Briefing

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Big enough to matter or too small to care?
Small mergers and competition authorities



John Schmidt
john.schmidt@shepwedd.com
+44 (0)20 7429 4967

Is a merger ever too small for a competition authority to care? It happens often in an EU context where the only country with significant overlaps or issues may be a small one: Liechtenstein or Luxemburg or Malta. If there are no issues elsewhere does that mean we can ignore small jurisdictions or small markets? The short answer is: no. The long answer is: maybe, in some circumstances and only in a couple of countries.

Let's stick with the short answer: if your transaction is notifiable at EU level, the size of the product or geographic market which entail a competition issue is not relevant. Your route to clearance will be to devise a remedy that deals with the issue. In a small market that often does not present any commercial issue although carving out a small market from the rest of the deal may present some practical hurdles.

For mergers notifiable in the UK, small markets can be a possible route to clearance. The UK's Competition and Markets Authority has a discretion not to refer a merger for a Phase II detailed review where '*the markets concerned are not of sufficient importance*'.[1]

When is a market insufficiently important?

The legislation does not provide a definition and the concept is quite elastic. The UK agency's guidance on how it approaches potential *de minimis* cases[2] uses the size of the market concerned as the starting point:

- If the market's annual value in the UK exceeds £10 million, then the *de minimis* exception is unlikely to be considered.
- If it is below £3 million, then the CMA will only refer in exceptional cases.

For the cases in between (and exceptionally in other circumstances) the CMA will look at the following factors:

- Strength of the CMA's concern that harm will occur as a result of the merger;
- Magnitude of competition lost by the merger;
- Durability of the merger's impact;
- Transaction rationale and the value of deterrence.
- Absence of clear-cut remedies.

Aspects that have in the past contributed to a *de minimis* clearance are: low barriers of entry and expansion, overall declining businesses declining at the hands of new technologies, strong customers who could easily self-supply or where the merging parties are not particularly close competitors.

[1] Enterprise Act 2002, sections 22(2)(a) and 33(2)(a).
[2] OFT, Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance

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Some Statistics

The following two tables provide some merger clearance statistics at EU and UK level for cases since 2007:

EU cases since 2007	3,129
Phase I unconditional clearance	93%
Phase I clearance with remedies	4%
Phase II referrals	3%
Unconditional clearance in Phase II	36%

UK cases since 2007	783
Phase I unconditional clearance	71%
Phase I clearance with remedies	8%
Phase I de minimis clearance	7%
Phase II referrals	14%
Phase II abandoned	21%
Unconditional clearance in Phase II	45%

The first point to note is that there is a very low incidence of Phase II referrals at EU level (3%) compared to the UK (14%). By contrast, there is a much higher unconditional clearance rate of Phase II cases in the UK. This suggests that the UK agency is very quick to refer cases that ultimately are found not to present any competition law issues.

The second point to note is that a UK *de minimis* clearance looks like a good bet: almost the same proportion of cases is cleared on a *de minimis* basis as is cleared with undertakings in lieu of a reference. However, securing merger clearances is not a game of chance. If one looks beyond the top line numbers four distinct points emerge:

- First, around a third of *de minimis* cases relate to the acquisition of local bus and/or rail services and are unlikely to be relevant to other industry contexts. The rest deal with either niche products/services (ca. 50%) or with small local markets (ca. 10%).

- Second, the *de minimis* rule does not create an enforceable safe harbour that merging parties can claim as of right. It simply provides the UK agency with the discretion not to refer a case where the cost of a referral to the public purse (ca. £400k) outweighs the likely harm that is caused by a potentially problematic merger. The additional factors that the CMA examines gives it a very large margin of appreciation in deciding whether to apply the *de minimis* exception. The CMA has declined to apply the *de minimis* exception in a couple of cases that fell within the £3-10m market size bracket largely because the parties were each other's closest competitors and the CMA's initial concerns were at the higher end of the spectrum. The vast majority of *de miminis* clearances have been in the below £3m market size segment.

- Third, importantly, the decision of whether a case is *de minimis* is not linked to the parties' cost of the proceedings but cost to the public purse. This means that a case that does not fulfil the above criteria will be referred even if a referral negates the anticipated synergies of the case. This is supported by some statistics. Namely, the UK's high incidence of Phase II referrals includes a good number of cases where the economics of the deal do not allow for an expensive Phase II process. In some 20% of Phase II cases the parties abandon the deal rather than proceed with the Phase II referral. Given that around over half of Phase II referrals result in an unconditional clearance, the assumption must be that a large part of such abandoned cases are for economic, rather than substantive reasons.

- Finally, if clear-cut undertakings in lieu can be devised that would resolve the CMA's competition concerns, then the CMA will seek such undertakings rather than clear on a *de minimis* basis. In other words: if the problem can be fixed then it is never too small to ignore.

When is it a viable route to clearance?

A *de minimis* analysis can be a viable route to truly small mergers, but typically it will require a number of additional features beyond the mere size of the market or the importance of the market or segment to the merging parties that soften the potential negative market impact.

This is not a quantitative exercise but a qualitative assessment of the case in the round, combined with formulating a view on the availability of clear-cut undertakings. Where this is a possible route to clearance, it will require detailed analysis and advocacy.

In addition, the UK is fairly unique in operating a *de minimis* exception. Germany is another country. There, the exception is more quantitative, linked either to the size of one of the parties (to allow transition of family owned businesses) or of the market. If the merger extends beyond countries operating a *de minimis* regime, it is important also to analyse the substantive impact of the deal in those jurisdictions and feed this into the overall merger control strategy.