

Introduction

This paper is submitted to the Competition Markets Authority ('CMA'), as a response to its public consultation "Mergers: Exception to the duty to refer in markets of insufficient importance".

The CMA is seeking comments on the content of the draft guidance and answers to the following questions:

- Do you agree with the proposed changes to the thresholds?
- Do you agree with the potential benefits of these proposals?
- Do you have any other comments about the proposed changes?

I welcome the opportunity to respond to the consultation. I am responding as an individual, thus this response does not purport to reflect the views of any CLF member.

1. The current situation

1.1. Under the Enterprise Act 2002, the CMA has responsibility for the review of mergers. The CMA has a legal duty to refer a merger to Phase II investigation where there is a realistic prospect of a 'sufficient loss of competition'.

1.2. The 2002 Act also contains discretionary exceptions to the CMA's duty to refer. Under ss 22(2) and 33(2), the CMA may exercise a duty not to refer mergers where it considers that the market is of insufficient importance to warrant investigation. The rationale underlying this policy is to avoid references being made where the costs involved would be disproportionate to the size of the markets concerned. However, the 2002 Act did not specify the criteria the CMA should consider in exercising this discretion. These questions are left to the judgment and expertise of the CMA.¹

1.3. The CMA has a discretion not to refer if the market concerned is of insufficient importance to merit a Phase II investigation, also known as the *de minimis* exception. This applies where:

(i) the annual value in the UK of the market or markets concerned is, in aggregate, less than £3 million, provided there is no clear cut undertaking instead of a Phase II reference available;

(ii) the annual value in the UK in aggregate is between £3 and £10 million and the expected consumer harm resulting from the merger is not materially greater than the average public cost of a Phase II investigation (which is around £400,000) having regard to the size of the market concerned, the likelihood of an SLC, the magnitude of any competition that would be lost, and the duration of any SLC;

¹ Office of Fair Trading, 'Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance' December 2010, para 2.20 (hereafter 'OFT 2010 Guidance').

- (iii) or any relevant consumer benefits outweigh the SLC and its adverse effects.

1.4. Overall, according to the 2010 Guidance on such exceptions, where the annual value of the market concerned is in aggregate more than £10 million, the CMA will generally consider the case to be of sufficient importance to justify a reference. Where the annual value of the market concerned is in aggregated less than £3 million, the CMA will generally consider that a reference is not justified. Where the annual value of the market is between £3 and £10, the CMA will have regard to the factors mentioned in para 1.3(ii).

1.5. The CMA is now considering altering the upper bound 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. Furthermore, the CMA is considering to alter the lower bound threshold (i.e. the threshold which the CMA will generally not consider a reference justified) from £3 million to £5 million.

1.6. Based on an internal review, the CMA believes that such reform would lead to benefits, that being in the form of:

- (i) A reduction in costs faced by the CMA;
- (ii) A reduction on the burden of merger control on businesses.

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

2.1. In short, yes. As with the current situation, where the CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference (such that the exception will not be applied) where its/their annual value in the UK, in aggregate, is more than £10 million. This is because the benefits of a reference would be expected to outweigh the public costs where the market(s) concerned have an aggregated turnover above £10 million.² Based on a cost/benefit analysis, if the CMA were to consider that this would apply as regards a threshold of £15 million, then certainly the logic would be the same.

2.2. As regards the suggestion of increasing the bottom threshold from £3 million to £5 million, under the current position of the CMA it is not possible to identify a mechanical 'safe harbour' in terms of market size below which the *de minimis* exception will always be applied.³ Considering that there is a possibility for mergers that are below the £3 million mark to be referred, even if exceptionally, increasing this mark to £5 million would not detract from the fact that there would be no 'safe harbour' threshold. Mergers below the £5 million mark would still be subject to referrals, even if exceptionally. For example, in the *BOC/INEOS Chlor* case, given the strength of both parties' and the OFT's concerns about the competitive impact of the merger, the OFT decided not to make use of the *de minimis* exception as the consumer benefit of referring the transaction for investigation outweighed the costs involved. Ultimately, the merger in this case was blocked.⁴ The existence of this 'clawback' right and lack of mechanical safe harbour threshold should remedy any concerns that mergers that warrant scrutiny may not escape unnoticed.

² OFT 2010 Guidance (n 1), para 2.14.

³ *Ibid*, para 2.51.

⁴ OFT Decision of May 29 2008 (BOC Ltd/the packaged chlorine business and assets carried on by Ineos Chlor Ltd). Available at http://www.offt.gov.uk/shared_offt/mergers_ea02/2008/BOC.pdf.

2.3. This point is fortified by the fact that CMA practice in exercising this 'clawback' right where it considers that a merger, despite being eligible for the *de minimis* exception, warrants scrutiny for harm to competition, is much stronger than in other jurisdictions.⁵

⁵ Boos et al, 'The Application of the German and UK *de Minimis* Regimes in Theory and in Practice: A Comparative Analysis' (2010) *European Competition Law Review* 231.

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

3.1. Yes. First, the reduction in costs to the CMA is a salient issue with the pending departure of the UK from the EU. It is widely considered that the removal of UK mergers from the scope of the European Commission's jurisdiction, and the loss of the one-stop-shop regime, will have a negative impact on the CMA's resources.⁶ Post-Brexit, the CMA will assume jurisdiction over a significant number of large mergers that are currently dealt with by the European Commission. It has been estimated that the CMA will need to review an added 50 mergers per year once the UK is no longer under the scope of the European Commission, with a number of these cases likely to be large and complex. Subsequently, the CMA would potentially face significant resourcing challenges following the end of this EUMR one-stop-shop.⁷ Furthermore, the consensus has been that this could not be addressed exclusively through CMA action and would require additional funding.⁸ Without a corresponding increase in resources from the government to deal with this added burden, extending the *de minimis* threshold is a potential solution to this problem.

3.2. Additionally, there is a risk that a lack of funding in merger review could potentially lead to a reallocation of funds from other areas, such as market investigations.⁹ In order to prevent deterioration in other areas of competition enforcement, alternative means of funding the CMA's merger review function is desirable.

3.3. The alleviation of this burden on merging businesses is certainly a benefit. The decision of whether a case falls within the *de minimis* exception is not linked to the

⁶ MacGregor and Kidane, 'Post-Brexit scenarios for UK competition policy and public enforcement: the EEA model v complete independence' (2015) *International Trade Law & Regulation* 81, 87.

⁷ Brexit Competition Law Working Group: Second Roundtable, 5 December 2016, The British Academy, London (hereafter 'BCLWG 2016').

⁸ *Ibid.*

⁹ Vickers, 'Consequences of Brexit for competition law and policy' for the *Oxford Review of Economic Policy*/British Academy conference on 'The Economic Consequences of Brexit', 7 December 2016, p 5.

parties' cost of the proceedings but cost to the public purse. Thus, a case may be referred even if a referral negates the anticipated synergies of the case. From 2007, in 20% of Phase II cases the parties chose to abandon the deal rather than proceed with the Phase II referral. As around half of the Phase II referrals result in unconditional clearance, the assumption must be that a large part of abandoned cases are for economic rather than substantive reasons.¹⁰ It is recognised that the fact that the CMA can review mergers due to concerns in markets that are entirely insignificant is a common source of frustration for merging parties. Any opportunity to extend the scope of the *de minimis* exception is thus welcome.¹¹

¹⁰ Shepherd and Wedderburn, 'Big Enough to Matter or Too Small to Care? Small Mergers and Competition Authorities', Briefing January 2017. Available at: https://www.shepwedd.co.uk/sites/default/files/Big_enough%20_to_matter_or_too_small_to_care.pdf

¹¹ Clifford Chance, *Corporate Update* January 2017, p 18. Available at: https://www.cliffordchance.com/briefings/2017/01/corporate_updatejanuary2017.html

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

4.1. Yes. Compared to the EU, there is a high incidence of Phase II referrals at the UK level, the EU level being at 3% and the UK at 14%. There is a much higher unconditional clearance rate of Phase II cases in the UK. This suggests that the CMA is very quick to refer cases that ultimately are found not to present any competition law issues. Furthermore, since 2007, almost the same proportion of cases were cleared on a *de minimis* basis as cleared with undertakings in lieu of a reference.¹² Considering the high level of cases that are ultimately cleared and the CMA's readiness to refer cases to Phase II investigation, evidently there is scope for the CMA's duty not to refer to be extended.

4.2. However, it may be worth considering alternatives to increasing the *de minimis* thresholds as a means of generating funds for the CMA, especially considering that a revision of the *de minimis* exception has been said to likely result in a loss over consumer welfare, and, over the long term and in aggregate, would reduce competitive pressures in the economy.¹³

4.3. Alternatives that have been suggested include:

- (i) Increasing notification thresholds in order to reduce the number of smaller mergers that are notifiable to the CMA. The CMA could also take a prioritisation decision that it will investigate fewer smaller or simpler mergers.¹⁴ Alternatively, the CMA could simply not conduct investigations with the intensity that it currently does.¹⁵

¹² Shepherd and Wedderburn (n 10).

¹³ BCLWG 2016 (n 7) page 3.

¹⁴ Ibid, pages 2-3.

¹⁵ Brexit Competition Law Working Group Issues Paper, Response of Alistair Lindsay, page 2. Available at: <http://www.bclwg.org/wp-content/uploads/2016/12/BCLWG-Merger-Control-Issues.pdf>.

(ii) The review process could be altered for simpler cases, for example by: changing the 'duty to refer' to a 'discretion'; reducing the time available at Phase I and Phase II (including placing limits on pre-notification discussions); revisiting the powers and duties of the Panel at Phase II to that they focus solely on remedies or on issues that remain in dispute at the end of Phase I.¹⁶

(iii) The CMA could look at its internal resourcing, such as reallocating staff from other areas (such as market investigations or antitrust) to merger cases. In fact, it has been noted that staffing on cases at the CMA is high compared to the European Commission. Thus, a reduction in staff per case would free up resources to take on more cases.¹⁷

4.4. Additionally, it has been suggested that in the longer term, if resourcing is a pressing issue, Parliament could legislate to raise the jurisdictional thresholds and/or give the CMA more flexibility to accept remedies in Phase I, especially considering that the European Commission is strikingly more flexible in accepting remedies at this stage.¹⁸

4.5. One final potential remedy for an underfunded CMA could be where the CMA considers cases which are also review by the European Commission and where the UK issues are not materially different from those raised in the EU Member States, there may be scope for the CMA to clear the case on the basis of UK versions of the remedies agreed by the European Commission in Phase I or Phase II. In this type of case, the CMA could focus its analysis and its recourses on whether the UK raises any materially

¹⁶ BCLWG 2016 (n 7) page 3.

¹⁷ Ibid, page 3.

¹⁸ Response of Alistair Lindsay (n 15), page 4.

different issues from those arising in the EU Member States and whether there are any plain flaws in the European Commission's market analysis or the remedies package.¹⁹

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8 February 2017

¹⁹ Ibid., page 2.