

Response to the Competition and Markets Authority's Consultation

Mergers: Exception to the duty to refer in markets of insufficient importance

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Simmons & Simmons

Simmons & Simmons LLP CityPoint One Ropemaker Street London EC2Y 9SS United Kingdom
T +44 20 7628 2020 F +44 20 7628 2070 DX Box No 12

The Simmons & Simmons LLP EU, Competition & Regulatory Group welcomes the opportunity to comment on the Competition and Markets Authority (**CMA**)'s proposals to amend its 2010 Guidance to raise the thresholds on what is known as the 'de minimis' exception. Our responses are contained within the answers to the three questions specified by the CMA, set out below.

As this response does not contain any information that is confidential to Simmons & Simmons LLP or our clients, we confirm that we are happy for it to be published on the CMA's website.

Q1. Do you agree with the proposed changes to the thresholds?

We welcome the CMA's effort to reduce regulatory burden upon small businesses. However, we consider that the CMA's proposed changes to the thresholds will not result in the suggested potential benefits, for the following reasons:

- (A) **No significant reduction in cost for merging parties:** We agree with the CMA's assessment that there may be a cost saving for the CMA in not making the referral¹. However, we consider that any adjustment by the CMA to its *de minimis* exception should provide the CMA with the means to account for the costs of submitting a merger notification for businesses in these very small markets, which we believe these proposals do not provide for.

The CMA will consider the *de minimis* exception and whether it applies, for the most part, at the end of Phase I when it is considering whether to refer the transaction for a Phase 2 investigation. It therefore comes at the end of a 40 day period of scrutiny, when much of the cost has been incurred already by the parties. Therefore, these proposals could result in some cost reduction to notifying parties (in not undergoing the Phase 2 process) - particularly if the CMA chooses not to wait until the end of Phase I to apply it. However, this cost saving is unlikely to be significant. It is also worth emphasising that the merger filing fee will also need to be paid by the merging parties, even if the CMA decides not to refer the transaction to Phase 2 on *de minimis* grounds.

- (B) **Unlikely to have an effect on the need for Phase I review:** The CMA may also take into account the *de minimis* exception when deciding whether to send a letter of enquiry and thus remove the need for a Phase I review. We accept that raising the £3 million threshold may provide businesses and their advisers with a wider scope to self-assess whether to notify a merger, as a business could take the view that the exception applies to it and the CMA is therefore unlikely to investigate if it is own-initiative.

However, these circumstances are rare and do not eliminate the possibility that the CMA may still investigate the merger. Indeed, the OFT Guidance of 2010 notes that..."[the OFT] *would generally need to be very clear that the annual value of any market(s) potentially concerned would be below £3 million and that there would not be any clear cut undertakings in lieu of reference available if the duty to refer were to be met*"². Although the proposal suggests increasing this amount to £5 million, we believe this does not make it easier in practice for the CMA to make use of this exception in deciding whether to make an enquiry.

For instance, market definition is always a matter of assessment and one that is developed by the parties' merger notification and the CMA's market testing during the Phase I process – even in cases where the market itself has been previously

¹CMA Consultation document, Paragraph 1.21. The OFT's 2010 Guidance on the *de minimis* exception (OFT1122) emphasised that cost savings to the OFT in not making a reference, rather than cost savings for the parties, were the primary benefits of the exception (see paragraph 2.10).

² OFT's 2010 Guidance on the *de minimis* exception (OFT1122), paragraph 2.47

and frequently examined by the CMA or OFT. The CMA may therefore not be in a position even to define the market and therefore the operators within it, whose turnover is used to set the monetary size of the market. Moreover, it is not clear how the CMA will ever be able to understand whether there may be clear-cut undertakings in lieu of reference or not, until it has an understanding of the market and its competitive dynamics - information which is typically found in the submitted merger notification.

- (C) **Unlikely to widen the scope for the exception to apply:** It is possible that the proposals may mean that more mergers can be considered under the *de minimis* exception. However, in practical terms, the application of the exception is unlikely to change. For instance, in considering a market worth £4 million, the CMA is currently likely to carry out a cost-benefit analysis³, which involves considering whether clear-cut undertakings in lieu could be offered, as well as looking at the market size, likelihood of harm etc.

If these new proposals are brought into the CMA's practice, then this example would be one of the markets to fall below the 'lower bound' threshold, which means the CMA will consider a reference not to be justified unless there are no clear cut remedies to address the consumer harm it considers will arise from the merger (as well as other factors). In essence, the CMA will look at the same aspects for markets worth less than £5 million and those worth between £5 million and £15 million. Raising the thresholds does not change the need for this level of scrutiny by the CMA and therefore what the parties to the merger might need to prove.

The likelihood of increased mergers workload following Brexit, and the need to expand and adopt the CMA's merger function ahead of that time, suggests that now is a good time to take a courageous position to limit the use of scarce CMA resources, and scarce business resources, on mergers relating to markets of insufficient importance.

Q2. Do you agree with the potential benefits of these proposals?

Please refer to our answer to Question 1.

Q3. Do you have any other comments about the proposed changes?

Please refer to our answer to Question 1.

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³ The factors are set out at paragraph 2.16 of the OFT's Guidance