the thresholds. We also consider that it would be useful if the CMA could footnote more recent merger cases to provide examples to the points made in the guidance, including referencing those that have been decided since the guidance was revised last year.

Arrangements which are insufficiently advanced or likely to proceed

2. We welcome the expanded section in the Draft Guidance on arrangements which are insufficiently likely to proceed (at paragraph 61 and footnote 34). It helpfully draws attention to the fact that parties can choose to abandon a merger following a substantial lessening of competition (**SLC**) finding but before the end of the 10-working day window for consideration of undertakings in lieu of a reference, and so avoid a phase 2 reference and filing fee.

3. With respect to the section in the Draft Guidance on arrangements which are insufficiently advanced, we note that the CMA only expects to use the exception if a proposed merger suffers unexpected disruption after the CMA has issued an invitation to comment and the initial review period has started (paragraph 65). It would be helpful if the CMA could confirm whether or not it has used this exception to the duty to refer in any case, providing references where appropriate.

Relevant customer benefits

4. In general we welcome the re-ordering and expansion of the section of the Draft Guidance on relevant customer benefits (**RCB**). The new headings and subsections are an improvement and allow for a clearer and more methodological understanding of the CMA's approach, in particular the RCBs the CMA will consider, how the CMA will determine whether particular RCBs are relevant, how the

CMA will weigh RCBs against the SLC and how the RCB analysis interacts with a consideration of remedies at phase 1 and phase 2. The Draft Guidance sets out a clear framework for parties to follow in assessing and making the case for RCBs.

5. In paragraph 71, the CMA notes that RCBs should be raised at an early stage. It would be helpful if the CMA expanded on this. Does the CMA expect evidence on RCBs to be presented in pre-notification discussions or can the CMA envisage cases where such evidence could be successfully provided once the phase 1 review period has begun? The timing of the parties' submissions on RCBs in the two cases where the CMA's discretion has been exercised is not clear in the published decisions.[1] We note that the *CMA guidance on the review of NHS Mergers* encourages parties to engage with the CMA and Monitor on any RCBs at the pre-notification stage (at paragraph 4.12) but does not rule out engagement after the phase 1 period has begun.

6. In paragraph 74 illustrating RCB situations, the CMA states a merger might lead to higher quality products only "in unusual circumstances" and yet higher quality patient care has been detailed as a RCB in both UHB/HEFT and DTHFT/BHFT.

7. The subsection on assessing the existence of RCBs adds useful clarification of the evidence that the CMA will consider when assessing the likelihood, timeliness and merger specificity of RCBs. With respect to the production of detailed and verifiable evidence of the benefits emerging, the CMA notes that NHS Improvement verified the parties' submissions in UHB/HEFT and DTHFT/BHFT. Would the CMA expect verification by independent third parties in all cases?

8. At paragraph 77 we recognise the CMA's position that a "reasonable period" when considering timeliness of a claimed benefit will vary from case to case, but it would be useful if the CMA could provide some illustrative examples to demonstrate the possible range of periods it would consider to be reasonable.

9. More generally, could any of the issues and types of evidence referred to be fleshed out further with or exemplified by cases, even if those where the CMA decided not to exercise its discretion under this exception?

10. Finally, we appreciate the CMA's acknowledgment at paragraph 80 that the provision by the parties of evidence of RCB does not imply that they accept the existence of a SLC. This is an important clarification so as not to deter the submission of RCB claims.

Allen & Overy LLP

20 July 2018

[1] University Hospitals Birmingham NHS Foundation Trust/Heart of England NHS Foundation Trust (UHB/HEFT) and Derby Teaching Hospitals NHS Foundation Trust/Burton Hospitals NHS Foundation Trust (DTHFT/BHFT).