# Response to Competition and Markets Authority

## *Consultation document: Mergers: Exception to the duty to refer in markets of insufficient importance*

**13 February 2017**

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This response represents the views of law firm Allen & Overy LLP on the Competition and Markets Authority (**CMA**) consultation document *Mergers: Exception to the duty to refer in markets of insufficient importance* dated 23 January 2017 (the **Consultation Document**).

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

1.1 We are broadly supportive of the CMA's proposal to increase the 'upper bound' threshold, i.e., the threshold over which the CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference, from £10 million to £15 million, as well as the 'lower bound' threshold, i.e., the threshold below which the CMA will generally not consider a reference justified, from £3 million to £5 million.

1.2 We can see an argument that the current thresholds are too low and we can equally see a benefit to parties contemplating merger activity in raising them. The 'upper bound' £10 million threshold potentially results in mergers having to be referred into phase 2 in circumstances where the potential customer harm may be too small to justify the public cost of a reference. Raising this threshold would allow more mergers to benefit from a CMA cost/benefit analysis and potentially avoid a reference, while still enabling the CMA to make a phase 2 referral in cases that pose a more serious risk of consumer harm.

1.3 In our view the recent decisional practice of the CMA indicates that the 'lower bound' £3 million threshold is too low: it fails to capture enough cases where the annual value of the market(s) is nevertheless very small and therefore where a referral into phase 2 would clearly be disproportionate. At present, these cases do not benefit from the comfort that the CMA will generally not consider a reference justified; the parties and the CMA are required to undertake additional analysis to confirm that the potential customer harm arising from the merger does not justify the costs of a reference. This was most recently exemplified in the Survitec / Wilhelmsen Maritime Services case, where the estimates of market size ranged from just under to just over £3 million. We also note that there were a number of other mergers in 2016 where the CMA exercised its discretion not to refer to phase 2 following a cost/benefit analysis which concerned markets valued only a little above the £3 million threshold (including DX Network Services / Legal Post and First Post and Kaplan / Osborne Books).

1.4 For both thresholds, the level of the proposed increase set out in the Consultation Document seems to us to be a sensible adjustment. As regards the cost/benefit analysis to be applied to cases falling between the upper and lower thresholds, we do not have visibility of the calculation methodology underpinning the CMA's estimate of £400,000 as the average public costs of a phase 2 reference. We assume (but it would be helpful if the CMA could spell this out) that these costs include not just an allocation of the fixed costs of running the CMA's day to day operations but also the incremental costs of paying panel members for the time involved in handling phase 2 merger inquiries. If that is the case, it is somewhat surprising to us that the £400,000 figure has not changed since it was first mentioned in the OFT's 2003 Substantive Assessment Guidance.

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

2.1 We can see that increasing the thresholds will enable the CMA to free up some resources that are currently employed in its merger control function, which could then be allocated to its discretionary functions. We agree that this would be beneficial.

2.2 We also agree that the proposals would reduce the merger control burden on businesses. Increasing the 'lower bound' threshold will give more companies considering mergers in small markets greater confidence in their assessment that the 'de minimis' exception would apply and therefore should enable them to make a more informed decision not to file with the CMA. Increasing the 'upper bound' threshold will potentially enable some companies to avoid the financial and other costs of a phase 2 merger review, allowing companies to undertake transactions that they might have otherwise ruled out.

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

3.1 We consider that the Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance issued in December 2010 (OFT1122; the **2010 Guidance**), together with the CMA's published decisions detailing the factors considered in its application of the cost/benefit analysis in particular cases, provide companies with a good steer as to how the CMA tackles its cost/benefit analysis and thus the likelihood of the CMA exercising its discretion not to refer any particular merger on 'de minimis' grounds. We therefore do not think that further substantive changes to the 2010 Guidance are required at present. However, we think it would be helpful if the CMA could footnote more recent merger cases to provide examples to the points made in the guidance.

3.2 Whilst we broadly support the CMA's decision to review the thresholds at this time, just over six years after they were set out in the 2010 Guidance and over two years after they were adopted by the CMA board in April 2014, we welcome the CMA's intention to remain committed to reviewing the application of the 'de minimis exception' regularly. We suspect that as a new post-Brexit UK merger control regime starts to crystallise there would be value in considering the need for a further uplift or change to the thresholds.