**RESPONSE TO CMA CONSULTATION: MERGERS: EXCEPTIONS TO THE DUTY TO REFER**

*Baker McKenzie welcomes the opportunity to comment on the CMA's consultation on guidance on Mergers: Exceptions to the Duty to Refer ("Draft Guidance"). Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on UK merger control. 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.*

**1. Is the content, format and presentation of the draft guidance sufficiently clear? In particular, does the draft guidance clearly explain the relationship between the RCBs and remedies?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 We agree with the CMA's proposal to consolidate the guidance on de minimis and guidance on RCBs into a single document, as both relate to the exception to the duty to refer a merger to Phase 2. It would be helpful to include in the final guidance a description of efficiencies which may be considered as RCBs, as currently set out in paragraphs 5.7.6 - 5.7.18 of the CMA Merger Assessment Guidelines. Whilst the Draft Guidance contains a cross reference to these sections, we consider that it would be simpler to repeat the relevant cross-referenced content in the final guidance, so as not to disrupt the flow and to keep the guidance user-friendly. It would also be helpful if the CMA would explain which of the efficiencies described in the Merger Assessment Guidelines could be considered as RCBs.

1.2 The section "Illustrations of relevant customer benefits" in the Draft Guidance is fairly general. It would be useful to include more detailed examples of RCBs, similar to the level of detail in the CMA Guidance: Review of NHS Mergers (paragraphs 7.13 - 7.23).

1.3 We consider that the Draft Guidance provides clarity on the relationship between RCBs and remedies.

**2. Is the draft guidance sufficiently comprehensive? In particular, does the 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?**

2.1 The section "Assessing the existence of relevant customer benefits" is useful but we consider that the CMA should go further and provide more detailed guidance on the type of data that it would expect parties to provide, and how this data should be presented. The need to provide compelling evidence of RCBs was made clear in the Competition Commission's report on *Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust*, where lack of evidence was key to the prohibition of the merger.

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

3.1 In our view the CMA should use this consultation as an opportunity to increase the current de minimis thresholds. The current levels of £5m and £15m are low, and as a result, the CMA is still able to review relatively small mergers. The CMA can (and does) review mergers in niche markets and/or local geographic markets where the parties have over 25% share of supply of the relevant goods or services, regardless of their turnover.

3.2 The de minimis exception has only been applied in 4 cases in 2017/18 (since the introduction of the current thresholds), which suggests that the CMA continues to spend resources on smaller mergers. Given that the UK merger control notification process is heavy-handed, the regulatory burden on parties to smaller transactions is disproportionate. In our view, the CMA should not have jurisdiction to review mergers where the value of the market concerned is less than £15 million. Alternatively, the parties should be able to submit a short letter to the Mergers Intelligence Committee explaining why the de minimis exception should apply. This would enable the CMA to decide whether to apply the exception before starting a Phase 1 review. If the CMA determines that the exception applies, it would inform the parties at the outset that it will not call in the merger, thus eliminating the need for a merger filing. In this way, a Phase 1 review for mergers involving markets of insufficient importance could be avoided altogether which would save time and resources of both the CMA and the parties.

3.3 Where the annual value in the UK of the market concerned is £5m - £15m, the CMA says it will consider whether the expected customer harm resulting from the merger is materially greater than the average public cost of a Phase 2 reference, which it estimates to be around £400,00. The figure of £400,000 has not changed since the OFT's 2003 Substantive Assessment Guidance, which is surprising. Given that Phase 2 investigations have become more transparent since 2003 and more document-intensive, we would expect that figure to have increased. We consider that the de minimis thresholds should be set by reference to an updated estimate of the cost to the public of a Phase 2 reference, which we suspect has increased since 2003.

3.4 We note that the CMA has stated that it anticipates around a 50% increase in merger caseload post-Brexit, with cases that currently fall under the EU Merger Regulation becoming subject to UK jurisdiction. Given the significant impact that this will have on the CMA's resources, in our view this consultation should consider increasing the de minimis thresholds in order to free up resources that could be sensibly employed to focus on large complex global transactions which are more likely to have an impact on competition in the UK.