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CMA'S CONSULTATION ON DRAFT GUIDANCE:
EXCEPTIONS TO THE CMA'S DUTY TO REFER IN MERGER INVESTIGATIONS

RESPONSE OF ASHURST LLP

Ashurst LLP welcomes the opportunity to respond to the consultation by the Competition and Markets Authority ("**CMA**") on "*Mergers: Exceptions to the duty to refer*" (11 June 2018) ("**the consultation document**"). This response contains our own views, based on our experience of advising and representing clients on merger control issues, and is not made on behalf of any of our clients.

We confirm that the contents of this response are not confidential. We also confirm that we would be happy to be contacted by the CMA in relation to our responses.

We note, at the outset, that the CMA is limited by the legislative framework which gives it considerable discretion not to open an investigation, but places very significant limits on the CMA's ability not to refer a Phase 1 investigation to a Phase 2 inquiry where a substantial lessening of competition ("**SLC**") has been identified. In our view, there is a separate, but related issue (which is not the focus of this consultation), as to whether the legislative framework strikes the correct balance. This is an issue which is likely to become critical in the medium term, and we consider that there is a strong case for a change to the Enterprise Act 2002 to give the CMA a *discretion* rather than a duty to refer.[1] That would provide the CMA with additional flexibility to control its case load and make the best use of its limited resources. Such a change may be essential depending upon the eventual arrangements that are in put in place in respect of the CMA's merger review function following the UK's exit from the European Union. We would encourage the CMA to advocate for such a change.

Nonetheless, notwithstanding our recognition of the legislative constraints under which the CMA operates, we consider that the CMA could and should apply the existing tools at its disposal in a more flexible way in order to make the best use of its resources and deliver the best public benefit from its merger review function. Against this yardstick, there are a number of aspects of the CMA's working practices and the consultation document which could be strengthened. As explained below, we would emphasise the need for the CMA to make more holistic, cumulative, assessments rather than looking at issues in isolation. In addition, we would suggest that the consultation document could be strengthened by including more detailed references to examples to illustrate certain points.

1. **Is the content, format and presentation of the draft guidance sufficiently clear? In particular, does the draft guidance clearly explain the relationship between RCBs and remedies? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.**

1.1 Overall, we find the content, format and presentation of the draft guidance to be generally clear. We welcome in particular the clarity brought by consolidating the CMA's guidance on exceptions to the duty to refer, which was previously split across documents OFT1122 and CMA64, into a single guidance document. We would welcome continued initiative by the CMA to consolidate its guidance documents, to ensure consistency and enable greater

[1] Pursuant to sections 22 and 33 of the Enterprise Act 2002.

accessibility to the CMA's practice which, at present, can occasionally be difficult to discern for practitioners without a background in competition law.

1.2 The section explaining the relationship between RCBs and remedies is well presented in the consultation document. However, we considered the corresponding sections of the previous guidance to be more clearly drafted.[2] For example, the CMA has now removed the explanation setting out the legal basis for why it is not possible to apply an exception to the duty to refer in relation to certain markets, whilst accepting an undertaking in lieu in respect of other markets. There is also scope for further clarity in relation to the relationship between RCBs and efficiencies which enhance rivalry, particularly with respect to the stage at which the CMA will take these factors into account[3] and how, in practice, rivalry-enhancing efficiencies have been applied.[4]

1.3 **Is the draft guidance sufficiently comprehensive? In particular, does it provide enough examples of the type of evidence that the CMA requires in its assessment of RCBs? Does it have any significant omissions? Do you have any suggestions for additional or revised content that you would find helpful?**

1.4 We welcome the specification of the types of evidence that the CMA will consider when assessing RCBs. We note in this regard that in *UHB/HEFT* the CMA placed "*significant weight*" on the advice from NHS Improvement given its role and expertise as sector regulator for the NHS.[5] It would be helpful to clarify in further detail, outside of merger investigations involving NHS Foundation Trusts, the extent to which the CMA would rely on the views from third party stakeholders to establish and verify RCBs (for example from consumer organisations). Further illustrations of the types of RCBs that the CMA will typically balance against the loss of competition would also provide helpful clarity, for example, on the benefits brought about by network effects or efficiencies resulting from vertical mergers.

1.5 It is somewhat disappointing that the CMA has not taken the opportunity in publishing the consultation document to comment on its approach in the past few years. In particular, the CMA's decision in *Capita / Vodafone* stands out as an overly mechanistic approach. The CMA was not persuaded by Vodafone's claims that it would not have exited the market 'but for' the merger, and therefore did not adopt this as an appropriate counterfactual for its merger analysis.

1.6 Furthermore, the CMA found that the size of the market was within its area of discretion for the duty to refer but, when assessed against the relevant criteria for markets of insufficient importance (market size, strength of the CMA's concerns, magnitude of competition lost, and durability) or relevant customer benefits, the CMA did not return again to the possibility that Vodafone would exit the market if a CMA reference was made.

1.7 As the CMA will be aware, Vodafone immediately terminated its paging business following the reference, causing entirely avoidable disruption to customers (mainly NHS Trusts).[6] It may, accordingly, be appropriate for the CMA to take a more rigorous examination of the costs and consequences of making a Phase 2 reference, taking into account the cost borne by merging parties when exercising its discretion in relation to mergers falling below the £10 million threshold. In addition, we consider that it may, in certain circumstances, be appropriate for the CMA to consider the parties' own proposed counterfactual when

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2 OFT1122, *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraphs 4.4-4.5

3 See, for example, the explanation that the OFT provided in Asda/Netto (2010), paragraphs 70-71.

4 See, for example, Global Radio UK / GCap Media (2009).

5 UHB/HEFT (2017), paragraph 147.

6 BBC News, 'Vodafone to close down pager business after CMA shock' (10 May 2017).

assessing the question of its duty to refer. We would encourage the CMA to consider amending the consultation document to address these points.

2. **Do you have any other comments on the draft guidance?**

2.1 We note that the CMA consulted on the applicable thresholds for the availability of the de minimis thresholds on 23 January 2017. That consultation resulted in the pre-existing thresholds, originally set in 2007, being increased by approximately 50 per cent. We responded to the CMA's consultation on the changes to its de minimis threshold at the time, noting the CMA's statement that it "*would remain committed to reviewing the application of the 'de minimis' exception regularly*". We are yet to receive any indication of how frequently such reviews are likely to occur. We would urge to CMA to consider a formal commitment to a regular review at fixed intervals (for example, once every three years) or, alternatively, an index-linked threshold, to ensure that the applicable thresholds remain relevant in real terms.

Ashurst LLP
20 July 2018