CMA's Consultation on a revised merger notice

(22 March 2017)

Response by Freshfields Bruckhaus Deringer LLP

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Freshfields Bruckhaus Deringer

RESPONSE TO THE CMA'S CONSULTATION ON

A REVISED MERGER NOTICE

dated 22 March 2017

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP (***Freshfields***) welcomes the opportunity to comment on the CMA's consultation on a revised merger notice dated 22 March 2017 (the ***Consultation***).

1.2 Our comments below are based on our substantial practical experience of mergers under the UK merger control regime and of comparable merger control regimes in the European Union (***EU***), the United States (***US***) and Asia as a legal adviser to our clients. However, the comments in this response are those of Freshfields Bruckhaus Deringer LLP and do not purport to represent the views of our clients.

1.3 Terms defined in the Consultation have the same meaning in this response.

1.4 This response is set out as follows:

(a) First, we set out our current concerns about the pre-notification process, which addresses question 2.2(a) of the Consultation (**Section 2**);

(b) Secondly, we suggest additional improvements as to the merger notice, which addresses questions 2.2(d) and 2.2(e) (**Section 3**); and

(c) Finally, we set our comments on the proposed changes contained in the revised merger notice, which addresses questions 2.2(b) and 2.2(c) (**Section 4**).

2. Merger Notice – fitness for purpose

2.1 Whilst we agree that engagement between the parties and the CMA at the pre-notification stage has been broadly beneficial, in particular, for complex merger cases, we consider that the CMA's current approach to pre-notification has resulted in a process which has become too burdensome and time-consuming for notifying parties.

2.2 The benefits of having an opportunity to discuss the substantive issues of a merger at the pre-notification stage must be balanced with the parties' needs to notify a merger formally, for example where a deal timetable necessitates it. Introducing further information requirements into the merger notice which are not targeted on a case-by-case basis will merely introduce further delay to the overall pre-notification process.

2.3 The increasing length of the pre-notification period has increased uncertainty for the timetable of notifiable transactions, which has increased the risks to notifying parties. The CMA's own statistics provide that the average pre-notification periods for 2015/16 and 2016/17 were 34 working days and 33 working days respectively. In the same presentation, the CMA acknowledged that "*pre-notification could be more streamlined and efficient.*" The CMA's approach to pre-notification must also be considered in light of its statutory 40 working day review period to conduct its Phase I investigation, a period which is significantly longer than many Phase I reviews in

other jurisdictions, including the EU. Despite this, the CMA's pre-notification period is comparatively long compared to these other jurisdictions.

2.4 The addition of non-tailored information requirements in 'pre-notification', as set out in the merger notice, has been counter-productive and has resulted in an increased burden on notifying parties without commensurate benefits accruing to the CMA. In particular:

(a) 'Cherry-picking' components of other regimes' information gathering requests has resulted in the current baseline level of disclosure in pre-notification becoming too high. Certain provisions contained in Part III (supporting documents) and Part V (contact details) of the revised merger notice go even further than the European Commission's (***EC***) requirements and the requirements imposed under the HSR Act in the US;[1]

(b) The merger notice now requires parties to provide in pre-notification information previously produced during a Phase I investigation or even Phase II, despite the previous regime working well;

(c) Whilst the CMA may consider that aligning its pre-notification information requirements with those required under the EC's merger regime is beneficial, adopting many of the same requirements without also adopting the associated checks and balances, which mitigate the burdens placed on notifying parties (such as setting out the circumstances under which 'waivers' will be granted and providing for a Short Form CO process), has resulted in the CMA's regime becoming significantly more onerous for notifying parties than the EC's equivalent regime. The revised merger notice fails to remedy this short-coming.

3. Other improvements the CMA should consider

3.1 We consider that the Consultation would be better served by considering more fundamental changes to the merger notice. We suggest that the following additional changes should be made.

3.2 **Set out guidance in the merger notice on circumstances where the CMA would be willing to accept more tailored responses for filings where there are limited substantive issues, setting out which information requirements in the merger notice could be dispensed with in cases of that type.**

(a) The CMA's current approach results in much expensive and unnecessary work for notifying parties in many cases. The CMA should explicitly state that it has reduced expectations for pre-notification engagement in cases with limited substantive issues and should set out in its guidance which information the parties would not normally be required to submit. In addition, for these cases the CMA should commit to additional flexibility in the pre-notification process and commit to a shorter pre-notification period.

[1] Hart-Scott-Rodino Antitrust Improvements Act of 1976.

3.3 **The CMA should commit to, at the very least in line with the EC's best practice,[2] certain timing goals in order to reduce the pre-notification period**. In particular:

(a) Commit to completing the pre-notification process within four weeks for all but the most complex of cases. By giving a clearer indication of the expected length of the pre-notification period, the CMA would reduce transaction timetable risk. For complex cases, a longer specified pre-notification period could be agreed between the CMA and the notifying parties.

(b) Require confirmation of a Satisfactory Notice to be given within five working days, and within two working days for cases where the parties have engaged in pre-notification. Given that the CMA seeks an active, collaborative engagement between the parties, it would be highly beneficial to notifying parties to have a specified time period within which they could expect the CMA to confirm whether a submitted notice constituted a Satisfactory Notice. In cases where the parties have engaged in constructive pre-notification there can be no justification for this taking undue additional time.

(c) Commit to providing responses to requests or queries by the notifying parties within 3 working days. This would ensure that the pre-notification process is an efficient, collaborative process between the CMA and the notifying parties and would reduce unnecessary delays.

4. Our comments on the specific proposed changes in the revised merger notice

4.1 Below we set out comments on the specific proposed changes.

Paragraph 21-24 of the preamble of the revised merger notice.

4.2 We welcome the further clarity in the preamble to the merger notice to confirm that there are circumstances in which it would not be necessary for notifying parties to provide certain information requested in the merger notice. We do however consider that this paragraph should be amended to include further guidance for filings which the parties consider have limited substantive issues and explicitly set out the more limited set of information (which would constitute a Satisfactory Notice) that parties can provide in those cases.

Changes to question 8-10 of the revised merger notice.

4.3 We note and welcome certain amendments to the scope of internal documents required in the revised merger notice. In particular:

(i) the removal of the requirement to provide *"marketing and advertising strategy documents"*[3], and

(ii) the clarification that the CMA "*would not expect to receive documents such as emails, handwritten notes, or instant messages*".[4]

4.4 However, we are concerned that the supporting documents requirements in Part III of the revised merger notice remain disproportionate and unwarranted because in a

[2] See paragraph 15, "*DG Competition: Best Practices on the conduct of EC merger proceedings*".
[3] Question 10(b)(i) of the revised merger notice.
[4] See guidance note to question 10 of the revised merger notice.

substantial proportion of cases, the CMA will not even need to review these documents in order to make a decision on whether the notified transaction may raise competition concerns. Therefore, the documents required for a Satisfactory Notification should be set at the minimum necessary level, and the CMA should issue tailored requests, in Phase I or II as appropriate, for any additional documents if merited by the transaction.

4.5 Furthermore, the CMA's pre-notification requirements should not include documents that are typically only requested by other applicable competition regimes, such as the EU or the US, in the course of an in-depth investigation. These include:

Documents analysing alternative options for acquisitions

(a) In our view, the requirement under question 9(b)(i) to provide documents which relate to "*any analysis of the merger in relation to potential alternative acquisitions*" is an unnecessary addition and appears contrary to the CMA's objective of reducing the regulatory burden for unproblematic mergers. Documents analysing acquisitions other than the notified transaction are irrelevant to the analysis of the notified transaction and therefore go significantly further than is necessary to conduct a Phase I review.

(b) The expanded scope also raises concerns in relation to the protection of third party confidential information which may raise additional process issues.

(c) Although the wording in 9(b)(i) mirrors the wording set out in section 5.4 of the Form CO, we do not consider that this is a good basis for determining the relevant scope for the provision of these types of documents. This provision is controversial in the Form CO and is typically of very limited practical relevance to the EC's investigation. Notably, this wording does not appear in the Short Form CO, which underscores the point made in section 2.4(c) above.

(d) The requirements of the HSR Act do not contain a similar requirement to provide documents relating to the merger in the context of potential alternative acquisitions. Instead, a similar requirement is included in the FTC's and DOJ's respective model second requests,[5] i.e. at the Phase II stage only.

(e) Therefore, we recommend that the CMA removes this reference from the revised merger notice altogether. In the unusual circumstances that these documents are relevant to a particular case, the CMA can expressly request them by means of a tailored RFI.

Clarification of the custodians

(f) The inclusion of "*senior management or shareholders*" is too broad, and the scope of documents that may be responsive to question 10 goes significantly further than the requirements under section 5.4 of the Form CO and the HSR Act section 4(c) and (d).[6]

[5] See question 19 of the FTC model second request and question 28 of the DOJ model second request.
[6] In the EU, the information requirements under section 5.4 is limited to the board of management, the board of directors and the supervisory board of the relevant companies; and in the US, the requirement is limited to officers and directors.

(g) In particular, the reference to shareholders raises serious concerns. Firstly, the CMA does not provide any criteria by which parties could determine which shareholders would be captured by this requirement. Secondly, in many cases the requirement will not be possible for the notifying parties to comply with as documents prepared by shareholders may not be under their custody or control. In any event, the inclusion of shareholders in the custodian list is disproportionate and likely to result in the capture of communications that go beyond the reasonable scope of what the CMA needs to commence its Phase I review. We recommend that the CMA removes this reference from the revised merger notice altogether.

Requirement to provide documents setting out commercial strategy

(h) Under revised article 10(b)(ii), the merger parties are required to provide documents which "*set out the commercial strategy (including, but not limited to, pricing, target customers (or customer groups, possible changes to product or service composition or quality, and the potential for sales growth or expansion).*" This request places a disproportionate burden on the merger parties to collate documents and should not be required at the pre-notification stage. Notably, under both the EU and the US merger control regimes, these types of documents would only be requested in Phase II (or under a second request), i.e. in the context of more complex and potentially problematic mergers, and are not required to commence a Phase I review.

The market share below which internal documents are not required

4.6 We welcome the clarification that internal documents required under question 10 typically do not need to be provided to the CMA where the merger parties' combined share of supply does not exceed 15%.[7] However, we consider that the thresholds under which documents are not expected to be provided should be increased to 20%, so as to ensure that significant and costly information gathering is only required of parties in circumstances where it is likely to be necessary for the CMA to engage actively with the parties' internal documents and to align it with the market share thresholds for which information is not usually required in the Form CO.

4.7 In addition, under the revised merger notice, "*the CMA may – having regard to the specific circumstances of the case at hand – require a broader set of documents to be produced in response to this question.*" From our experience, increasing these thresholds will help counteract the tendency to err on the side of caution even when it is plainly clear that the information requested is unnecessary.

The addition of new question 14 (share of supply) to the revised merger notice.

4.8 The terminology in the revised merger notice's guidance fails to properly distinguish between the jurisdictional threshold under question 5 ("*share of supply in the UK, or in a substantial part of the UK*") and the substantive assessment under question 14 ("*plausible Candidate Markets*"). Rather than references to "*share of supply*" it would be clearer to refer to the need to produce "*market shares*" for Candidate Markets.

[7] See guidance note to question 10 of the revised merger notice.

4.9 In addition, the Guidance Note to question 14 states, inter alia, that a Satisfactory Notification "*is likely to require*" the share of supply for "*the narrowest plausible Candidate Market,"* but also that the CMA "*is likely to request*" the share of supply for those Candidate Markets where the combined "*share of supply*" is more than 25%. This contradicts the wording of question 14 itself that the "*share of supply*" for "*each Candidate Market in which the merger parties overlap*" is required. We would welcome the CMA clarifying its approach and, in particular, what its default expectations are in respect of the requirements for a Satisfactory Notice.

4.10 Moreover, the requirement to provide share data for "*several years (typically three to five years)*" in all cases where shares of supply may vary,[8] is excessive and disproportionate, in particular in the context of non-problematic mergers reviewed in Phase I. It should be limited to three years so as to align the period requested with other information requests in the merger notice.

4.11 Under the revised merger notice, the notifying parties have to provide their shares in all Candidate Markets (or at least the narrowest markets) in which they have a vertical relationship. This is a substantial extension of the current position which simply requires the merger parties to confirm that their respective shares of supply are below 10%. In addition, where the parties have a vertical relationship where the combined shares of (or both) a pair of upstream and downstream Candidate Markets is below 30%, we suggest that the information requirements in respect of those markets should be much more limited, for example by not requiring the parties to provide market shares in those Candidate Markets of competitors at first instance. This would reduce the burden on parties whilst allowing the CMA to request this data if necessary.

Changes to Guidance Note to question 15 (Horizontal Effects) of the revised merger notice.

4.12 The proposed changes to the guidance for question 15 suggest that the provision of capacity, switching data and variable profit margins is now the default position, even where it is unclear what benefit the CMA would obtain from this information at the pre-notification stage. We suggest that the guidance note is redrafted to make clear that the requirement to provide capacity data, switching data and variable profit margins is decided on a case-by-case basis and is only necessary where the CMA indicates as such. The merger notice should be cautious in mandating the provision of types of information which are unlikely to be necessary for all but the most complex of cases.

4.13 Notwithstanding our concerns above, the guidance note to question 15 would benefit from increasing the thresholds (from the current 15% level) at which the notifying parties will not typically have to provide information on capacity, switching data and variable profit margins in relation to a Candidate Market. We suggest that a figure of 20% would be more suitable as it would align with the market share thresholds (at the horizontal level) for which information is not usually required in the Form CO.

Changes to the guidance note to question 16 (bidding data).

4.14 Whilst we note that providing bidding information at the pre-notification stage can in certain circumstances be beneficial for the efficient determination of a case, we note

[8] See guidance note to question 14 of the revised merger notice.

that the provision of data to the level of specificity and detail set out in the Guidance is typically provided to agencies internationally in Phase II cases. It should not be necessary to provide a full "bidding study" in pre-notification for the CMA to undertake a Phase 1 assessment.

4.15 We agree with the guidance that the period for which bidding data is likely to be provided will vary by the specific circumstances of the case. Whilst we agree that there are certain markets which lend themselves to requiring that historic bidding data is provided, we have concerns that the current drafting is likely to result in the default position being that five years of bidding data is required. Our extensive experience has given us first-hand knowledge of how difficult this data can be to collect in the prescribed form, particularly historic data. We therefore suggest that the guidance makes clear that data for between **one and three** years is likely to be requested, so as to align the time period for the data with other requests in the merger notice but making clear that the CMA can seek a longer period in exceptional circumstances, for example where an industry characterised by an infrequent bidding process requires that bidding data needs to be provided for a longer period.

Question 18 (loss of potential competition).

4.16 We consider that the revised merger notice would benefit from providing guidance on how the CMA interprets "*plans*" for supplying new products/services/geographic areas in the context of this question. Further guidance on the CMA's approach as to what constitutes a "*plan*" would aid parties and practitioners, and likely reduce extensive discussions between the CMA and the parties and the associated time and cost that comes with those discussions.

Changes to questions 21-24 (Entry or expansion/Countervailing Buyer power/Efficiencies and customer benefits).

4.17 We welcome the clarification that responses to these questions are only required where notifying parties would like the CMA to consider these aspects, and therefore are not required to be provided in other instances. However, we are concerned about the additional guidance note to questions 21 to 24 (page 26 of the revised merger notice), which provides that the CMA will only consider information responsive to questions 21-24 if it is provided during the pre-notification period and will not consider responsive information provided during Phase I.

4.18 This change would eliminate the ability of notifying parties to provide the CMA with information that is responsive to concerns the CMA may raise at Phase I but which the parties, on their assessment, did not consider was likely to raise competition concerns. In such a scenario, we do not think it would be appropriate for the CMA to disregard information provided by the parties which may be relevant to the CMA's assessment. Whilst we understand the CMA's desire to ensure that it is able to consider arguments put forward by the notifying parties in a timely manner, we do not consider such a hard and fast prohibition is required to achieve this. In any event, the prohibition would likely have the effect of potentially increasing instances where cases such as those described above were referred to Phase II. We consider that this would not be a beneficial consequence for either the notifying parties or the CMA, and would create a category of situations where Phase II referrals could arise as a consequence of incomplete information rather than as a consequence of an analysis

which takes into account all relevant considerations. As such, we strongly suggest that the guidance note is amended or removed.

Questions 26-29 (consolidation of the requests for third party contact details).

4.19 We welcome the proposed organisational change to the revised merger notice to group the contact details section together in the merger notice for ease of reference for notifying parties. We are concerned however that the contact detail provisions to achieve a Satisfactory Notice remain overly inclusive and more onerous than the equivalent requirements under the Form CO, which provides that the contact details for only the top five customers in each affected market must be produced.[9] There does not appear any good reason why the merger notice should go further in its the requirements on the notifying parties than other applicable merger control regimes simply to establish a satisfactory notification. Aligning the contact detail requirements with the requirements set out in the Form CO would be a welcome step and it of course remains open to the CMA to seek additional contact details in appropriate cases should that be necessary for the CMA's investigation.

4.20 Additionally the revised merger notice fails to offer clarity on the provision of competitor details. It is our experience that notifying parties often do not have contact details for competitors at the level of detail required by the merger notice. At the very least, the guidance should make clear that the requirements to provide contact details for competitors are more flexible in quantity and form than customer details.

5. Conclusion

5.1 We welcome the proposed revisions to the merger notice and Guidance to align them more closely to the CMA's actual conduct of merger control reviews. We remain concerned, however, that "cherry picking" specific informational requirements from other international regimes has resulted in a system overall that is now weighted too heavily towards pre-notification. This has increased the time, burden and cost of pre-notification excessively in the majority of cases when information of the detail and specificity requested is in reality only really needed for more challenging cases and, even then, not all in pre-notification. We would be happy to discuss any of these issues further with the CMA at any time.

Freshfields Bruckhaus Deringer LLP

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[9] See section 8.15(b) of the Form CO.