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RS/HK

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Dear Ms Town

CMA consultation on draft guidance in relation to requests for internal documents in merger investigations (the "Draft Guidance")

Matheson advises parties notifying mergers to the Competition and Consumer Protection Commission ("the CCPC") in Ireland.

We are grateful for the opportunity to respond to the CMA's consultation, given the potential impact of its approach on merger reviews undertaken in parallel with other authorities, such as the CCPC. The CMA has traditionally pursued a common sense approach to merger investigations, embedding economists in its investigative teams and testing the plausibility of economic theories of harm through intelligent engagement with third parties (in particular, customers) in the context of an analytical, market-focussed, approach. Perhaps because of this, the decisions of the CMA have often proved persuasive in other jurisdictions reviewing a transaction, including Ireland.

With the above in mind, we have carefully reviewed the Draft Guidance and have the following comments.

First, we would encourage the CMA to expressly acknowledge that requests for internal documents (other than those responsive to the merger notice) will in many circumstances not be required. Internal documents, by their very nature, tell at best a partial story of how competition is operating in a given market. They are rarely 'best evidence' and in most cases play a subsidiary role to robust economic analysis and market engagement. As a result, in our experience it is rare for large volumes of internal documents to be requested by the CCPC or by other EU competition authorities.[1]

Where a market-focussed investigation does not identify competition concerns (eg where the parties together have modest shares of supply, a number of competitors remain and customers have not raised concerns) there is likely to be little or no value in requesting and reviewing large volumes of additional documents. It may therefore be helpful to set out the profiles of merger investigation where the CMA is unlikely to require internal documents.

[1] To the extent that internal documents are required, these are usually furnished in the context of providing a complete notification rather than in response to a formal document request.

Relatedly, in addition to the scenarios listed at paragraph 10, if the CMA has experience of specific merger investigations where internal documents have been instrumental, either in clearing the merger or identifying competition concerns, it would be extremely helpful to provide examples of these.[2]

Second, the requirement to provide material volumes of internal documents (whether at phase 1 or 2) places a significant burden on merging parties, in terms of both the financial cost and time spent identifying and extracting potentially responsive documents. It seems to us that the principle of proportionality, when applied to the exercise by the CMA of formal information gathering powers, places it under a clear duty to consult with merging parties prior to issuing a document request. Such a duty is heightened in circumstances where the CMA is not requesting a *specific document* but instead is requiring the production of *categories of documents*. Where there is material uncertainty as to the volume of documents that a party is required to produce (and therefore the *burden* of complying with such a request), the CMA must take steps to mitigate that burden wherever possible. In compelling parties to provide potentially large volumes of documents, the CMA should explain in detail how it will exercise its statutory function in a manner proportionate to the objective pursued. At a minimum, the CMA should commit to sharing a draft of any document request with the parties concerned.[3]

Third, related to the above, we would suggest that a clear and unambiguous distinction be drawn upfront between the approach at phase 1 as compared to phase 2. There is no presumption at Phase 1 that a merger may give rise to anti-competitive concerns.[4] The CMA should be cognisant of this when weighing the proportionality of any document request at phase 1 since it is yet to meet any legal threshold for identifying potential competition concerns. The CMA should acknowledge that it will first explore and exhaust other avenues of evidence gathering and analysis that are less burdensome on the merging parties but are of equal or greater probative value.

Finally, we would propose that a further distinction be made between the CMA's approach to parties that have voluntarily notified a merger at Phase 1 as compared to cases where the CMA has launched an own-initiative investigation of a completed (non-notified) transaction. In notified transactions, the CMA will have had an opportunity during pre-notification to discuss the extent to which internal documents will be required as part of the merger notification. The CMA also has the statutory power to reject a merger notice if it is not complete and does not contain the documents it requires to carry out its investigation.[5] The CMA should therefore use the pre-notification stage to determine the appropriate scope of internal documents required and should not use a formal request to obtain them, save in genuinely exceptional circumstances.[6]

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[2] There may of course be scenarios where specific internal documents are sought from parties as rebuttal evidence (for example, where a third party has made an unsubstantiated complaint). However, such requests should be made on a voluntary basis.

[3] The Draft Guidance states that it is the CMA's intention to use formal section 109 requests "*as standard in future investigations*" (Paragraph 15). This differs from a scenario where the merging parties are invited to provide documents which support their submissions with regard to a particular issue. We note the Irish Supreme Court's judgment in *CRH v CCPC* where evidence obtained on foot of a legally obtained warrant was nonetheless successfully withheld from the CCPC on the basis that the scope of the evidence seized was unduly broad.

[4] In the last three years over 60% of mergers investigated by the CMA at Phase 1 have been cleared without conditions. See CMA merger statistics, available here.

[5] In practice we understand that the CMA will not initiate an investigation until it satisfies itself that a merger notice is complete under section 96(2A) of the Enterprise Act 2002.

[6] For example, where evidence comes to light that key documents were not provided as part of the merger notice or additional competition concerns arise from third party engagement that were not addressed in the merger notice.

We hope that the above comments are helpful to the CMA.

Yours faithfully

sent by email, bears no signature

MATHESON