

## RESPONSE TO THE CMA'S CONSULTATION ON MERGER THRESHOLD GUIDANCE

This response represents the views of law firm Allen & Overy LLP on the Competition & Markets Authority's (CMA's) consultation on *Guidance on changes to the jurisdictional thresholds for UK merger control (Draft Guidance)*.

This response does not contain any confidential information.

**1. Is the content, format and presentation of the draft guidance sufficiently clear?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.**

The Draft Guidance is generally set out clearly, both in terms of content and format/presentation. However there are two areas where we think that greater clarity is necessary.

The first relates to the description of the new share of supply test in paragraph 2.5(b). The wording in this paragraph flows from The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018. However, we think that the paragraph would benefit from further explanation. In particular we would suggest removing the last sentence of paragraph 2.5(b) and adding a short new paragraph which clarifies that:

- the test is met if the target is a Relevant Enterprise, and has an existing 25% or more share of supply of goods or services in the UK before the merger (even if that share of supply does not increase as result of the merger)
- the relevant goods or services for the purposes of applying the test are those by virtue of which it qualifies as a Relevant Enterprise
- the new provision adds to, rather than replaces, the existing share of supply test.

Second, paragraph 3.7 of the Draft Guidance sets out the principle that there is no need to notify the CMA of mergers giving rise to a relevant merger situation where competition concerns do not arise. However footnote 15 states that this is "*assuming there are no public interest concerns*". Given the voluntary nature of the UK regime we would welcome clarification from the CMA in relation to this statement.

**2. Is the draft guidance sufficiently comprehensive?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?**

Overall, the Draft Guidance contains the relevant information for merging parties and their advisors (although as noted in response to question 3 below, the CMA should keep the Draft Guidance under review and update it as necessary once the change to the jurisdictional thresholds takes effect).

However, one particular point that we think could be included expressly in the Draft Guidance is a statement that "*the CMA does not consider that the three defined sectors should be treated differently from other sectors for competition reasons*". This appears in paragraph 1.4 of the consultation document accompanying the Draft Guidance, but not in the Draft Guidance itself. While paragraphs 3.1 to 3.6 of the Draft Guidance address the detail of how this principle is expected to apply in practice, the inclusion of the statement would provide

additional clarity and reassurance for merging parties. It could perhaps be added to paragraph 3.2.

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

Once the change to the jurisdictional thresholds takes effect, it will be important for the CMA to keep the Draft Guidance (which will at that stage be in final form) under review. For example, to the extent that merging parties are routinely raising a particular query in relation to the new thresholds and the competition assessment which is not currently addressed, appropriate wording should be added to the Draft Guidance.

**Allen & Overy LLP**  
**11 April 2018**