

Response to Competition and Markets Authority
Consultation document: Mergers: Revised Merger Notice

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This response represents the views of law firm Allen & Overy LLP on the Competition and Markets Authority (CMA) draft for consultation *Revised merger notice* dated 22 March 2017 (the **Draft Notice**).

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

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 We welcome the CMA's endeavours to ensure the Draft Notice is clear, not unduly onerous and sufficiently flexible to be used in a more proportionate way. The Draft Notice and the guidance notes are generally clear, albeit very detailed.

1.2 As a general point, whilst we recognise the efforts in the Draft Notice to reduce the level of detail that is required from merger parties (particularly in relation to information on non-horizontal and coordinated effects where these issues are not likely to be relevant), we still tend to consider that the Draft Notice is onerous, and in fact arguably more so than a Form CO under the EU Merger Regulation. The extent of the actual burden in any given case will depend on the extent to which case teams are willing to grant waivers, but it is important that all CMA case teams maintain a degree of pragmatism and flexibility in their approach to assessing "completeness" as is now indicated more openly throughout the Draft Notice. We have positive experience of this on recent cases and would hope that it continues.

2. Do you agree with the proposed changes?

2.1 The Draft Notice incorporates welcome changes that further clarify the obligations of notifying parties. While we agree with the majority of the proposed changes, we have the following comments to further improve the Draft Notice.

2.2 Paragraph 20 of the Preamble to the Draft Notice clarifies a requirement to provide documents requested in their original electronic format. We hope the CMA would adopt a reasonable approach to receipt of any such electronic documents which have been necessarily converted for practical reasons, for example to improve accessibility. For example, notifying parties should not be expected to provide simple text documents and presentations that were finalised in .pdf format in their native .docx or .pptx format (when there is no practical disadvantage to the CMA in receiving .pdf format documents).

2.3 We welcome the CMA's encouragement of notifying parties to discuss with the CMA during pre-notification discussions any information that they consider should not be necessary, as outlined in paragraph 22 of the Preamble. In our experience, an open and free dialogue with the CMA, particularly in the pre-notification period, enables both the merger parties and CMA to tailor requests and responses appropriately to ensure a smooth process. However, as no formal process exists through which the CMA will grant "waivers" from the requirement to provide certain information, we would therefore be grateful for consistency between case teams as to their openness for and encouragement of such discussions.

2.4 We appreciate in particular the CMA's efforts to clarify Question 10(b)(ii) in relation to examples of relevant commercial information, and Question 18 in relation to loss of potential competition (i.e. detailed information only required if the merger party has plans or has attempted to enter a market that it does not currently supply or service in the last three years), and agree with the proposed changes.

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

3.1 In Question 9(b)(i) of Part III, we would caution against the addition of the requirement to provide any analyses of the merger in relation to potential alternative acquisitions on the grounds that such alternative acquisitions may be entirely irrelevant to the particular analysis of the merger under consideration. In the alternative, we would recommend this be caveated to refer only to potential alternative acquisitions in the same or potentially the same Candidate Markets so as to oblige the notifying parties to provide only information that would be relevant to the CMA's merger assessment. This is particularly important as the more documents that are produced, the more concerned a client may become about protecting its legitimate right to confidentiality – especially in relation to irrelevant actual or alternative transactions.

4. 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?

4.1 We are grateful for the clarification in the third bullet of paragraph 21 of the Preamble that it may not be necessary for the acquiring party to provide non-public information on the target in situations where the merger is a “hostile” acquisition. However, we note that the footnote to this bullet (footnote 9) outlines the CMA's expectation that for most acquisitions the acquiring party should be able to access any relevant information relating to the target. We would therefore propose that this footnote be clarified to refer to “non-hostile” transactions, so as to make clear the distinction in the CMA's expectations with regards to the provision of information between the two types of transactions – hostile and non-hostile – as in relation to the latter the transaction parties would usually not have entered into cooperation obligations.

4.2 We propose the addition of a materiality threshold to the example of vertical relationships used in the first bullet of paragraph 21 of the Preamble. As only “material” vertical relationships between the merging parties are likely to have a potential vertical effect on the merger, we would welcome a specific caveat to this effect.

4.3 In the Guidance Note to Question 9, the CMA encourages a complete response to Question 9 in order to ensure a Satisfactory Notification, while recognising that the question may result in a large number of responsive documents. In order to clarify what a complete response entails in light of a potentially voluminous amount of responsive material, we would suggest some additional changes. We would like to see reflected in the guidance a recommendation that the first initial production of internal documents be limited only to obviously responsive documents that go to the assessment of the effects on competition of the transaction and that are collected from key decision makers and stakeholders. In our experience, providing the CMA with a narrower set of responsive and relevant documents not only reduces the administrative burden on the notifying parties, but also allows the CMA to narrow potential issues of focus more quickly. What has worked well in the past is providing the CMA with a detailed “organogram”. This organogram would outline, among other things, the relevance of other institutional decision makers and the existence or provenance of other potentially responsive documents. We hope that this more targeted production, accompanied by a detailed outline of other relevant information, would be an appropriate balance between ensuring a complete response that contains the relevant information and avoiding an unnecessary and over burdensome document disclosure exercise.

4.4 In relation to Question 19, we propose the reinstatement of a materiality threshold to ensure that consideration of the impact of the proposed merger only takes into account the limiting of the supply of “key” inputs, as only these will be most relevant to the analysis.

4.5 In relation to the Guidance Note to Questions 21 to 24, we would welcome a softening of the CMA's position that it will not generally consider these issues within the forty working day statutory

timeframe it has to issue its Phase I decision where they are not included within the original filing. While we agree that it is best practice to consider issues such as these early on (and most appropriately during pre-notification), we also note that some issues may only arise further into the process as a result of feedback received from third parties during market testing. The CMA may wish to reflect that it is willing to consider responses to unforeseen comments received, for example, during the market testing period.