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CMA'S CONSULTATION ON CHANGES TO THE DE MINIMIS POLICY

RESPONSE OF ASHURST LLP

Ashurst LLP welcomes the opportunity to respond to the consultation by the Competition and Markets Authority ("**CMA**") on "*Mergers: Exception to the duty to refer in markets of insufficient importance*" (23 January 2017) ("**the consultation document**"), to which we refer in this response as the "**de minimis exception**". 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 confirm also that we would be happy to be contacted by the CMA in relation to our responses.

1. **Do you agree with the proposed changes to the thresholds?**

1.1 We agree that a review of the upper and lower thresholds for application of the de minimis exception is appropriate and that they should be increased.

1.2 It is difficult to comment on whether the proposed new levels of £15 million and £5 million represent a sufficient increase for the new upper and lower thresholds because the CMA does not provide any indication of the basis on which they have been calculated. The Bank of England inflation calculator[1] shows that £10 million in 2007 corresponds to around £14.5 million in 2016 and £3 million in 2007 to around £4.4 million in 2016. This suggests that the proposed increases are simply inflation-based. Absent any change in policy, this clearly demonstrates the need to update the thresholds. Moreover, it follows that there will have been a reduction over time in the number of mergers that can benefit from the de minimis exception, and a corresponding increase in the burden on both the CMA/public purse and the parties to mergers which may generate only small-scale detriment.

1.3 We consider that there is scope to raise the thresholds further than is proposed – in particular as regards the higher threshold – for two reasons:

(a) if the proposed new thresholds simply reflect inflation since 2007, the assumption must be that there has been no change in any of the underlying elements of the original calculation. We consider that this may be incorrect. As the consultation document explains, the thresholds were originally set as being the upper and lower value thresholds for the size of market considered likely to generate consumer harm equivalent to the estimated cost of a reference. Accordingly, it would seem sensible to cross-check the proposed new thresholds by reference to the current cost of a Phase 2 investigation (a figure to which the integrated CMA presumably has ready access). The consultation document refers to the figure of £400,000, which was initially given as the estimated cost of a reference in OFT guidance of 2003. It does not, however, consider whether that figure has been reviewed or whether it remains accurate – which would appear very unlikely. In addition to inflation (which has resulted in £400,000 in 2003 becoming almost £600,000 in 2016), Phase 2 procedure has become notably more transparent since 2003, which seems very likely to have increased the average cost of a reference given the

[1] http://www.bankofengland.co.uk/education/Pages/resources/inflationtools/calculator/default.aspx

additional documentation, consultation and publication which is involved. Moreover, the estimate of £400,000 may well have been too low even in 2003 (we note that the regulatory impact assessment which accompanied the Enterprise Act 2002 estimated that the new legislation would *increase* the cost of a merger reference to the Competition Commission by £370,000). We consider that the new thresholds should be set by reference to an updated estimate of the cost to the public purse of a Phase 2 reference, which we suspect has increased by more than inflation since 2003; and

(b) we consider that the CMA should take advantage of the potential for the de minimis exception to be used as a form of prioritisation for merger control.[2] It offers the CMA the ability to allocate its resources away from smaller, less damaging mergers. We note that the decision to use the de minimis exception is always a matter of discretion and is not a bright-line rule. Raising the upper threshold higher than the inflation-based proposal of £15 million would increase the number of mergers where the de minimis exception is in play, but would not affect the ability of the CMA to undertake the usual case-by-case analysis of whether its use is warranted on the facts. We note, in this context, that the current indications are that Brexit will result in the EUMR ceasing to have precedence over UK merger control, which will in turn result in increased notifications of larger and potentially more complex mergers to the CMA. Greater scope for discretion in relation to less significant mergers may be an important way for the CMA to ensure the most appropriate deployment of limited public resources.

2. **Do you agree with the potential benefit of these proposals?**

2.1 The consultation document identifies the following benefits:

(a) a reduction in merger control Phase 1 and Phase 2 investigation costs, allowing resources to be redeployed on markets, Competition Act and consumer matters;

(b) a reduction in costs for business due to:

(i) wider scope to self-assess and take a robust decision not to notify a qualifying merger on the basis that the de minimis exception is likely to be used; and

(ii) wider scope to avoid a phase 2 investigation.

2.2 We broadly agree with these points.

2.3 In relation to paragraph 2.1(b)(i) above, we would observe that it is likely that, in at least some cases where the de minimis exception would appear to be in play, the parties would take advantage of the possibility of seeking comfort from the Mergers Intelligence Committee ("**MIC**"). Parties are likely to welcome confirmation of their advisers' self-assessment that the CMA is unlikely to "call in" the merger for investigation because even if a realistic prospect of a substantial lessening of competition were identified, the merger would be cleared using the de minimis exception. The benefit to the CMA and the parties in such a situation would therefore be not that the de minimis exception eliminates the need for the parties to liaise with the CMA at all, but that the matter can be dealt with by the MIC, without a full Phase 1 investigation.

3. **Do you have any other comments about the proposed changes?**

3.1 We have noted above that if the de minimis thresholds are left unchanged for a number of years, they steadily reduce in real terms. We therefore consider that there would be

[2] There may be an oblique reference to this point in paragraph 1.23 of the consultation document.

merit in committing to a regular review. We note the comment in paragraph 1.23 of the consultation that the CMA "would remain committed to reviewing the application of the 'de minimis' exception regularly", but we consider that a formal commitment to a regular review at fixed intervals (say, once every three years) would be appropriate. Alternatively, we consider that the thresholds should be index-linked so that they increase automatically and can simply be updated and republished annually by the CMA.

Ashurst LLP
14 February 2017