

Mergers: Review of the Merger Notice

Summary of responses to the consultation

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1. Introduction

Background and summary

- 1.1 The Competition and Markets Authority (CMA) is a non-ministerial department formed on 1 April 2014. It is the UK's primary competition and consumer authority which took over a number of functions formerly performed by the Office of Fair Trading (OFT) and those of the Competition Commission (CC). The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy.
- 1.2 As part of the Enterprise and Regulatory Reform Act 2013 (ERRA13) reforms, section 96 of the Enterprise Act 2002 was amended to require that a 'merger notice' (ie a notice to the CMA of proposed arrangements which might result in the creation of a relevant merger situation) should be made in a 'prescribed form'.
- 1.3 The merger notice sets out a series of questions specifying the information that should be provided to meet these requirements. The merger notice also contains guidance notes intended to explain how merger parties should respond to these questions in the circumstances of a given case (depending on, for example, the activities of the merger parties or the extent of overlap in their activities). In particular, to ensure that information can be provided in an efficient and proportionate manner, the merger notice also explains that merger parties may not need to provide certain information requested in the merger notice where this is unnecessary for the assessment of a given case (provided that the merger parties explain why this is the case).
- 1.4 In practice, the merger parties and the CMA will also discuss the information required for a satisfactory notification during pre-notification. The CMA considers, however, that it may be useful for merger parties to have a more complete understanding of the information likely to be required prior to beginning pre-notification discussions and that clearer guidance notes should generally help to streamline the pre-notification process.
- 1.5 Following a consultation, from 22 March 2017 to 12 April 2017, the CMA is publishing a revised Merger Notice Template (referred to as the Revised Merger Notice).
- 1.6 The Revised Merger Notice is primarily intended to clarify the interpretation of certain existing questions and guidance notes and to ensure that the information provided is adequate and proportionate to the circumstances of the case (in particular by making clear where certain of the information

requested in the notice may not be necessary). For the most part, the proposed changes reflect the CMA's existing practice.

- 1.7 More specifically, the most notable proposed changes in the Revised Merger Notice include:
- (a) additional guidance to make clear that 'bespoke' submissions (ie not following the merger notice template form) are also welcomed by the CMA(see paragraph 18 of the Preamble);
 - (b) additional guidance to make clear that merger parties may not be required to provide all of the information requested in the notice in all circumstances (and that this can be discussed with the CMA in pre-notification) (see paragraphs 21 to 23 of the Preamble);
 - (c) minor changes to the scope of internal documents requested (with more extensive guidance provided in relation to the types of documents that the CMA would expect to be responsive to these questions and a clearer explanation of the circumstances in which the CMA would not expect documents to be provided) (see questions 9 and 10 and associated guidance notes);
 - (d) a new question that specifies the share of supply data that the CMA will typically expect to be provided (see question 14);
 - (e) additional guidance to clarify the circumstances in which other types of granular data (eg in relation to capacity, switching data and variable profit margins) may be required (see question 15 and associated guidance notes);
 - (f) additional guidance to clarify the circumstances in which bidding data may be required (see question 16 and associated guidance notes);
 - (g) revised questions and guidance in relation to non-horizontal effects, intended to reduce the scope of the information required in cases where significant analysis of non-horizontal theories of harm is not likely to be necessary (see questions 19 and 20 and associated guidance notes);
 - (h) removal of the question relating to coordinated effects, with additional guidance to explain that analysis of potential coordinated effects need only be provided where requested by the CMA;
 - (i) additional guidance to clarify that responses to certain questions (eg in relation to entry and expansion, countervailing buyer power, efficiencies, and customer benefits) need only be provided where the notifying parties

would like these factors to be taken into account by the CMA (see, for instance, question 21 and 22);

- (j) a new section intended to consolidate all of the third party contact details likely to be required (see Part V); and
- (k) a revised declaration, intended to provide merger parties with a more comprehensive explanation of their obligations in signing the merger notice and of the way the CMA may use the information provided (see Part VI).

1.8 The Revised Merger Notice replaces the existing merger notice template and should be read in conjunction with [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), in particular Annex A, and the [Merger assessment guidelines](#) (CC2/OFT1254). Together with these documents, the Revised Merger Notice is intended to provide merger parties with guidance in relation to the types of information likely to be required when notifying a merger to the CMA.¹

Purpose of this document

1.9 The consultation document that accompanied the proposed revised merger notice (draft Revised Merger Notice) set out a series of specific questions on which respondents' views were sought. This document is intended to summarise the key issues raised by the responses and the CMA's views on these key issues. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available on the [consultation page](#).

1.10 This document should be read in conjunction with the consultation document, which contains further background and explanation of the rationale to the review of and the proposed changes to the Merger Notice.

¹ See section 96(2) of the Enterprise Act 2002.

2. Issues raised in the responses to the consultation

- 2.1 The CMA received seven responses to the consultation, all of which were from legal advisers. A full list of respondents can be found in Appendix A.

General purpose and scope of the Merger Notice

Respondent views

- 2.2 Overall, the majority of respondents welcomed most of the proposed changes and the additional guidance as sensible refinements to the UK merger control regime.
- 2.3 Some respondents submitted, as a general matter, that the draft Revised Merger Notice remains more onerous than necessary, which leads to unduly long pre-notification periods and imposes too much time, burden and cost on notifying parties. Some respondents suggested, in particular, that the information requested is excessive when compared to that requested in other jurisdictions, which results in the CMA's pre-notification process being relatively lengthy compared to that in other jurisdictions.

CMA views

- 2.4 The CMA recognises the importance of ensuring that merger notice avoids imposing unnecessary burdens where possible and that the pre-notification process is as streamlined as possible.
- 2.5 The CMA notes, in this regard, that the Merger Notice is intended to provide a flexible template for a merger notification. In particular, it may not be necessary to provide all of the information identified in the Merger Notice in all circumstances,² and some of the information requested in the Merger Notice will only typically be required where the merger parties' activities meet certain materiality thresholds.³

² As paragraph 21 of the Revised Merger Notice explains, where the merger parties consider that certain information requested is not relevant for the CMA's assessment, it may be sufficient to provide a brief explanation setting out why the information requested that has not been provided.

³ For example, information on capacity, switching data and variable profit margins is only normally requested when the combined share of supply of the merger parties exceeds 15% and additional information regarding the non-horizontal effects of a merger is only requested if the combined shares of supply exceed 30% in either of a pair of upstream and downstream Candidate Markets.

- 2.6 Taking this flexibility into account, the CMA considers that the extent of information requested in the Merger Notice is not unduly onerous.
- 2.7 As concerns the suggested comparisons with other jurisdictions, the CMA notes that the UK has a voluntary system of merger control (in contrast to many other jurisdictions, such as the European Union, which have a mandatory system). In practice, this means that a higher proportion of the mergers that are notified to the CMA, or that the CMA investigates on its own initiative, tend to raise potential competition concerns (because mergers that do not raise any competition concerns would typically not be subject to investigation). Taking these differences into account, the CMA considers that the extent of information requested in the Merger Notice is not unduly onerous by comparison to that requested in other jurisdictions.

Extent of information requested by the Merger Notice

Respondent views

- 2.8 Respondents generally welcomed the changes proposed in the Revised Merger Notice that are intended to refine the extent of information required.
- 2.9 Some respondents suggested, however, that certain of the information requested in the Revised Merger Notice would, in most cases, not be necessary for the CMA's assessment. Respondents noted, in particular, that monthly management accounts would rarely be relevant, and that it can be difficult to provide contact details for large numbers of customers and competitors (with the Revised Merger Notice requesting contact information for ten of each).

CMA views

- 2.10 The CMA has removed the requirement to provide monthly management accounts from the Revised Merger Notice.
- 2.11 The CMA notes, as explained in the Revised Merger Notice, that the number of customers and competitors whose contact details are required will vary from case to case (and that merger parties will be able to discuss the requirements in a given case with the relevant case team). The CMA recognises, however, that providing third party contact details can impose some burden on the merger parties. The CMA has therefore reduced the number of competitors for which details should be provided to five in the final Revised Merger Notice (although the CMA notes that merger parties who place weight on particular competitors as material constraints post-Merger

may nevertheless wish to proactively provide the CMA with contact details for those competitors).

- 2.12 The CMA notes that merger parties would ordinarily have ready access to contact details for their own customers. The CMA therefore considers that it should not be unduly burdensome for merger parties to provide contact details for ten customers.

Extent of guidance provided by the Merger Notice

Respondent views

- 2.13 Respondents generally welcomed the additional guidance provided in the Revised Merger Notice.
- 2.14 Some respondents suggested that guidance on other elements of the CMA's practice would be useful (or suggested other changes to the CMA's practice, such as lowering merger fees). Some respondents indicated that it would be useful for the CMA to commit to completing the pre-notification process within a certain period of time. One respondent indicated that it would be helpful to have a clarification of the CMA's approach to surveys and econometric analysis that merger parties had carried out without consulting the CMA. Similarly, another respondent suggested that additional guidance on what constitutes a 'plan' for new entry (within the context of assessing a loss of potential competition) would be useful.
- 2.15 Some respondents also suggested that it would be useful for the Merger Notice to explicitly refer to certain rights available to the merger parties (eg to assert that the merger should be subject to the *de minimis* exception⁴ or to decline to provide internal documents that are covered by legal professional privilege).

CMA views

- 2.16 The CMA considers that providing guidance on other elements of the CMA's practice, such as the timing of the pre-notification process or the CMA's approach to surveys and econometric analysis, is beyond the scope of current consultation exercise. The CMA notes the views expressed that additional guidance in other areas would also be useful and will take these into account

⁴ See [Mergers: Exceptions to the duty to refer and undertakings in lieu \(OFT1122 and CMA64\)](#).

in its ongoing assessment of whether changes to its existing guidance, or the provision of additional guidance, might be useful.⁵

- 2.17 The CMA also notes that its approach to certain issues for which some respondents thought additional guidance would be useful (eg on what constitutes a ‘plan’ for new entry) is likely to vary depending on the specific circumstances of a given case. The CMA therefore considers that it is not feasible to provide sufficiently robust guidance on these issues within a template Merger Notice (particularly given the desire to make the accompanying guidance notes as concise as possible). The CMA therefore considers that merger parties should continue to discuss these issues with the relevant case team.
- 2.18 More generally, the CMA notes the importance of making the template Merger Notice as clear and concise as possible. For this reason, the CMA considers that there is no need for the notice to include explicit references to all rights available to the merger parties (eg in relation to the *de minimis* exception or legal professional privilege), particularly where there is no suggestion that merger parties are not already sufficiently aware of these rights.

Approach to supporting documents

Respondent views

- 2.19 Respondents generally indicated that the additional guidance in relation to supporting documents was useful.
- 2.20 Some respondents suggested, however, that the scope of documents requested in questions 9 and 10 of the Revised Merger Notice remained disproportionate. One respondent indicated, in particular, that the Merger Notice should only request the ‘minimum necessary level’ of documents, with tailored requests for additional documents as necessary after the CMA’s investigation formally commences. Similarly, another respondent suggested that ‘minimal supporting documentation should be required’ in a way that is ‘similar to the old OFT notice.’

CMA views

- 2.21 As noted above, the CMA recognises the importance of ensuring that merger notice avoids imposing unnecessary burdens where possible. Accordingly, the

⁵ See the CMA’s [Good practice guide in the design and presentation of consumer survey evidence in merger inquiries](#). An updated version of this document will be issued shortly.

final Revised Merger Notice seeks to further narrow the scope of the documents requested. In particular, the Revised Merger Notice:

- (a) removes the reference to documents in relation to potential alternative acquisitions (in question 9);
- (b) clarifies that the inclusion of shareholders in the custodian lists refers to documents circulated at shareholder meetings at which the merger was considered and not to all shareholder communications (in question 9);
- (c) removes shareholders from the custodian lists completely (in question 10); and
- (d) reduces the scope of the documents relating to the merger parties' commercial strategy that should be provided (in question 10).

2.22 The CMA notes, however, that internal documents often form an important element of its CMA's investigation (as demonstrated by the extensive references to internal documents in many of the CMA's – phase 1 and phase 2 – decisions). The CMA also notes that the suggestion that internal documents should be provided 'as appropriate' after its phase 1 investigation has already begun is not realistic given timing constraints.

Appendix A: Respondents

- Allen & Overy LLP
- Ashurst LLP
- Baker Mckenzie
- Clifford Chance LLP
- Dentons
- Freshfields Bruckhaus Deringer LLP
- Simmons & Simmons LLP