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## **Prior notice of publicly proposed mergers**

June 2003

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This leaflet explains the provisions of the Enterprise Act 2002 (as amended by the Enterprise Act 2002 (Merger Prenotification) Regulations 2003 – SI 2003 No 1369) for giving prior notice of proposed mergers.

## **Background**

Sections 96-102 of the Enterprise Act 2002 (the Act) provide a voluntary pre-notification procedure to provide for the quicker handling of merger proposals. The procedures are designed to provide the OFT, in straightforward cases, with sufficient information to enable it to decide, at an early stage, that there are no grounds to refer an anticipated merger to the Competition Commission (CC).

The system does not require companies to notify the OFT 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 OFT if the proposed merger is to be considered under the pre-notification procedure.

In straightforward cases where no reference is made, the merger will generally be cleared 20 working days after submission of the Notice. In other cases, the OFT may need further information before a decision can be made. In those circumstances it 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 OFT may wish to seek the views of parties with an interest in the merger (customers, suppliers, competitors etc). Therefore, 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 OFT.

The completed Notice may be delivered to the OFT by post, by hand, fax or by email before 5.00pm, together with the appropriate fee made payable to the OFT, 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 and the appropriate fee made payable to the OFT. If the appropriate fee is transmitted to the OFT via the BACS system, information relating to this transfer must be forwarded to the Mergers Branch so that the payment can be matched with the appropriate submission. 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 OFT 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 OFT needs to consider further, or the transaction may be complex and the OFT may need more time to consider all its implications. In these cases, the OFT will be able to extend the original consideration period by 10 working days.

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

As well as the standard 10 day extension the OFT may extend the total period of consideration by an additional 10 days if the Secretary of State has issued an intervention notice in respect of the case. The OFT may also extend the period for considering a merger notice if the European Commission is considering a request, in relation to the matter concerned, under Article 22(3) of the EC Merger Regulation (ECMR) or if undertakings in lieu of a reference under the Act are being negotiated.

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 OFT before the posting of the Offer Document to allow the decision to coincide with the first closing date. The OFT cannot be bound by the offer timetable however, and it has the discretion to extend the consideration period if necessary.

## **Rejection of a Merger Notice**

The OFT can reject a Notice for five reasons:

- (a) it suspects the information given to be false or misleading;
- (b) it suspects that the parties do not propose to carry the pre-notified arrangements into effect;
- (c) the parties fail to provide on time the information specified in the Notice, or any supplementary information requested by the OFT;
- (d) it considers that the notified arrangements are, or if carried into effect would result in, a concentration with a Community dimension within the meaning of the ECMR; or
- (e) the requisite merger fee is not paid at the time of submitting the Notice.

The OFT can reject a Notice at any time during the consideration period. This decision takes effect at the time it is sent to the pre-notifier or his authorised representative. The OFT will give notice of the rejection in writing, by fax, email 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 OFT may decide that it needs further information in order to analyse the effects of the merger. The OFT will normally issue a request for information by notice under section 99(2) of the Act and will specify the time by which the information must be provided. If the information is not supplied by that time, the OFT may reject or extend the Notice.

Any information supplied in response to a written request must be given in writing by hand, post, fax or email. Information received by the OFT 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 117 of the Act makes it an offence knowingly or recklessly to give false or misleading information to the OFT, 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 OFT.

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

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

A company 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 email. The merger fee cannot, however, be refunded unless the merger is caught by the ECMR, is found not to qualify, or is referred to the European Commission under Article 22(3) of the ECMR.

### **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 OFT;
- (b) the Notice is withdrawn;
- (c) the proposed 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;
- (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; or
- (h) the OFT (or Secretary of State in public interest cases) has given notice that it is seeking undertakings in lieu of reference and has not been notified by the relevant person that it is not willing to give such undertakings. If the person concerned does give such a notice, the OFT (or Secretary of State as appropriate) then has 10 working days within which to make a reference.

## **Further information**

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

Office of Fair Trading

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