

RESPONSE TO COMPETITION AND MARKETS AUTHORITY CONSULTATION

New draft guidance on mergers: exceptions to the duty to refer

1. Introduction and general comments

- 1.1 This response represents the views of the law firm Allen & Overy LLP on the Competition and Markets Authority (CMA)'s consultation on its draft revised guidance on the exceptions to the duty to refer mergers, dated 20 November 2023 (Draft Revised Guidance).
- 1.2 We welcome the opportunity to respond to this consultation. We would be happy to discuss any of the points made in this response if the CMA would find it helpful to do so.
- 1.3 We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.
- 1.4 Overall, we welcome the CMA's decision to update Chapter 2 (Markets of insufficient importance) of its current 2018 guidance on the exceptions to the duty to refer (Current Guidance), to ensure that the CMA continues to focus its resources on mergers that will have the biggest impact on UK consumers and businesses. The Draft Revised Guidance will provide businesses with greater clarity on whether their merger may fall within the "de minimis" exception, and when and how they should engage with the CMA on its application.
- 1.5 We have set out specific comments below. These are structured by commenting on each of the key changes in content, format and presentation in turn, taking into account the consultation questions set out at section 3 of the consultation document that the CMA published alongside the Draft Revised Guidance.

2. Thresholds for applying the "de minimis" exception

- 2.1 We welcome the CMA's decision to simplify the "de minimis" assessment and in particular the CMA's decision to replace the current two-tier threshold for applying the "de minimis" exception with a single threshold.
- 2.2 In our opinion, given there is no absolute certainty that the CMA will not refer into phase 2 mergers falling under the lower GBP5 million threshold, that lower threshold is unnecessary, potentially misleading and should be removed.
- 2.3 The proposal for the CMA to consider the same set of factors when deciding whether to apply the "de minimis" exception to all mergers falling under a single threshold will simplify and clarify the application of the exception.
- 2.4 However, we consider that it is important for the CMA to clearly acknowledge (as it does at paragraph 2.16 of the Draft Revised Guidance) that the smaller the size of the market(s) concerned, the more likely it is that the CMA will apply the exception.
- 2.5 We welcome the CMA's decision to increase the market size threshold for the "de minimis" exemption to apply from GBP15m to GBP30m to take account of inflation since 2017 and the increased public cost of a phase 2 investigation.

3. Removing the requirement for no clear-cut undertakings in lieu of a reference to be available

- 3.1 We support the CMA's efforts to expedite the merger control process by making it easier for the CMA to rely on the "de minimis" exception as early as possible.

3.2 We agree that removing the requirement that there are no clear-cut undertakings in lieu of a reference will take out a layer of analysis that does not on balance materially contribute to an assessment of the importance of a market.

4. Replacing the cost/benefit analysis

4.1 We agree with the CMA's decision to replace the cost/benefit analysis in the Current Guidance. In particular we agree with the CMA's view (as set out in its consultation document) that there is some tension in the Current Guidance between the CMA's assessment of whether the merger gives rise to a realistic prospect of an SLC (such that the duty to refer is engaged) and the cost/benefit analysis used to determine whether the merger should nevertheless be 'de minimised', in particular because the evidence supporting an SLC finding will generally point against the application of the 'de minimis' exception. We consider that this tension has historically made it difficult for parties to apply the Current Guidance in practice.

4.2 We agree that the starting point for the CMA when deciding whether to apply the "de minimis" exception should continue to be the size of the market(s) concerned. It is therefore right that this factor is detailed first in the Draft Revised Guidance.

4.3 We welcome the statement at footnote 8 of the Draft Revised Guidance, ie that where the aggregate value of the market(s) concerned only marginally exceeds the GBP30m threshold, the CMA may still consider whether the exception should be applied.

4.4 Paragraph 37 and footnote 14 of the Current Guidance note that the market concerned is the "affected market", which "may be a subset of the relevant market as defined for the purposes of the competition assessment . . . where it is clear that the size of any customer detriment will be experienced by only a proportion of the relevant market". While the reference to the CMA's Merger Assessment Guidelines is now out of date, and cases where this point was applied are quite old, we consider that the point is still a useful one to make. We suggest adding it to the bullets in paragraph 2.17.

4.5 Footnote 9 of the Draft Revised Guidance should cross refer to paragraph 2.11 rather than paragraph 2.10.

4.6 Paragraphs 2.18 to 2.20 of the Draft Revised Guidance set out how the CMA will assess whether markets may expand or contract in the foreseeable future, and/or the relevance of revenues as a measure of market size. In such cases, we consider it will be particularly important for the CMA to engage with the parties on the information or evidence that is relevant for this assessment (as envisaged at paragraph 2.10).

4.7 Paragraph 2.18 gives guidance on the CMA's approach where a market is nascent and/or likely to grow significantly. We consider that it would be helpful for the CMA to also detail and reference its approach to declining markets.

4.8 Given the importance placed in the CMA's "de minimis" assessment on the CMA's overall priorities and objectives and the fact that these will evolve with time, we consider that the Draft Revised Guidance should include a hyperlink to a collection page with the CMA's latest Annual Plan.

4.9 We are pleased that the CMA has taken the opportunity to update and add to the example merger cases referenced throughout the Draft Revised Guidance.

5. Application of the "de minimis" exception at different stages of the CMA's review

5.1 We support the CMA's reordering of content so that the Draft Revised Guidance sets out how the CMA will consider the "de minimis" exception at the different stages of its review before going into detail on the application of the exception and factors to be considered.

5.2 The Draft Revised Guidance usefully confirms that merging parties should take the opportunity to include a clear explanation of their position on the “de minimis” exception in any briefing note submitted to the CMA’s mergers intelligence function.

Allen & Overy LLP
3 January 2024