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Our ref: RSJ/099608.00000
Your ref: Consultation: Revised Merger Notice

11 April 2017

Dear Ms Nizam

Thank you for the opportunity to respond to the consultation on the CMA's draft revised Merger Notice. We respond to four discrete proposed changes to the Merger Notice, namely:

- (a) the new requirement for merging parties to explain why they are not providing information;
- (b) the new requirement for merging parties to provide working files used to calculate shares of supply;
- (c) the new requirement for parties to provide documents in their original electronic format; and
- (d) the new prescribed format for providing contact details.

We address each of these points in turn below. We also comment generally on the format of the Merger Notice.

- 1 The requirement for parties to explain why they are not providing information (paragraph 22)**
 - 1.1 At 48 pages and over 14,000 words, the Merger Notice in its current form is considerably longer than the Form CO used by the European Commission (21 pages and slightly over 9,000 words). The difference is largely down to the fact that Merger Notice adopts a "kitchen sink" approach and contains a comprehensive list of what a competition authority *may* need to evaluate a merger, whereas the Form CO contains a list of what a competition authority *must* have in order to evaluate a merger.
 - 1.2 Historically, the CMA and its predecessor, the OFT, allowed merger notifications to take the form of either a Merger Notice or informal submission. Our experience has been that most notifying parties choose to make informal submissions in part due to the extensive information requirements contained within the Merger Notice. As a result, a merger notification to the CMA has, historically, not necessarily been any more burdensome than a notification to the European Commission.
 - 1.3 We welcome the retention of the informal submission mechanism. However, the requirement for merging parties to explain why information requested in the Revised Merger Notice has not been

provided moves UK merger notification closer to the more prescriptive format of EU merger notification.

- 1.4 An informal submission can no longer be silent on information requested in the Revised Merger Notice: it must set out why this information has not been provided. This effectively shifts the onus from being on the CMA to explain why information not provided is needed to the notifying parties, who must explain why information is not being provided. Without any corresponding reduction in the information required by the Revised Merger Notice as compared to the Merger Notice, this has the potential either:
- (a) to increase drastically the information provided to the CMA; or
 - (b) prolong prenotification discussions between the CMA and notifying parties regarding the information to be provided.

2 The requirement for parties to provide working files used for the calculation of shares of supply (guidance note to question 14)

- 2.1 It is unclear why the Revised Merger Notice requests the working files used by the parties to estimate market shares.
- 2.2 Such working files may be subject to legal advice privilege, for example if they have been created for the purpose of seeking or giving legal advice on merger filing requirements worldwide. Often, several potential share of supply estimates are generated by merging parties and legal counsel as part of the jurisdictional analysis. Many of these estimates are abandoned or adjusted as information comes to light which renders them less accurate or meaningful. The justification for legal advice privilege, in that it allows clients to have a full and frank discussion with their lawyers, clearly applies to the generation of these estimates.
- 2.3 If the CMA expects to request a waiver of privilege in relation to working files, this requirement should be made explicit in the Revised Merger Notice. As a matter of principle, we consider that any requirement for such a waiver should not be made lightly and should be robustly justified. A waiver of privilege is not currently required in leniency submissions and it is unclear why one should be required in merger submissions.
- 2.4 Given the UK's voluntary merger notification regime, a requirement for a waiver is likely to be a disincentive to parties notifying mergers.
- 2.5 Further, working files related to share of supply estimates can be incomprehensible to third parties without lengthy explanation. Requiring such explanation would place an additional burden on notifying parties, with less than clear benefits for the CMA's ability to consider the merger.
- 2.6 As an alternative, the CMA could consider requesting a summary of the methodology used for calculating the market shares provided by the merging parties in their submissions and an explanation of why this method was chosen.

3 The requirement for parties to provide documents in their original electronic format (paragraph 20)

- 3.1 At paragraph 20 of the Revised Merger Notice, the CMA requests that documents be provided in their original electronic format (rather than scanned or converted into pdf). There are practical issues with this requirement.

3.2 The paragraph is silent on whether or not the CMA has made this stipulation because it wishes to review any metadata attached to these documents. Notifying parties' approaches to metadata are likely to differ, as it is standard practice within many businesses (but by no means all) to strip metadata automatically from documents when they are emailed. We anticipate that, should the CMA review metadata as a matter of course, the CMA will find it difficult to distinguish between those cases where metadata is being not being provided deliberately and those where it has been erased as part of an automatic data security process.

3.3 Additionally, certain documents (for example spreadsheets which update from external sources on a company network) may be unusable in their native formats when provided to the CMA.

3.4 One explanation for this new requirement may be that the CMA has, historically, found it useful to be provided with text-searchable documents from which it can copy and paste text and diagrams but has often been provided with documents in a format which do not permit this. An alternative, which would solve this issue but avoids the above problems, would be for the CMA to require that text-searchable electronic documents are provided to it.

4 Contact details template

4.1 The Revised Merger Notice refers to an Annex which sets out the form for contact details to be provided. However, this Annex has not been provided with the consultation. We suggest that the CMA adopts the format used by the European Commission for merger notifications under the EUMR.

5 Format of the Merger Notice

5.1 As before, the Merger Notice follows the format of a short question, followed by an extensive guidance note. The guidance note provides extensive additional information about the requirements of the CMA, including whether or not the question has to be answered. The guidance note can also (for example, in the case of question 17), break the question down into several discrete parts and effectively ask additional questions rather than clarifying the question to which the note is attached.

5.2 While the requirements of the questions are familiar to practitioners, they can be confusing to the merging parties themselves. We suggest that the CMA consider reordering the Merger Notice so that it is more readily comprehensible. Useful amendments might include:

- (a) addressing up front the share of supply/procurement threshold above which merging parties should provide a response; and
- (b) where the guidance note states that the CMA will require several discrete types of information in response to a question, moving these requirements to the question itself.

Yours sincerely

 Adrian Magnus

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