RESPONSE TO THE CMA CONSULTATION:

MERGERS: EXCEPTION TO THE DUTY TO REFER IN MARKETS OF INSUFFICIENT IMPORTANCE

1. INTRODUCTION

1.1 Pinsent Masons LLP welcomes the opportunity to comment on the Competition and Markets Authority's (CMA) consultation on amendments to its guidance "Mergers: Exception to the duty to refer and undertakings in lieu of reference, OFT1122" of December 2010 and adopted by the CMA board in April 2014 (the 2010 Guidance), in particular Chapter 2 which sets out the markets of insufficient importance exception.

1.2 As a law firm, Pinsent Masons LLP has substantial experience of advising on the application of the UK merger control rules and guidance, including the 2010 Guidance.

1.3 The comments made in this response paper are those of Pinsent Masons LLP and do not necessarily represent the views of any of our individual clients or of individual partners of Pinsent Masons LLP.

1.4 This response does not contain any confidential or sensitive information and we are content for it to be published on the CMA's website.

2. QUESTIONS FOR CONSIDERATION

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

2.1 Pinsent Masons LLP welcomes and agrees with the CMA's proposed amendments to the indicative market size thresholds set out in Chapter 2 of the 2010 Guidance which concerns the markets of insufficient importance exception (the *de minimis* exception) as follows:

(a) increase the market size 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;

(b) increase the market size threshold below which the CMA will generally not consider a reference justified from £3 million to £5 million.

2.2 We understand and agree with the CMA's intention not to make any other substantive changes to the 2010 Guidance and to retain the cost/benefit approach supporting the choice of the thresholds and the application of the *de minimis* exception more generally.

2.3 We also welcome the fact that the CMA will continue to exercise its discretion in a manner consistent with statutory intent by using its judgment and expertise to make case-by-case assessment, centred on maximising customer benefit across any market, including innovative/nascent markets.

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

2.4 Pinsent Masons LLP agrees with the CMA that the proposed changes are appropriate and will lead to a number of benefits as detailed at paragraphs 1.21 and 1.22 of the

consultation document, including an increase in the number of cases falling within the scope of the *de minimis* exception and therefore a reduction of the number of smaller Phase 1 and 2 merger investigations carried out by the CMA; a reduction of the costs faced by the CMA in investigating mergers and a reduction of the burden of merger control on businesses as more cases will fall under the scope of the exception.

2.5 We are also of the view that the proposed changes could become an important coping mechanism for the CMA in the context of the exit of the UK from the European Union, as we understand that the CMA anticipates an increase of at least 40 to 50% on its merger workload since its creation due to the new potential for parallel merger investigations and the increase of international mergers that will affect the UK which under the current one-stop-shop arrangements would be assessed by the European Commission.

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

2.6 Pinsent Masons LLP would encourage the CMA to consider further broadening the scope of the *de minimis* exception by taking into account the sales in the UK of the enterprise being taken over either together with or instead of the current value of the market(s) concerned test.

2.7 This would allow the capture of transactions where the parties to the transaction have significant market shares on a very narrowly defined market, triggering the jurisdictional thresholds, yet the UK sales of the enterprise being taken over are particularly low.

2.8 This would further reduce the burden of merger control on businesses due to the wider scope to self-assess and avoid a merger notification altogether as a greater number of businesses could take comfort that the *de minimis* exception could apply to them and their transactions would unlikely be investigated by the CMA on its own initiative.

3. ADDITIONAL COMMENTS

3.1 Pinsent Masons LLP wishes to encourage the CMA to maximise its use of *de minimis* exception in filtering out cases before sending an enquiry letter whilst the 2010 Guidance currently state that the CMA will have regard to the potential applicability of its *de minimis* discretion in deciding whether or not to send an enquiry letter to trigger an own-initiative investigation.

3.2 We understand and agree with the CMA's intention not to make any other substantive changes to the 2010 Guidance and to retain the cost/benefit approach supporting the choice of the thresholds and the application of the *de minimis* exception more generally. However, we consider that it would be useful if the CMA could complete paragraphs 2.40 to 2.42 of the 2010 Guidance with examples of where "replicability" might be a concern that would impact on the application of the *de minimis* exception. In particular, where a market is worth less than £5 million, but the CMA exercises its discretion not to apply the *de minimis* exception because it is concerned about greater harm to consumers through the merger being replicable.

We hope that the CMA finds this contribution helpful. Please feel free to contact us if you would like to discuss any aspect of our response.

Pinsent Masons LLP

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