CMA's Consultation on the 'exception to the duty to refer in markets of insufficient importance'

(23 January 2017)

Response by Freshfields Bruckhaus Deringer LLP

13 February 2017

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RESPONSE TO THE CMA'S CONSULTATION ON

THE 'EXCEPTION TO THE DUTY TO REFER IN MARKETS OF INSUFFICIENT IMPORTANCE'

of 23 January 2017

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP (***Freshfields***) welcomes the opportunity to comment on the CMA's consultation on the 'Exception to the duty to refer in markets of insufficient importance' of 23 January 2017 (the ***Consultation Document***).

1.2 Our comments below are based on our substantial practical experience of merger control regimes across Europe, the US and Asia over several decades. However, the comments in this response do not purport to represent the views of our clients.

1.3 Terms defined in the Consultation Document have the same meaning in this response.

2. Question 1: Do you agree with the proposed changes to the thresholds?

2.1 Any increase of 'de minimis' thresholds that may result in a reduction of costs and the administrative burden caused by the UK merger control review process is welcome. We, therefore, in principal agree with the proposed increase of the review thresholds as set out in the Consultation Document.

2.2 However, we also believe that the proposed changes are not far-reaching enough (please see the response to Question 3 below for alternative proposals).

3. Question 2: Do you agree with the potential benefits of these proposals?

3.1 While the Consultation Document's description of potential benefits may in some instances be accurate, we believe that it is unlikely that the benefits both in terms of costs reduction and in the reduction of the burden of merger control on businesses will be as substantial as stated in the Consultation Document.

3.2 The CMA's proposal (as outlined in the Consultation Document) will in the majority of cases not significantly alleviate the burdens imposed by the merger control process on small businesses/businesses involved in transactions in small markets (please see the response to Question 3 below).

4. Question 3: Do you have any other comments about the proposed changes?

4.1 We submit that the suggested amendments to the 2010 Guidance (as outlined in the Consultation Document) are not significant enough to make an appreciable difference for businesses operating in the UK.

4.2 In essence, the application of the 'de minimis' exception still relies on the same approach as outlined in the 2007 Guidance. This fails to take into account that the UK merger control process – in particular at Phase 1 – has evolved significantly since 2007.

4.3 Specifically, it is widely recognised that the Phase 1 review process has significantly expanded in scope and intensity (e.g. with regards to the length of pre-notification; the breadth of information to be provided by notifying parties; the depth of the review process including large volumes of internal documents; and the econometric analyses undertaken by the CMA). All of this has led to the UK's merger control system putting a materially greater administrative burden on parties than other systems in comparably advanced economies around the world and within the ECN. This increased administrative burden immediately leads to an increase in costs for the parties to a transaction that is reviewable by the CMA. Our clients frequently draw our attention to the fact that the UK's merger control system is, for these reasons, not business friendly.

4.4 The CMA's proposal does not help in significantly reducing this burden, as it does not deal with the following issues:

- The parties still have to go through the entire Phase 1 review process (with all associated burdens and costs as outlined above) before the application of the 'de minimis' exception will even be considered.

- Even then, the application of the 'de minimis' exception will only be considered if there is no clear-cut remedy available. This requires parties to at least go through parts of the remedy process before the application of the 'de minimis' exception will even be considered.

- All of this combined with maintaining the 'cost/benefit analysis' (and hence the CMA's discretion on whether to apply the 'de minimis' exception even for cases where the market size is smaller than the lower threshold, i.e. £3/5m, and certainly for those in the broad range between £3/5m and £10/15m respectively) lead to a continued uncertainty for businesses facing transactions that would normally fall under UK jurisdiction, but where the markets involved are very small on any view. The fact that no changes are proposed to amend the discretionary character of the 'de minimis' exception leads to a continuous lack of legal certainty for parties.

4.5 Rather, we believe that there would be significant scope for reducing uncertainty and costs and other administrative burdens for market participants by overhauling the 2010 Guidance and developing a more clear-cut 'de minimis' exception, thus making the UK system more business friendly.

4.6 The CMA should in particular consider the following options for broadening the scope and appeal of its 'de minimis' exception and thus for reducing the burden on undertakings operating in small markets in the UK:

- Removing the discretionary character of the 'de minimis' exception entirely by dropping the 'cost/benefits analysis' and instead applying the 'de minimis' exception without discretion to all cases that fall within the thresholds;

- Abolishing at least the discretionary character of the lower threshold and instead exempting transactions on all markets smaller than the lower threshold from a reference; thus increasing legal certainty;

- Disregarding the question whether a clear-cut remedy is available or not – if the markets are of sufficiently little relevance, then the parties to a transaction should not be required to offer a remedy even in clear-cut cases; and

- Considering the application of the 'de minimis' exception at the beginning (or even before) its Phase 1 review and not at its end, and thus making it possible to at least substantially reduce the costs/depth of a Phase 1 review for cases falling under the exception (if not eliminating the need to go through a Phase 1 review entirely).

4.7 We would be happy to discuss any of these issues further with the CMA at any time.

Freshfields Bruckhaus Deringer LLP

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