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CMA consultation on the exception to the duty to refer mergers in markets of insufficient importance

This short paper responds to the questions posed in the CMA's consultation document on proposed changes to its 'de minimis' policy.

The response is informed by my role as specialist adviser to organisations with a wide variety of interests in UK merger control, including 'de minimis' considerations. Previously, as Head of Merger Economics at the OFT, I was closely involved in many merger cases involving 'de minimis' and advised on the development of the policy framework.

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

Since the 'de minimis' exception was first introduced in 2007 its use has been considerably developed, taking into account

- the changes introduced in 2010
- significant changes in the way in which the policy has been applied
- the evolving approach taken to calling in for investigation non-notified mergers that may meet the exception criteria.

The thresholds for market size are therefore only one component in the overall policy stance on 'de minimis'. This has two important implications:

1. The analysis of the effects of previous changes to the 'de minimis' arrangements needs to take account of these wider factors, using case data and mergers intelligence data.

2. Looking ahead, the effects of the proposed changes will depend significantly, for example, on the approach the CMA takes regarding the calling in of cases, especially those that may fall below the new £5m threshold.

The consultation document is very light on detail regarding the analysis that the CMA has undertaken to inform its proposals, including the risk assessment it mentions. Much further detail on this would be needed to comment on how cautious the CMA is being in the changes it is proposing.

Be that as it may, some merging companies (and those who may consider merging) will clearly benefit from the further relaxation of the 'de minimis' arrangements that is proposed. The proposals will enable them to be more confident about one or more of the following: pre-merger planning, notification strategy and the prospects for avoiding a lengthy Phase 1 and/or Phase 2 investigation.

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

The proposals hold the potential to produce cost savings for the CMA and reduce the burdens for some businesses as described above.

Regarding the potential scale of the savings for merging businesses, the burden of the merger control regime varies widely, even among businesses of similar nature and size.

For companies most likely to be candidates for the 'de minimis' exception the potential cost savings from the proposed changes depend significantly on the extent to which they self-assess (which many companies do) and how efficiently and effectively they deploy external professional advice.

In addition to the benefits identified in the consultation paper, the changes will also offer new opportunities for companies that would otherwise have been discouraged from proceeding with mergers involving 'small' markets or would have proceeded in a different form.

It is not clear to what extent these additional benefits have been included in the CMA's unpublished analyses.

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

My comments relate to:

- Transparency in published decisions
- The information available from the extensive 'de minimis' case practice built up since 2007

Published decisions:

In order to achieve the full benefits that the CMA sees in the proposed changes there is a case for maximum transparency in the published decisions involving the exercise and non-exercise of the 'de minimis' exception. In a number of cases the CMA's published reasoning regarding the exception has been very difficult to interpret.

Where this occurs it makes it very difficult for companies and advisers to understand how the policy is being applied and therefore reduces their ability adequately to self-assess. This increases the burdens on business.

Evaluation of previous 'de minimis' cases

A key question for the effective development of 'de minimis' policy is how cautious have been the SLC and 'de minimis' judgments made in the extensive set of cases examined since 2007 and in its mergers intelligence work.

Cases that have been found to fulfil the 'de minimis' criteria represent an unusual opportunity to evaluate the effects of mergers that have proceeded despite meeting the Phase 1 SLC test.

While the challenges of such evaluations are not to be underestimated, as the 'de minimis' policy evolves to cover more and larger markets the analysis of this body of casework becomes increasingly important for gauging how to calibrate the policy framework.