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CMA'S CONSULTATION ON THE REVISED MERGER NOTICE

RESPONSE OF ASHURST LLP

Introduction

Ashurst LLP welcomes the opportunity to respond to the consultation by the Competition and Markets Authority ("**CMA**") on its consultation "*Mergers: revised merger notice*" (22 March 2017) ("**the revised Merger Notice**"). This response contains our own views, based on our experience of advising and representing clients on merger control issues, and is not made on behalf of any of our clients.

Please note that this is a non-confidential version of our response. We have separately provided a confidential version which includes additional confidential information related to our experience of advising and representing clients. We confirm also that we would be happy to be contacted by the CMA in relation to our responses.

1. **Is the revised merger notice fit for the purpose of setting out the categories of information that are necessary to enable the CMA to assess a merger?**

1.1 Notwithstanding the revisions which are proposed and clarifications which have been added, the Merger Notice remains a demanding document to complete, which takes a highly inclusive and detailed approach as regards the information and evidence which are required to achieve "Satisfactory Notification" status. In addition, there are extensive warnings in the Merger Notice notes that parties will need to consult with the CMA in pre-notification discussions in order to know exactly what is required in preparing a complete notification in relation to their particular case. Moreover, the CMA enjoys complete discretion as to whether the Merger Notice has been satisfactorily completed and therefore when the statutory timeframe commences. This enables the CMA to front-load a significant proportion of the investigation process into the pre-notification phase. This means that it is rare – certainly in cases with any degree of complexity – that an apparently complete Merger Notice will be considered satisfactory without a number of rounds of supplemental requests for detailed information and data during pre-notification discussions. The working assumption, in our experience, is therefore that even an apparently complete draft Merger Notice will not contain all the information desired by the CMA to start the clock.

1.2 It is far from clear that the emphasis on pre-notification discussions to deal with as much as possible of the information gathering process (which used to be considered to be the first phase of the substantive investigation process) is consistent with the spirit of the reforms to the Enterprise Act 2002 under the Enterprise and Regulatory Reform Act 2013. In particular, our experience is that the true "end to end"[1] length of Phase 1 has materially increased in many cases.

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[1] In its original consultation on introducing statutory timescales for Phase 1 merger control, the Department for Business, Innovation and Skills ("BIS") argued that "*… the introduction of statutory timescales could achieve quicker results and outcomes for businesses and consumers. It could also give business certainty as to when decisions would be made and could incentivise a speedier end to end merger process*" (see the BIS consultation document "A competition regime for growth: a consultation on options for reform" (March 2011) at paragraph 4.43 (emphasis added)).

1.3 From a practical perspective, it is of course in our clients' interests to have a thorough Phase 1 process, if that means that concerns can be eliminated and a Phase 2 reference avoided. Businesses are willing to invest the additional time, effort and costs in order to secure a Phase 1 clearance. Our point is that the certainty and predictability claimed for the introduction in 2014 of the statutory timeframe and pro forma Merger Notice have been largely circumvented in practice. Overall, the UK remains amongst the most burdensome and lengthy Phase 1 processes globally, which the proposed revisions to the Merger Notice will not significantly change.

2. **Do you agree with the proposed changes?**

2.1 Broadly speaking, we have no objection to the changes proposed.

2.2 We welcome the increase in the market share threshold from 25 per cent to 30 per cent for the need to provide more detailed information about vertical or conglomerate effects.

2.3 We also welcome the clarification that a bespoke submission will be acceptable (with cross references to demonstrate that all required information has been provided).

3. **Do you disagree with any of the proposed changes? If so, why?**

3.1 We have no objections.

4. **Are there any other aspects of the revised merger notice that are not sufficiently clear at present?**

4.1 We believe that the revised Merger Notice is sufficiently clear.

5. **Are there any other changes to the current revised merger notice that the CMA should consider? In particular, are there any questions in the revised merger notice that could be removed?**

5.1 We note that there is a specific question about efficiencies and relevant customer benefits. For the benefit of those less familiar with the merger control regime, it might also be useful to include an optional question where parties wish to claim eligibility for the de minimis exception for mergers of insufficient importance which do not warrant a Phase 2 reference. There is a general perception that this exception may become more significant post-Brexit if the CMA sees a significant increase in merger notifications and wishes to prioritise larger cases with a greater market impact. A new optional question about de minimis might contribute to highlighting cases where the exception may be in play.

6. **Views on any other aspects of the revised merger notice**

6.1 As a minor practical point concerning the consultation process overall, it would have been very helpful to have a blacklined version comparing the current Merger Notice to the proposed revised draft.

April 2017
Ashurst LLP