

## Prior notice of publicly proposed mergers

June 2000

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This leaflet explains the provisions of the Fair Trading Act 1973 (as amended by the Companies Act 1989 and Statutory Instrument 1994/1934) for giving prior notice of proposed mergers.

## **Introduction**

Before 1 April 1990, there was no explicit provision for any merger to be notified to the Director General of Fair Trading (the Director General). In some cases the Office of Fair Trading (the Office) learnt about a proposed merger only through the financial press. This meant that there could be a delay for the parties in receiving a decision on whether or not the merger was to be referred to the Competition Commission (the CC).

## **Background**

Sections 75A-F of the Fair Trading Act provide a voluntary pre-notification procedure to provide for the quicker handling of merger proposals. The procedures are designed to provide the Director General, in straightforward cases, with sufficient information to enable him to decide, at an early stage, that there are no grounds to recommend a reference to the CC.

The system does not require companies to notify the Director General of a proposed merger. Where companies choose to pre-notify they must do so using a standard Merger Notice (the Notice). The Notice prescribes the basic information which must be supplied to the Director General if the proposed merger is to be considered under the pre-notification procedure.

In straightforward cases where no reference is made, the merger will be cleared 20 working days after submission of the Notice. In other cases, the Director General may need further information before he can advise the Secretary of State. In those circumstances he may extend the consideration period. Thus, subject to what follows, any merger that has been properly pre-notified cannot be referred to the CC after expiry of the consideration period.

## **Publicity**

You should only pre-notify a merger proposal where its existence has already been made public. This is because the Director General may wish to seek the views of parties with an interest in the merger (customers, suppliers, competitors etc). The /You should not use the Notice to seek confidential guidance on proposals which are not yet public.

## **Submission of a Merger Notice**

A Notice may only be given by an authorised person. An authorised person is defined as any person carrying on an enterprise to which the notified arrangements relate. An authorised person may then appoint a representative, for example a firm of solicitors, to

complete the Notice on his behalf and to act for him in further correspondence with the Director General.

The completed Notice can be delivered to the Office by post or by hand before 5.00pm on any working day. Working days exclude Saturdays, Sundays, Christmas Day, Good Friday and Bank Holidays in England and Wales.

## **Timing**

The pre-notification period will begin at 9.00 am on the first working day after receipt of the Notice. Any Notice received after 5.00 pm or on any day which is not a working day, will be deemed to have been received on the next working day. The consideration period will then expire at 5.00 pm 20 working days later (or at 5.00pm on the last working day of the extension period). The Office will confirm in writing receipt of the Notice and the date on which the consideration period will expire.

A Notice may reveal potential areas of concern that the Office needs to consider further, or the transaction may be complex and the Office may need more time to consider all its implications. In these cases, the Director General will be able to extend the original consideration period by 15 working days.

If the Director General needs to extend the period, he will inform the person submitting the Notice (the pre-notifier) before expiry of the original consideration period. The Office will usually inform the pre-notifier in writing. In urgent cases it may do so by telephone with subsequent confirmation in writing.

You should bear in mind the need to reconcile submission of the Notice with the requirements of the City Code on Takeovers and Mergers. If you are seeking a decision by the first closing date of an offer, you will need to submit the Notice to the Director General before the posting of the Offer Document to allow the Secretary of State's decision to coincide with the first closing date. The Secretary of State cannot be bound by the first closing date however, and the Director General may extend the consideration period.

## **Rejection of a Merger Notice**

The Director General can reject a Notice for three reasons:

- (a) he suspects the information given to be false or misleading;
- (b) he suspects that the parties do not propose to carry the pre-notified arrangements into effect; or

(c) the parties fail to provide on time the information specified in the Notice, or any supplementary information requested by the Office.

The Director General can reject a Notice at any time during the consideration period. His decision takes effect at the time it is sent to the pre-notifier or his authorised representative. The Office will give notice of the rejection in writing, either by fax or in a letter sent by first class post. It will normally also give advance notice by telephone.

### **Requests for further information**

On receipt of the Notice, the Director General may decide that he needs further information in order to analyse the effects of the merger. He will normally make a written request for information and will specify the time by which the information must be provided. If the information is not supplied by that time, the Director General has discretion to reject the Notice.

Any information supplied in response to a written request must be given in writing by hand, post, fax or telex. Information delivered to the Office after 5.00pm, or on any day which is not, a working day, will be deemed to have been received on the next working day.

### **False or misleading information**

Section 93B of the Fair Trading Act makes it an offence knowingly or recklessly to give false or misleading information to the Director General, either in the Notice, or in response to any request for further information. It is also an offence knowingly or recklessly to give false or misleading information to any third party (eg your authorised representative or your legal adviser) in the knowledge that they will then supply it to the Director General.

The penalties for breaching this provision are severe: a fine of up to the current maximum of £2,000; or a maximum of two years in prison; or both.

### **Withdrawal of a Merger Notice**

You can withdraw a Notice at any time after it has been given but before the end of the consideration period. The withdrawal must be made in writing by the pre-notifier or his authorised representative, and must be delivered by hand, post, fax or telex.

### **Exceptions to automatic clearance of the proposed merger**

There are some limited circumstances in which a pre-notified merger can be referred to the CC after the end of the consideration period. These are where:

- (a) the Notice is rejected by the Director General;
- (b) the Notice is withdrawn;
- (c) a merger is completed before expiry of the consideration period;
- (d) before the merger(s) covered by the Notice are completed, any of the enterprises concerned enters into an unrelated merger with any other enterprise not covered by the Notice;
- (e) the merger(s) covered by the Notice are not completed within six months of the expiry of the consideration period;
- (f) any information supplied by the pre-notifier (or any associate or subsidiary) is, in any material respect, false or misleading; and/or
- (g) any material information which is, or ought to be, known by the pre-notifier (or its associate or subsidiary) is not disclosed at least five days before the end of the consideration period: Such information must be given in writing.

### **Further information**

If you have any queries, or require further copies of the Notice, contact the Mergers Branch.

Office of Fair Trading

Mergers Branch

2-6 Salisbury Square

London EC4Y 8JX

Telephone No. 020 7211 8915/8917/8452/8586

Fax No. 020 7211 8916

Email [steven.clarke@oft.gsi.gov.uk](mailto:steven.clarke@oft.gsi.gov.uk)