

## RESPONSE TO CMA CONSULTATION MERGERS: REVISED MERGER NOTICE

*Baker & McKenzie LLP welcomes the opportunity to comment on CMA's consultation on revising the Merger Notice template. Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on UK merger control.*

### 1. General Comments

- 1.1 We agree that it is appropriate for the CMA to review the current Merger Notice, which has been in use since 1 April 2014. We welcome the clarification that bespoke submissions (i.e. which do not follow the Merger Notice template form) may be made, as this provides greater flexibility to the notifying parties and their advisors.
- 1.2 We are however concerned that the proposed revisions may not go far enough and that the UK merger notification process will therefore continue to create a significant burden on both the notifying parties and the CMA. The current Merger Notice has been subject to a certain amount of criticism by companies and their advisers since it was introduced in 2014. We feel that the CMA could take this opportunity to streamline the merger notification process in a way which fully addresses the expressed concerns.

#### *Burden on the parties*

- 1.3 The revised Merger Notice continues to ask for a large amount of information and supporting documentation, attempting to cover almost all theories of harm (though we welcome the proposal to drop the question relating to coordinated effects). As a result, parties face a significant regulatory burden. In our view, there needs to be a shift in emphasis. Parties are actively encouraged to engage in detailed pre-notification discussions with the case team and during these discussions they should agree to provide the information required for the CMA to develop its assessment to the stage of market testing. The current and the revised Merger Notice appear to ask for information that the CMA would need in order to draft an issues letter or final decision, rather than as a starting point to discuss with the parties what information is needed in order to conduct an initial review of the merger and then carry out market testing. There may be cases where much of the information asked for in the current and revised Merger Notice will never be relevant to the CMA's assessment, so a more targeted approach to the Notice would seem to be appropriate.
- 1.4 The problem with having such extensive questions in the Merger Notice itself is that it creates the impression that the parties need to provide all the requested information in order for the notification to be deemed complete. We appreciate that the CMA actively encourages parties to seek derogations, and that the revised Merger Notice seeks to clarify that not all of the requested information will be required where certain thresholds are not exceeded. However, we submit that the onus should be on the CMA to consider during pre-notification whether it needs all of this information and, if so, to request it at this stage, together with an explanation to the parties why it needs it (rather than the placing the burden on the parties to seek derogations).
- 1.5 Parties are often required to engage with less experienced case officers who may err on the side of caution and not grant a derogation, or may not send out appropriately targeted additional information requests. We recommend that the CMA expressly commits that a

senior official will engage with the parties in all discussions relating to derogations and information requests.

- 1.6 As part of the proposed revisions, the CMA should consider amending paragraph 26 of the revised Merger Notice, which states that the CMA will typically take between five and ten working days of receipt of a Merger Notice to confirm that the notification is complete. We consider that five to ten working days is too long, particularly as during pre-notification the parties and the CMA will discuss information requirements, and draft notification(s) will have been submitted and reviewed. There is therefore no obvious reason why the CMA needs such a long period to confirm that a notification is complete. Therefore, we urge the CMA to revise this time period to be no more than five working days (this would be in line with the approach of the European Commission, which in practice often takes less than five days to confirm that a notification is complete).

#### *Burden on the CMA*

- 1.7 As well as the significant burden on parties, we are concerned that the draft Merger Notice will continue to place a burden on the CMA and its resources. The level of information requested places an unnecessary burden on the CMA at the Phase 1 stage where such detailed scrutiny is rarely required. This will likely become more apparent following the withdrawal of the UK from the EU, and the subsequent loss of the EU merger control "one stop shop". The CMA has indicated that it expects an increase of at least 40 to 50% on the CMA merger workload post-Brexit, which will obviously impact its ability to manage its workload. As such, we strongly encourage the CMA to consider paring down the Merger Notice and to request further information on a case by case basis during pre-notification and in the Phase 1 review.

## **2. Suggestions for a more streamlined process**

- 2.1 We consider that the issues discussed above largely stem from the fact that there is no recognition of an "affected market" threshold below which the merger would be considered not to have any effect on competition in a particular market in the Merger Notice. This is in contrast to the EU merger notification position, where detailed information only has to be provided where there is an affected market. The CMA has sought to address this by applying certain thresholds below which the parties may not be required to provide all of the requested information but in our view these thresholds are currently too low. For example, Guidance Note 10 states that documents will not be required where the merger parties' combined share of supply does not exceed 15%. We consider that this threshold should be increased to 25% (in line with the share of supply jurisdictional threshold), or at a minimum, 20%, in line with the European Commission's identification of horizontally affected markets. The same guidance note states that the CMA may require documents under Question 10 where there is a vertical link - this should also be subject to a materiality threshold - we suggest upstream and downstream market shares under 30% and that the presence on both vertically linked markets should be appreciable (at least 10%). The materiality threshold should also be increased with respect to Question 15 on horizontal effects (to 25%, or at least 20%).
- 2.2 We consider that the whole process could be made more efficient if a short form notification procedure were to be introduced, similar to the EU position i.e. a separate simplified Merger Notice which would be used where there are no affected markets. We suggest that "affected markets" could be as follows:
- (a) the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market (horizontal relationships) is less than [25%] [or at least 20%];

- (b) none of the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships) is at either level 30 % or more. The presence on both vertically linked markets should be appreciable (at least 10%) in order to be an affected market.
- 2.3 Another possibility would be to also introduce a "safe harbour" for mergers with very small increments in concentration which would also benefit from a simplified Merger Notice. The CMA could consider following the approach of the European Commission's Horizontal Merger Guidelines, which state that there are unlikely to be any horizontal competition concerns in a merger with a post-merger HHI between 1 000 and 2 000 and a delta below 250, or a merger with a post-merger HHI above 2 000 and a delta below 150, unless certain factors apply.<sup>1</sup>
- 2.4 It could be argued that there is no need for a short form notification for cases where there are no affected markets or for a safe harbour for mergers with small increments in concentration in circumstances where the system is voluntary because only mergers with substantive issues requiring detailed investigation will be notified. Whilst the CMA is in the best position to judge whether this is the case, a decision about whether to make a notification in the UK depends on many factors including business considerations around risk appetite and allocation. In our view, a voluntary system should not try and anticipate when voluntary filings are made but rather cater for all circumstances in which filings could be made.
- 2.5 We set out in the attached Annex the information that we think should be asked for in cases where there are affected markets and cases where there are no affected markets. The clear advantage of having a simplified Merger Notice are that disclosure obligations would be less burdensome on the parties (i.e. less market data, fewer third party contact details and fewer internal documents are required). This procedure would also mean that the parties would not need to spend time and resources seeking derogations from the CMA at the outset. It would be open to the CMA to ask for any additional information as required during pre-notification and during the Phase 1 review.

**Baker & McKenzie LLP**

**April 2017**

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<sup>1</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), paragraph 20.

**ANNEX**

*This table compares the notification requirements of the old OFT Merger Notice, the CMA's current Merger Notice, and the CMA's revised draft Merger Notice. A ✓ or ✗ indicates where we agree or disagree with the information being requested in that document. In the final two columns we give our view on how we consider that certain categories should be treated..*

<b>CATEGORY</b>	<b>OFT MERGER NOTICE</b>	<b>CURRENT CMA MERGER NOTICE</b>	<b>DRAFT CMA MERGER NOTICE</b>	<b>BM VIEW: AFFECTED MARKETS</b>	<b>BM VIEW: NO AFFECTED MARKETS</b>
<b>General Information</b>	✓	✓	✓	✓ As per the draft Merger Notice	✓ As per the draft Merger Notice
<b>The Merger Situation</b>	✓	✓	✓	✓ As per the draft Merger Notice	✓ As per the draft Merger Notice
<b>Description of the businesses of the parties</b>	✓	✓	✓	✓ As per the draft Merger Notice	✓ As per the draft Merger Notice
<b>Jurisdiction</b>	✓	✓	✓	✓ As per the draft Merger Notice	✓ As per the draft Merger Notice
<b>Supporting Documents / Financial Information</b>	✓ (copies of most recent annual reports and accounts; copies of analyses, reports, studies and surveys submitted to or prepared for board of directors,	✗	✗ Question 8 in the current and draft Merger Notice asks for the last set of monthly management accounts as well as the most recent annual accounts. It is not clear to us why the CMA needs the monthly management accounts as a matter of course. We suggest that this requirement is removed and the CMA can ask for it on a case by case basis if necessary.	✗ Questions 8(e); 9 and 10 should only apply to cases where there is an affected market. It would be more appropriate for the CMA to request these documents on a case by case basis during the Phase 1 review if	Minimal supporting documentation should be required (similar to the old OFT Notice). The documentation asked for in Questions 8(e); 9 and 10 are unlikely to be relevant to the CMA's assessment.

CATEGORY	OFT MERGER NOTICE	CURRENT CMA MERGER NOTICE	DRAFT CMA MERGER NOTICE	BM VIEW: AFFECTED MARKETS	BM VIEW: NO AFFECTED MARKETS
	<p>supervisory board, or the shareholders meeting, for the purpose of analysing the merger).</p>		<p>Question 9 in the current and draft Merger Notice asks for any analysis of the merger in relation to potential alternative acquisitions. We cannot see why the CMA would need this analysis as part of the Phase 1 review and suggest that this be deleted.</p> <p>Question 9 (b) (ii) now asks for "Information Memoranda prepared by or for the merger parties that specifically relate to the sale of the target." In the current Merger Notice, Question 9 asks for "Information Memoranda prepared by or for the merger parties <i>and in either of their possession</i> that specifically relate to the sale of the target." We do not agree with the proposed deletion of the words "<i>and in either of their possession</i>" - this qualification is important because, for example, in a completed transaction, the acquiring party may not have Information Memoranda produced for rival bidders, and would not be in a position to provide them to fulfil the requirements of a completed Merger Notice.</p> <p>Question 10 in the current and draft Merger Notice asks for "<i>copies of</i></p>	<p>necessary, rather than as part of the Merger Notice.</p>	

CATEGORY	OFT MERGER NOTICE	CURRENT CMA MERGER NOTICE	DRAFT CMA MERGER NOTICE	BM VIEW: AFFECTED MARKETS	BM VIEW: NO AFFECTED MARKETS
			<p><i>documents (including, but not necessarily limited to, reports, presentations, studies, internal analyses, industry/market reports or analysis, including customer research and pricing studies) in either merger parties' possession and prepared or published in the last two years..". We suggest that the geographic scope of Question 10 is restricted to documents relating to competitive conditions in the UK, rather than globally. Furthermore, the requirement to provide documents produced in the last two years appears to go beyond what is necessary for the CMA to analyse most transactions. In the majority of cases that do not raise substantive issues, the CMA will not need such information, and is unlikely to have the time to review the large volume of documents that such a request is likely to produce.</i></p>		
<b>Counterfactual</b>	✓	✓	✓	✓ As per the draft Merger Notice	✓ As per the draft Merger Notice
<b>Market definition</b>	✓	✓	✓	✓ As per the draft Merger Notice	✓ As per the draft Merger Notice
<b>Horizontal effects;</b>	✗ (detailed	✗	✗	✗ The level of detail	The Merger Notice

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<b>vertical effects; conglomerate effects</b>	information is only asked for where the merger creates combined market share of 10% or more; for vertical effects information was only required where either party had more than 15% share of supply of any input or output in a vertical supply chain; no data requested on conglomerate effects - these thresholds were too low)		The current and draft Merger Notice ask for an extensive level of information to assess horizontal, vertical and conglomerate effects e.g. variable profit margins, and supporting documentation on how pricing is determined.	asked for in Questions 15 - 19 should be limited to cases where there is an affected market, and the CMA should decide whether it needs this information on a case by case basis. We can see no reason why such information would be necessary for a notification to be deemed complete before the CMA. For Question 16, we suggest bidding data for the last one to three years should be sufficient for the CMA's assessment (rather than one to five years).	should not ask for this level of detail in cases where there are no affected markets, as it is unlikely to be relevant to the CMA's assessment.
<b>Buyer power; loss of potential competition</b>	✓	✓	✓	✓ As per the draft Merger Notice	Not relevant
<b>Entry or expansion</b>	✓	✗	✗	✗ The information in the draft Merger Notice	Not relevant

<b>CATEGORY</b>	<b>OFT MERGER NOTICE</b>	<b>CURRENT CMA MERGER NOTICE</b>	<b>DRAFT CMA MERGER NOTICE</b>	<b>BM VIEW: AFFECTED MARKETS</b>	<b>BM VIEW: NO AFFECTED MARKETS</b>
			The current and draft Merger Notice ask for detailed information on barriers to entry and expansion. We agree (as per guidance note 21) that this information should only be requested where the parties wish the CMA to consider potential entry or expansion but suggest that this information asked for be limited to cases where there are affected markets.	should only be asked for in cases where there are affected markets.	
<b>Efficiencies and customer benefits</b>	✓	✓	✓	✓	Not relevant
<b>Third party contact details</b>	✓ (top five competitors and top five customers)	✗	✗ We welcome the proposal to consolidate all of the third party contact details likely to be required into a single question. However, the draft Merger Notice asks for a disproportionately large number of contact details, which presents a significant burden on the notifying parties, and we suggest that the top five competitors and customers should be sufficient in cases where there are affected markets. In cases where the CMA requires further contact details the CMA can request such additional details by means of an information request post-	✗ We think that contact details of the top five customers and competitors should only be requested in cases with horizontal overlaps where there are affected markets. The CMA has placed a threshold for candidate markets with conglomerate effects - we consider that a threshold should also be introduced for	In cases where there are no affected markets, contact details of the top three competitors and top three customers should be sufficient. We note that the EU Short Form CO only asks for contact details for the top three competitors.



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			notification.	horizontal overlap cases.	