CMA CONSULTATION ON ITS EXCEPTION TO THE DUTY TO REFER IN MARKETS OF INSUFFICIENT IMPORTANCE

RESPONSE FROM DEBEVOISE & PLIMPTON LLP

Debevoise & Plimpton LLP is grateful for the opportunity to provide comments to the Competition and Markets Authority ("CMA") in relation to the CMA's consultation on the application of the exception to its duty to refer mergers in markets of insufficient importance (the "de minimis exception").

We have set out below our response to the three questions raised by the CMA in Chapter 2 of its consultation. These comments are those of Debevoise & Plimpton LLP alone and do not represent the views of our individual clients.

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

Yes, we agree with increasing the market size thresholds.

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

We are concerned that two main benefits of the proposed increase in thresholds – i.e. reduced costs and the wider scope for businesses to self-assess – will not be fully realised. The underlying reason for that is because the de minimis exception is not a quantitative or jurisdictional test and does not create a safe harbour that merging parties can rely on. Further, the CMA has a very wide discretion in practice when deciding whether or not to apply the exception. Together, these factors limit the amount of comfort that businesses have when evaluating whether the CMA will actually apply the exception, and there can be no certainty that the CMA will exercise its discretion.

We suggest, therefore, that the CMA consider adopting a presumption that the cost of a reference is disproportionate when the value of the market(s) concerned is below the 'lower bound' threshold of £5 million. Consequently, we would propose that the de minimis exception should be applied routinely by the CMA in its review of transactions involving such markets and not only after a full substantive evaluation. We consider, for example, that there would be a real efficiency benefit for all concerned when conducting a Phase 1 review of transactions involving multiple areas of overlap if those aspects concerning de minimis markets could be dealt with in an expedited fashion at the outset.

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

We have two further observations about how the CMA applies the de minimis exception. These do not relate to the proposed changes being consulted on, but instead are more general comments about how the exception is applied in practice.

First, we note that the CMA will only decide not to refer a transaction where the market(s) concerned are, in aggregate, below the upper threshold – currently £10 million – if there is also not "in principle" a clear-cut undertaking in lieu ("UIL") of reference. The corollary is that no market is too small for the CMA to seek remedies provided the problem can be fixed – typically by the divestment to a third party of the part of the transaction that raises concerns. The CMA's guidance provides that UILs are considered to be available unless a remedy via a structural divestment would be tantamount to prohibiting the merger altogether, or where the minimum structural divestment would be wholly disproportionate in relation to the concerns identified. We consider that the CMA should also take into account the cost and delay to the merging parties of going through a divestment process and whether that itself has any material negative implications for the commercial logic of the wider transaction, even if these other criteria are met. Otherwise an immaterial part of a larger deal can end up determining the timing and potentially also the realisable value of the main acquisition – assuming certain cost savings or benefits are time sensitive.

Second, for transactions between the upper and lower thresholds – currently between £3 million and £10 million – the cost/ benefit analysis employed by the CMA when deciding whether to make a Phase 2 reference takes into account only the average public cost of a referral. The CMA's estimate as to the expected cost of a Phase 2 reference has been set at £400,000 since 2003. We consider it an omission that the CMA does not also take into account the costs to the parties of going through an in-depth investigation. On the one hand there is the financial expense and substantial commitment of time that a Phase 2 reference requires. On the other, there is the question of the cost of a reference relative to the size of the transaction and the overall value of the deal. That would appear to be reflected in the fact that over 20% of transactions referred to Phase 2 in the UK are abandoned. The implication is that some competitively benign or pro-competitive mergers are not happening because of the regulatory cost to the parties of a reference.

Debevoise & Plimpton LLP
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