



## **CMA consultation**

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

#### **Consultation document of 23 January 2017**

#### **1. Introduction**

1.1. Herbert Smith Freehills LLP welcomes the opportunity to provide comments on the CMA's consultation document of 23 January 2017 on Mergers: Exception to the duty to refer in markets of insufficient importance ("**Consultation Document**"). The comments set out below are those of Herbert Smith Freehills LLP and do not represent the views of any of our individual clients.

#### **2. General comments**

2.1. We note that the consultation is limited to the indicative market size thresholds set out in the section on markets of insufficient importance (de minimis) of the CMA's Guidance on exceptions to the duty to refer and undertakings in lieu of reference ("Guidance"), and our comments therefore focus on the proposed amendments to the existing thresholds.

2.2. The CMA has decided to maintain the current cost/benefit approach when applying the de minimis exception and, in the interest of continuity and consistency with the statutory intent, not to make any other substantive changes to the de minimis section of the Guidance. In the Consultation Document the CMA highlights that, since the introduction of the 2010 Guidance, it has gained extensive experience of applying the exception and we believe that it would be helpful to see this extensive experience reflected in an updated version of this section of the Guidance. It would be particularly useful for the CMA to illustrate and expand on its criteria for a decision not to refer a transaction that falls between the two thresholds.

2.3. Also, as the text of the Guidance was adopted by the CMA Board in its original format and without reflecting the changes made by the Enterprise and Regulatory Reform Act 2013 (ERRA 2013) to the institutional framework, merger control legislation and process, we recommend that, when updating the thresholds in the Guidance, the CMA also updates the text and format of the Guidance more widely in order to reflect any such changes to ensure that the correct terminology and contact details are used.

#### **3. Question1. Do you agree with the proposed changes to the thresholds?**

3.1. The CMA is proposing to increase the threshold above which it considers that the market(s) concerned will be of sufficient importance to justify a phase 2 reference from



£10 million to £15 million and the threshold below which it will generally not consider a reference justified from £3 million to £5 million.

3.2. We are very much in support of raising these market size thresholds but our main concern is that the current proposals do not go far enough and that there is scope for the thresholds to go up considerably higher. In our view, the lower threshold could be increased to £10 million or even £15 million (which would bring it in line with the €15 million threshold applied in Germany) and the higher threshold could be removed altogether. At the proposed revised thresholds levels the CMA retains jurisdiction over very small transactions in comparison to the thresholds for intervention in other comparative jurisdictions.

3.3. We believe a greater increase in the size of the market size threshold should be considered, in particular in light of the developments expected as a result of Brexit. In a recent speech the acting Chief Executive of the CMA indicated that, as a result of losing the one-stop-shop between the Commission and the UK for reviewing mergers and the resulting potential for parallel investigations by both authorities, there may be an increase in the CMA's merger workload of at least 40 to 50%. Limited resources at the CMA would be better spent on other areas rather than on comparatively small transactions. A more realistic approach to the de minimis exception should assist with this.

#### **4. Question2. Do you agree with the potential benefits of these proposals?**

4.1. We agree with the CMA's analysis of the benefits of higher thresholds for the de minimis exception:

4.1.1. A reduction in the costs faced by the CMA in investigating phase 2 and phase 1 mergers as well as an opportunity to use this resource for its other discretionary functions such as market investigations, competition investigations and consumer enforcement actions;

4.1.2. A reduction in the burden of merger control on businesses, as a result of avoiding a phase 2 review but also as a result of the greater level of comfort that the exception will apply and that merger notification can therefore be avoided altogether with reduced risk that the CMA will investigate on its own initiative.

4.2. However, in order for these benefits to be worthwhile, the thresholds will need to be set at a sufficiently high level. Under the levels currently proposed by the CMA businesses will continue to face the disproportionate burden of a reference for small transactions. Realistic and strong guidance from the outset will also allow businesses to rely on the



exception to take a more informed view as to whether the regime will apply and therefore whether or not there is a need for filing.

**5. Question3. Do you have any other comments about the proposed changes?**

5.1. A key threshold, which is currently not addressed in the Consultation Document, is the expected cost of a phase 2 reference, against which the expected consumer harm resulting from the merger is balanced. The OFT's 2003 Guidance estimated the cost of a phase 2 investigation at £400,000, a figure that has since not been updated in the 2007 or 2010 guidance.

5.2. It is unlikely that the cost of a phase 2 investigation has not increased over the last 14 years, and we recommend that the CMA consider this so that it can be taken into account when revising the market size thresholds. Failing to adjust the cost of a reference adequately will result in a lowering of the thresholds in real terms, even if the market share thresholds are raised, and will reduce the benefits of the proposed changes.

**Herbert Smith Freehills LLP**

**13 February 2017**