EVERSHEDS SUTHERLAND

EVERSHEDS SUTHERLAND (INTERNATIONAL) LLP

RESPONSE BY EVERSHEDS SUTHERLAND (INTERNATIONAL) LLP TO THE CONSULTATION ON DRAFT GUIDANCE ON THE COMPETITION AND MARKETS AUTHORITY'S APPROACH TO CHANGES TO THE JURISDICTIONAL THRESHOLDS FOR UK MERGER CONTROL

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Eversheds Sutherland (International) LLP

One Wood Street
London
EC2V 7WS
United Kingdom

T: +44 20 7497 9797
F: +44 20 7919 4919
DX 154280 Cheapside 8
eversheds-sutherland.com

Introduction

1.1 Eversheds Sutherland (International) LLP (**"Eversheds Sutherland"**) welcomes the opportunity to respond to the "Guidance on changes to the jurisdictional thresholds for UK merger control - Consultation document" (**"Consultation Document"**) published by the Competition and Markets Authority (**"CMA"**) on 15 March 2018.

1.2 Eversheds Sutherland regularly advises on merger control matters before the CMA (and other competition authorities internationally) and has experience of advising clients on deals in the defence sector raising possible public interest concerns. We advise clients on a range of trade issues and particularly in relation to export controls and sanctions across a range of sectors including aerospace and defence, diversified industrials, technology, media and telecommunications.

1.3 We set out below our responses to questions raised in Chapter 2 of the Consultation Document. The comments and observations set out in this response are ours alone and should not be attributed to any of our clients.

Responses

2. **Is the content, format and presentation of the draft guidance sufficiently clear? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.**

2.1 The application of the revised jurisdictional thresholds for relevant enterprises will affect a number of small and medium UK companies which may not be familiar with the competition regime owing to their small size; they may have no experience of conducting a self-assessment or any understanding of the voluntary notification regime.

2.2 Confusion or uncertainty may lead businesses to submit notifications on a safety-first basis, even in transactions which do not raise national security or competition concerns. This is presumably not the intention as it would divert CMA resources from cases that genuinely raise competition issues. It would be particularly unfortunate given the already significant impact that Brexit is expected to have on the CMA's resources (for example, the CMA has said that it expects that it will have to review an additional 30 to 50 merger cases per year as a result of Brexit, some of which are likely to be resource intensive given the size of those transactions and their international nature).

2.3 Therefore it is important for businesses to be provided with simple and clear guidance on the self-assessment and notification processes. In itself the draft guidance fails in this respect. Businesses are referred to four other CMA guidance notes and concepts and processes are described in a way that assumes knowledge of the competition regime which many readers will lack. We consider that a better solution would be to reissue the guidance on the CMA's jurisdiction and procedure[1] in which the current section on public interest mergers is replaced by a comprehensive description of the new rules.

2.4 The draft guidance states at paragraph 2.6 and 3.8 that any queries over whether a merger may give rise to national security concerns or whether the enterprise being taken over is one to which the new thresholds apply should be directed to the Department for Business, Energy and Industrial Strategy ("**BEIS**"). Paragraphs 3.9 and 3.11 set out that businesses also need to engage in a separate dialogue with the CMA in order to submit either a briefing note (explaining to the CMA why they do not propose to submit or have not submitted a merger notice to the CMA) or file a full merger notification.

2.5 We understand that BEIS and the CMA have different remits. However, we consider that having two separate sets of guidance, two different points of contact and two different avenues of dialogue may be confusing for businesses, and will serve to increase the burden on businesses in this area. Instead, businesses would benefit from the ability to engage in

[1] CMA2 Mergers: Guidance on the CMA's jurisdiction and procedure, January 2014

a joint dialogue with the CMA and BEIS, for example by submitting a single briefing note to both bodies, in order to resolve merger control and national security queries in parallel.

2.6 As an alternative to our suggestion above of reissuing guidance on the CMA's jurisdiction and procedure, the CMA and BEIS could issue joint guidance on the new rules and the self-assessment process and more comprehensive information on when a voluntary notification would be required.

3. **Is the draft guidance sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional or revised content that you would find helpful?**

3.1 For the reasons set out above, we consider that the draft guidance is not sufficiently comprehensive.

3.2 There appears to be an inherent tension in reducing the turnover threshold to £1 million, clearly signalling the Government's intention to review transactions of low value, and the existing de minimis rules, which are designed to relieve small businesses from the burdens of merger control rules. We consider that it would be helpful to provide businesses with a more explicit explanation of how the two sets of rules will operate alongside each other and be applied together. The absence of such an explanation is a significant omission.

3.3 We consider that businesses would benefit from the CMA revising and re-issuing its de minimis guidance to take account of these changes or including an expanded section on de minimis rules in this guidance. In the absence of such guidance the CMA may find itself receiving notifications of very small deals.

3.4 Similarly, the draft guidance, at paragraph 3.9, refers to the option of submitting a briefing paper. The draft guidance encourages businesses to submit briefing notes, rather than full notifications, but it does not explain how the briefing note procedure will operate alongside existing Mergers Intelligence Committee processes. It would be helpful to understand if the CMA will employ a different approach to briefing papers under the new regime.

3.5 We agree that it would be more efficient, and less resource intensive, for the CMA to deal with most transactions reviewable under the reduced thresholds through the briefing note process. The CMA should consider promoting this process within the guidance, to avoid unnecessary filings.

4. **Do you have any other comments on the draft guidance?**

4.1 We are concerned more generally that there is a low level of awareness of the proposed changes; CMA and BEIS guidance is only helpful if a business understands that it is affected by these changes. The CMA, along with BEIS, should ensure that the changes to the rules are widely publicised, in a clear and coherent manner, to raise awareness among businesses in the affected sectors.

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