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Federal Competition and Consumer Protection Act 2018  
Merger Review Regulations 2020  
Form 1 (Notice of Merger) & Guidance Notes

**GUIDANCE NOTE**  
**FEDERAL COMPETITION AND CONSUMER PROTECTION ACT 2018**  
**MERGER REVIEW REGULATIONS 2020**  
**FORM 1 (NOTICE OF MERGER) TEMPLATE FOR COMPLETION**

Preamble

**1.1. Purpose of this Guidance Note**

- 1.1.1 This Note elaborates on the nature of information that must be provided by merger parties when notifying the Commission of a proposed merger, acquisition or joint venture. The Federal Competition and Consumer Protection Act 2018 (“Act”), the Merger Review Regulations 2020 (the Regulations) and the Merger Review Guidelines 2020 (the Guidelines) specify the applicable rules, norms and procedure for merger review.
- 1.1.2 The Act requires the Commission to reach a decision within a specific timeframe. Based on the Act, the Regulations and the Guidelines, the expected timeframe for merger review together with the scope and extent of the review processes are as identified in the Notice in Respect of Timeframes.
- 1.1.3 In view of these deadlines, it is essential that the Commission is provided, in a timely fashion, with the information required to carry out the necessary investigation and to assess the impact of the merger on the markets concerned. This requires that a certain amount of information be provided at the time of notification. Merger Parties are invited to note that this Guidance Note is indicative of the minimum requirements to assure a Satisfactory Notification. The exhaustive information requirements to aid the Commission’s review functions are identified in the Regulations and Guidelines.

**1.2. Definitions and instructions for purposes of this Merger Review Regulation**

- 1.2.1 Merger party or parties: in cases where a notification is submitted by only one of the parties/undertakings who is a party to a transaction, ‘merger parties’ is used to refer only to the party/undertaking actually submitting the notification.
- 1.2.2 Party(ies) to the transaction: these terms relate to both the acquiring and acquired parties, or to the merging parties, including all undertakings in which a controlling interest is being acquired.
- 1.2.3 Except where otherwise specified, the term merger party(ies) and party(ies) to the merger include all the undertakings, companies or entities that belong to the same groups as those parties as stated in (i) above. This Form 1 requires the merger parties to define the relevant product markets, and further to identify which of those relevant markets are likely to be affected by the notified transaction.
- 1.2.4 Affected Markets: For the purposes of preparing information regarding Relevant Market(s) as it pertains to concluding Form 1, **Relevant markets that are affected by the merger are considered to be Affected Markets**. There are two senses in which Affected Markets are considered:

- (a) For the purposes of the notification, a market is considered to be 'horizontally affected' if there is at least one market in which both the acquirer and the target group of undertakings (or target assets) are present, or might reasonably be present - that is, the entities are in competition with each other and the combined market share of the merging groups of undertakings is more than 15%;
- (b) A market is considered to be 'vertically affected' if:
  - (i) either the acquirer or the target group of undertakings (or target assets) is (or might reasonably be) active in the market or such market is either downstream or upstream of another market where the other party is (or might reasonably be) active; and
  - (ii) the relevant entities' individual or combined market share at either level is at least 25%, regardless of whether a supplier-customer relationship exists between them.

If there are no horizontally or vertically affected markets, the parties may undertake a simplified procedure as specified under the Regulations .

- 1.2.5 Relevant Markets: is as defined in Section 71 of the Act and Regulation 25 of the Regulations.
- 1.2.6 Satisfactory Notification: notification which the Commission in exercising its discretion, deems acceptable.
- 1.2.7 Nature of undertaking's business: A description of the merger parties' business operations.
- 1.2.8 Strategic/ Economic Rationale: This describes in summary the corporate strategic or economic factors or reasons that underly the merger and it could include one or more of the following among other factors-
  - (i) value creation for shareholders in producing revenue or cost synergies that improve revenue generating ability and/ or result in economies of scale reducing the merged undertaking's cost structure;
  - (ii) diversification where, for example, an undertaking uses a merger to diversify its business operations by entering into new markets or offering new products or services or to diversify risks relating to its operations;
  - (iii) acquisition of assets, where a merger is driven by the rationale to acquire certain assets that are unique to the undertaking's business or cannot be developed internally in a timely manner- for example, access to new technologies;

- (iv) Increase in financial capacity where an undertaking merges to secure a higher capacity to finance its business development process through equity or debt finance.

1.2.9 Year: all references to the word year in this Form 1 must be read as meaning calendar year, unless otherwise stated. All information requested in this Form 1 must, unless otherwise specified, relate to the year preceding that of the notification.

1.2.10 The financial data requested in this form must be provided in Naira at the average official exchange rates prevailing for the years or other periods in question. Where denominated in another currency, the financial data must be converted at the average official Central Bank of Nigeria exchange rate.

1.2.11 All references to provisions of law contained in this Form 1 are to the relevant sections of the Federal Competition and Consumer Protection Act 2018, and the Merger Review Regulations 2020, unless otherwise stated.

### **1.3. Pre-notification contacts**

1.3.1 If the merger parties consider that there is a justifiable basis for any particular information to be dispensed with or provided in a varied form, they are encouraged to discuss such reasons with the Commission requesting dispensation. The Commission reserves the right to request for additional information or dispense with information which it considers irrelevant.

1.3.2 The Commission may offer pre-notification contacts which is a service offered to merger parties on a voluntary basis in order to prepare the formal merger review procedure. As such, while not mandatory, pre-notification contacts can be extremely valuable to both the merger parties and the Commission in determining, amongst other things, the precise amount of information required in a notification and may result in a reduction of the information required.

1.3.3 Accordingly, while the parties are solely responsible for deciding whether to engage in pre-notification contacts and when exactly to notify, parties are strongly encouraged to consult the Commission on a voluntary basis regarding the adequacy of the scope and type of information on which they intend to base their notification. The Commission would envisage any such contact to be at least two weeks prior to formal notification.

### **1.4. The requirement for a correct and complete notification**

1.4.1 All information required by this Form 1 must be correct and complete. The information required must be supplied in the appropriate Section of this Form.

In particular, merger parties should note that:

- (a) In accordance with Sections 93, 95, 96 and 97 of the Act, the time-limits relating to the notification will not begin to run until all the information required to be supplied with the notification has been received by the Commission. This ensures that the Commission is able to assess the notified merger within the strict time-limits provided by the Act.
- (b) The merger party or parties must verify, in the course of preparing their notification, that contact names, addresses, phone numbers and e-mail addresses, provided to the Commission are accurate, relevant and up-to-date.
- (c) If a notification is incomplete, within three (3) working days, the Commission will inform the merger parties or their representatives in writing and without delay. The notification will only become effective on the date on which complete and accurate information is received by the Commission.
- (d) Merger parties are invited to note that where they intentionally or knowingly supply false or misleading information, they may be liable to penalties provided under the Act or specified by the Commission in the form of administrative penalties. In addition, the Commission may revoke its approval of a notified merger where it is based on incorrect information for which one of the merger parties is responsible.
- (e) Merger Parties may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information required by Form 1, if such information is not reasonably available to the merger party or parties in part or in whole (for example, because of the unavailability of information on a target company). The Commission will consider such a request, provided that merger parties give reasons for the unavailability of that information and provide best estimates for missing data together with the sources for the estimates. Where possible, indications as to where any of the requested information that is unavailable could be obtained by the Commission should also be provided.
- (f) The Commission may dispense with the obligation to provide any particular information in the notification, including documents, or with any other requirement specified in this Form 1 where the Commission considers that compliance with those obligations or requirements is not necessary for the review of the case. This may be the case, for example, for straightforward mergers where there are no material overlapping activities of the merger parties. Accordingly, merger parties may submit a written request for a waiver, asking the Commission to dispense with the obligation to provide such information if they consider that that information is not necessary for the Commission's review of the case. This may also be discussed openly and agreed with the Commission during pre-notification.

- (g) Waiver requests should be submitted together with a draft Form 1 in order to allow the Commission determine whether or not the information (in relation to which a waiver is being requested) is necessary for the review of the case. Waiver requests should be made either within the text of the draft Form 1 itself or as an e-mail or letter addressed to the chief executive officer of the Commission.
- (h) The Commission will consider waiver requests, provided that merger parties give adequate reasons why the information in question is not necessary for the review of the case. Waiver requests will be dealt with in the context of the review of a draft Form 1. The Commission would normally require three (3) working days before responding to waiver requests.
- (i) For the avoidance of doubt, it should be noted that the fact that the Commission may have accepted that any particular information requested by Form 1 was not necessary for the complete notification of a merger (using the Form 1) does not in any way prevent the Commission from requesting that information at any time, in particular by way of request for information pursuant to Section 93 of the Act.

## **1.5. How to notify**

- 1.5.1 The notification must be completed in English Language. English language will be the language of the proceedings for all merger parties. Where there are documents/ information that have been prepared in any other languages, merger parties must present attested translations of such documents/ information.
- 1.5.2 The information requested by Form 1 is to be set out using the sections and paragraph numbers of the Form, signing a declaration and annexing supporting documentation. The original of the Form 1 must be signed by persons authorised by law to act on behalf of each merger party or by one or more authorised external representatives of the merger party or parties. In completing this form, the merger parties are invited to consider whether, for purposes of clarity, these sections are best presented in numerical order (ideal for each individual Affected Market), or whether they can be grouped together ( ideal for a group of Affected Markets).
- 1.5.3 For the sake of clarity, certain information may be put in annexes. However, it is essential that all key substantive pieces of information, and in particular market share information for the parties and their largest competitors, are presented in the body of Form 1. Annexes to this Form 1 must only be used to supplement the information supplied in the Form 1 itself.
- 1.5.4 For a proper investigatory process, it is essential that the contact details are accurate. Incorrect contact details (email addresses, telephone numbers, addresses) may be a ground for declaring a notification incomplete.

- 1.5.5 Supporting documents are to be submitted in English language. Supporting documents may be originals or copies of the originals. In the latter case, the merger party must confirm that they are true and complete.
- 1.5.6 One original and the required number of copies of Form 1 and the supporting documents must be submitted to the Commission. The required number and format (paper and/or electronic) of copies will be published from time to time on the Commission's website.
- 1.5.7 The notification must be delivered to the Commission's address available on the Commission's or the notification portal on the Commission's website. The notification must be delivered to the Commission on business days and during the business hours indicated on Commission's website. Submissions sent after business hours will be deemed received on the next business day.
- 1.5.8 All electronic copies of the Form 1 and supporting documents must be provided in a useable and searchable format (using appropriate Optical Character Recognition tool) as specified on the Commission's website.

## **1.6. Confidentiality**

- 1.6.1 The Commission will treat business secrets with the utmost confidentiality. If merger parties believe that their interests would be harmed if any of the information they are required to supply were to be published or otherwise divulged to other parties, they should submit this information separately with each page clearly marked 'Business Secrets' under separate cover. They should also give reasons why this information should not be divulged or published.
- 1.6.2 In the case of business combinations or in other cases where the notification is completed by more than one of the parties, business secrets may be severally submitted under separate cover, and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered complete.

## **1.7. Description of quantitative economic data collected by the undertakings concerned**

- 1.7.1 In cases in which quantitative economic analysis for the affected markets is likely to be useful, briefly describe the data that each of the undertakings concerned collects and stores in the ordinary course of its business operations and which could be useful for such analysis.
- 1.7.2 The following are two examples of cases where the data could be useful for quantitative economic analysis in those cases:
- (a) a merger between producers of retail products that are sold to final consumers and where 'scanning data' about consumers' purchases in shops are collected over a significant period of time;

(b) a merger amongst providers of mobile telephone services to end customers and where regulatory authorities for telecommunication collect data on customer switching between the providers of mobile telephone services.

1.7.3 The data description should include, in particular, information about the type of such data (information on sales or bids, profit margins, procurement process details, etc.), the level of disaggregation (per state/city, per product, per customer, per contract, etc.), the time period for which the data are available and the format.

## **1.8. International cooperation between the Commission and other competition authorities**

1.8.1 The Commission encourages the undertakings concerned to facilitate the international cooperation between the Commission and other competition authorities reviewing the same merger. The Commission encourages merger parties, where possible, to submit together with this Form 1 a list of those jurisdictions outside Nigeria where the merger is subject to regulatory clearance under merger review rules.

1.8.2 Furthermore, the Commission encourages the undertakings concerned to submit waivers of confidentiality that would enable the Commission to share information with other competition authorities outside Nigeria reviewing the same merger. Each waiver facilitates joint discussion and analysis of a merger as it allows the Commission to share relevant information with another competition authority reviewing the same merger, including confidential business information obtained from the undertakings concerned. To this end, the Commission encourages the undertakings concerned to use the Commission's model waiver, which is published on the Commission's website and updated from time to time.

## **1.9. Provision of information to employees and their representatives**

The Commission would like to draw attention to the obligations to which the parties to a merger may be subject under Nigerian law and rules on information and consultation regarding Merger transactions vis-à-vis employees and/or their representatives.



**FEDERAL COMPETITION AND CONSUMER PROTECTION ACT 2018  
MERGER REVIEW REGULATIONS 2020**

**FORM 1  
(NOTICE OF MERGER)**

**PART I- Executive summary and nature of the parties' business**

**1.1.** Provide a non-confidential executive summary (up to 500 words) of the merger, specifying the parties to the merger, the nature of the merger (for example, merger, acquisition, or joint venture), the areas of activity of the parties to the merger, the markets on which the merger will have an impact, and the strategic and economic rationale for the merger. It is intended that this summary will be published on the Commission's website subsequent to notification. The summary must be drafted so that it contains no confidential information or business secrets and will constitute Form 1 A for purposes of publication under the Act.

**1.2. Nature of the parties' business**

For each of the merger parties and the other parties to the merger, describe the nature of the undertaking's business.

**1.3. Information about the parties**

Information on merger party (or parties) and other parties to the merger

For each merger party as well as for each other party to the merger provide:

- i. name of undertaking;
- ii. name, address, telephone number, and e-mail address of, and the position held by, the appropriate contact person(s) (the address given must be an address for service to which documents and, in particular, the Commission's decisions and other procedural documents may be notified, and the contact person given must be deemed to be authorised to accept service(;
- iii. if one or more authorised external representatives of the undertaking is appointed, the representative or representatives to which documents and, in particular, the Commission's decisions and other procedural documents may be notified;
- iv. name, address, telephone number and e-mail address of, and position held by, each representative; and
- v. Power of Attorney that each representative is authorised to act.

**1.4. Information about authorised representatives**

Provide the name and contact details of:

- i. an individual within each of the merger parties
- ii. any authorised representatives of each of the merger parties

- iii. if not already provided in response to (i) and (ii), the person(s) submitting the Notice
- iv. the person to whom the Commission should address any correspondence.

### **Guidance Note to Part 1**

Merger parties can authorise a representative, for example, a firm of solicitors, to complete the Notice on their behalf and to act for them in further correspondence with the Commission.<sup>1</sup>

If merger parties do authorise someone to act in this way they must sign the authorisation at **Part III of the Notice**. If an authorised representative ceases to act for merger parties, the Commission must be advised of this immediately.

Merger parties must give the name and address of a person who is authorised to accept all correspondence and accept service or take receipt on behalf of merger parties. This may be a person within the company or merger parties' authorised representative.

**'Contact details'** include full name, telephone number, address and email address where the Commission can make contact between 9.00am and 5.00pm on working days. If any such details change, merger parties should notify the Commission immediately in writing.

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<sup>1</sup> Note, however, that the Notice must be signed by a person or persons with authority to bind each merger party (see Part VI of this Notice and the associated Guidance Notes).

## **PART II – Details of the merger, ownership and control**

### ***Description of Merger***

2. Describe the nature of the merger being notified. By reference to the provisions of Section 92 of the Act:
  - a. identify the undertakings or persons solely or jointly controlling each of the undertakings concerned, directly or indirectly, and describe the structure of ownership and control of each of the undertakings concerned before the completion of the merger;
  - b. explain whether the proposed merger is:
    - i. a purchase or lease of the shares, and interests or assets of the other undertaking in question;
    - ii. the amalgamation or other combination with the other undertaking in question;
    - iii. a joint venture.
  - c. explain how the merger will be implemented (for example by conclusion of an agreement).
  - d. timing: specify the expected time scale for exchange of contracts and completion of the merger;
  - e. explain which of the following have taken place at the time of notification:
    - i. an agreement has been concluded;
    - ii. a controlling interest has been acquired;
    - iii. the intention to launch has been announced, or;
    - iv. the undertakings concerned have demonstrated a good faith intention to conclude an agreement, including the signing of a Memorandum of Understanding or a Letter of intent or other pre- substantive agreement.
  - f. indicate the expected date of any major events designed to bring about the completion of the merger;
  - g. explain the structure of ownership and control of each of the undertakings concerned after the completion of the merger;
  - h. describe the strategic and economic rationale/justification of the merger as it affects Nigerian markets;
  - i. state the value of the transaction (the purchase price (or the value of all the assets involved, as the case may be); specify whether this is in the form of equity, cash, or other assets);
  - j. for the parties to the merger (other than the seller) provide a list of all other undertakings which are active in Nigeria or have a turnover element in Nigeria in which the undertakings, or persons, hold individually or collectively any voting rights, issued share capital or other securities, identifying the holder and stating the percentage held; and
  - k. Provide details of whether the merger is being notified in any other jurisdictions and, if so, whether the merger parties are willing to offer a waiver to support

coordination between the Commission and the competition authorities in those jurisdictions.

## **Guidance Note to Part 2**

Parties to the merger are advised to illustrate the information sought in this part by the use of organisation charts or diagrams to show the structure of ownership and control of the undertakings before and after completion of the merger.

When describing the merger parties, provide their full legal names and explain how this entity fits within a wider group structure if relevant, specifying the ultimate beneficial ownership.

Identify any legal or natural person which, directly or indirectly, owns, controls, or has material influence over (together, referred to hereinafter as ‘controls’) any one of the merger parties and is active in any of the Affected Markets identified in response to question 11 below, and any legal or natural person that any one of the merger parties controls and which is active in any of the Affected Markets.

When describing the type of transaction, indicate, for example, whether it is (a) a full merger, an agreed bid, or a full takeover, (b) the acquisition of shares and/or assets, (c) the acquisition of a minority shareholding giving material influence, (d) a change of directorship giving material influence, or (e) the formation of or change of control in a joint venture.

Where the transaction gives rise to material influence, please describe in detail the aspects of the transaction that enable material influence to be exerted, including shareholding, voting patterns, board representation and other relevant factors.<sup>2</sup>

Note that where merger parties submit that a minority shareholding does not give rise to material influence, where the Commission considers that the circumstances of the case are such that the determination of a lack of material influence is not clear cut, the Commission may nonetheless require information on the minority shareholder to be provided for the purposes of a satisfactory notification, and will inform merger parties of this.

Where merger parties are unsure as to whether or not information related to material influence is required for a satisfactory notification, they are encouraged to contact the Commission in pre-notification to discuss.

When describing the consideration, indicate its value as well as the form it will take.

The description of the key terms of the merger should include but should not necessarily be limited to any factors upon which completion of the merger is conditional together with the status of these factors.

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<sup>2</sup> For the avoidance of doubt, parties should refer to Regulations 6 & 7 of the Merger Review Regulations 2020.

The Commission considers that where mergers are subject to investigation in more than one jurisdiction, there can be substantial benefits to the merger parties and to the competition authorities in those jurisdictions from communication and cooperation between the competition authorities. If the merger has been or is being notified in other jurisdictions, please indicate whether merger parties would be willing to provide the Commission with a confidentiality waiver allowing it to exchange confidential information with the relevant competition agencies in other jurisdictions in respect of the notified merger. A satisfactory notification will not be conditional on merger parties' providing such a waiver.

If the structure of the proposed arrangements is complex, provide a diagram. Where appropriate, details of the ownership structure should include the identity and shareholdings, pre- and post-merger, of any persons holding 10% or more of the voting rights, issued share capital or other securities in the business that has been or will be acquired.

Include a description of any other links between the merger parties (either formal or informal). This should also include (but should not necessarily be limited to) any associated persons.

3. Provide a brief description of the businesses of the merger parties (and, where relevant, their groups).

### **Guidance Note to Part 2 (3)**

When describing the business or businesses over which control is being or has been acquired, if assets are being acquired, set out which assets – both tangible and intangible – form part of the acquisition and include a brief description of the main products and services supplied by the acquired business or businesses.

In the case of an acquisition, a brief description of the acquirer group's business should include a description of the main products and services provided, together with a corporate structure chart and an organisation chart (showing the names, job titles and areas of responsibility of the senior executives of the merger parties).<sup>3</sup>

Where the transaction involves a full merger or a joint venture, specify for each merger party the information identified in the preceding paragraph.

4. Provide brief details of any other transactions (merger, acquisition, disposal, joint venture) undertaken by:
  - i. either of the merger parties in the last three years which involve the products or services in any Affected Market identified in response to question 11,<sup>4</sup> and
  - ii. both or all merger parties in the last three years (that is, where the merger parties were party to the same transaction).

<sup>3</sup> If the acquirer is a conglomerate or multinational undertaking, merger parties will not generally be expected to provide such details of senior executives with responsibility only for areas of the business that do not fall within any of the Affected Markets identified in response to Question 11 below.

<sup>4</sup> Where this involves a large number of transactions, merger parties are encouraged to contact the Commission to discuss.

**PART III- Annual Turnover**

5. Indicate the annual turnover in the last financial year associated with each of:
  - a. the acquiring undertaking (including group companies where relevant); and
  - b. the target undertaking;
  - c. for foreign to foreign mergers, the annual turnover of the Nigerian component is required.

**Guidance Note to Part 3**

For turnover, provide details as prescribed by the Threshold for Merger Notification Regulations 2019 (Threshold Regulations).

## **PART IV – Supporting documents**

6. The merger party or parties must provide the following:
- a. copies of the final or most recent versions of all documents bringing about the merger, including heads of terms, memorandum of understanding, sale and purchase agreement, business purchase agreement or equivalent. Where these are not in final form, please provide the latest draft and keep the Commission informed of subsequent changes to the document, if any.
  - b. copies of the following documents prepared by or for or received by any member(s) of the board of management, the board of directors, or the supervisory board, as applicable in the light of the corporate governance structure, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting:
    - i. minutes of the meetings of the board of management, board of directors, supervisory board and shareholders' meeting at which the transaction has been discussed, or excerpts of those minutes relating to the discussion of the transaction;
    - ii. analysis, reports, studies, surveys, presentations and any comparable documents for the purpose of assessing or analysing the merger with respect to its rationale (including documents where the transaction is discussed in relation to potential alternative acquisitions), market shares, competitive conditions, competitors (actual and potential), potential for sales growth or expansion into other product or geographic markets, and/or general market conditions;
    - iii. analysis, reports, studies, surveys and any comparable documents from the last two years for the purpose of assessing any of the affected markets with respect to market shares, competitive conditions, competitors (actual and potential) and/or potential for sales growth or expansion into other product or geographic markets.

### **Guidance Note to Part 4**

Provide a list of documents mentioned in Question 6 of this part, indicating for each document, the day of preparation and the name and title of the addressee(s).

For each of the undertaking parties, provide the most recent annual report and accounts. The Commission will usually need only the most recent annual report and accounts of the main parties to the merger. However, where the acquiring company is part of a larger group, the Commission will normally also need group annual report and accounts for the past three (3) years.

It may not need group accounts for the target's parent company where the target is a subsidiary or affiliate company and separate accounts are prepared for that company. Where documents are submitted in electronic format, annual reports and accounts can be provided by way of a hyperlink.

Also, indicate the internet address or online portal, if any, at which the most recent annual reports and accounts of the parties to the merger are available to the extent that they pertain to Nigeria business, or if no such internet address exists, copies of the annual reports and accounts for the past three (3) years of the parties to the merger;

It is important that the target's undertaking turnover for the preceding business year is provided. If no annual report or accounts are available, provide separate figures (audited if reasonably practicable) on annual turnover, profits and assets. For turnover, provide details of sales exclusive of VAT and duty. For profit, provide the profit and loss accounts.

7. Provide copies of the most recent business plan of the acquirer and acquirer group (if relevant) and the target (or merger parties in the case of a full merger). Where a horizontal overlap or vertical relationship involves, for example, a specific division or brand of one or both of the merger parties, the most recent business plan for the relevant division or brand should be provided as well.
8. Provide copies of any documents in either of the merger parties' possession which:
  - a. have been prepared by or for, or received by, any member of the board of directors (or equivalent body) or senior management or the shareholders' meeting of either merger party (whether prepared internally or by external consultants); and
  - b. also,
    - (i) set out the rationale for the merger (including but not limited to the benefits of, and/or investment case for the acquisition); and/or
    - (ii) assess or analyse the merger with respect to competitive conditions, competitors (actual and potential), potential for sales growth or expansion into new product or geographic areas, market conditions, market shares and/or the price to be paid. This should include but not necessarily be limited to post-merger business plans or strategy (including integration plans and financial forecasts) and Information Memoranda prepared by or for the merger parties that specifically relate to the sale of the merger transaction. If no such Information Memoranda exist, explain what information or document(s) given to any of the merger parties is meant to serve the function of an Information Memorandum.

#### **Guidance Note to Part 4 (7, 8)**

The consideration of internal documents is an important element of the Commission's investigation and therefore a complete response to this question is necessary for a Satisfactory Notification.

The Commission encourages merger parties to discuss the process for gathering these documents with the Commission in pre-notification discussions, particularly if merger parties are unsure what documents may be responsive or if, in their case, the question may result in a large number of responsive documents.



The Commission expects that documents responsive to this question will typically include minutes of meetings, studies, reports, presentations, surveys, analyses or recommendations. In most cases, the Commission would not expect to receive documents such as emails, handwritten notes, or instant messages in response to this question.

If merger parties consider that they have no or limited documents responsive to this question (or if the documents provided contain limited information of substance), the Commission may request a list of the key members of each merger party involved in the merger and decision-making process. It may then ask for documents prepared for or by them, including substantive emails that may contain the information it would expect to appear in the supporting documents described in this question.

Further, where no Information Memorandum exists, the Commission may then use the explanation of information or documents given to the acquirer or other merger party in place of an Information Memorandum to identify and specify any documents that it wishes merger parties to provide.

Indicate (if not contained in the document itself) the date of preparation and the identity and role of the author(s) within the merger parties or external consultants.

## **PART V – Industry/Market Reports**

9. Provide copies of documents (including, but not necessarily limited to, reports, presentations, studies, internal analyses, industry/market reports or analysis, including customer research and pricing studies) in either merger parties' possession and prepared or published in the last two years which:
  - i. have been prepared by or for, or received by, any member of the board of directors (or equivalent body) or senior management of either merger party (whether prepared internally or by external consultants); and
  - ii. set out the competitive conditions, market conditions, market shares, competitors, or the merging parties' business plans in relation to the product(s) or service(s) where the merger parties have a horizontal overlap.

### **Guidance Note to Part 5**

As noted above, the consideration of internal documents is an important element of the Commission's investigation and therefore a complete response to this question is necessary for a Satisfactory Notification.

The Commission encourages merger parties to discuss the process for gathering these documents with the Commission in pre-notification, particularly if merger parties are unsure what may be responsive to this question or if, in their case, the question results in a large number of responsive documents (for example, because of a large number of overlaps).

As noted above, the Commission expects that the documents responsive to this question will typically include reports, presentations, studies, internal analyses, industry/market reports or analyses, including customer research and pricing studies.

Where merger parties consider that they have no or limited documents (or if the documents provided contain limited information of substance), the Commission may request other documents that may contain the information it would expect to appear in the supporting documents described in this question, for example, substantive emails to or from certain key individuals.

The Commission will typically not require documents responsive to this question to be provided for product(s) or (services), as identified in response to question 11, in which the merger parties' combined share of supply does not exceed 15%.

In some limited cases, the Commission may – having regard to the specific circumstances of the case at hand – require a broader set of documents to be produced in response to this question. This might include, for example, documents that have been prepared by or for, or received by, a broader set of custodians (other than the board of directors or senior management). Similarly, in some circumstances, the Commission may require the production of documents relating to product(s) or service(s) in which the merger parties' combined share of supply does not exceed 15%, or where there is a vertical relationship between the merger parties' activities. This should be discussed with the Commission in pre-notification.

## **PART VI – Competition assessment**

### ***Counterfactual***

10. If the merger parties consider that the Commission should assess the competitive effects of the merger against a counterfactual other than the current or pre-existing competitive situation, please describe that counterfactual and explain why the merger parties consider it should be used for that assessment.

#### **Guidance Note to Part 6**

Merger parties may wish to submit an alternative counterfactual from the current or pre-existing competitive situation to the merger. Where merger parties wish to do so, given the time constraints on the Commission's Phase 1 investigation, the Commission requires this to be done at the time of filing in order for the Notice to be a Satisfactory Notification.

Indeed, merger parties are encouraged to discuss such alternatives with the case team at the earliest opportunity as part of pre-notification discussions. For the avoidance of doubt, in the event merger parties do not put forward such arguments for the purposes of the Commission's Phase 1 investigation, they will not be prevented from doing so in the event of a reference for a Phase 2 investigation.

Where the merger parties contend that the acquired undertaking and/or the acquirer would have exited or would exit the market absent the merger, they should submit detailed evidence (including internal documents) as to why such exit by the failing firm would be, or would have been, inevitable. These could include, but are not limited to:

- (a) board documents (including those discussing what would happen absent the merger as well as alternative options to the merger and why these were discounted);
- (b) statutory accounts for the last three years and monthly management accounts for the last 18 months;
- (c) cash flow forecasts (including underlying assumptions);
- (d) balance sheet projections;
- (e) documents showing that underlying assumptions of these cash flow forecasts or balance sheet projections hold absent the merger;
- (f) details of current financial arrangements including "off-balance sheet" financing tools such as leasing and any additional finance that would be required;
- (g) documents that show all avenues of legal, operational and financial restructuring/reorganisation have been exhausted; and
- (h) documents showing that the firm has sought additional finance and been rejected.

Merger parties should also explain whether there would have been an alternative purchaser for the firm or its assets including, for example,

- i. how, if at all, the exiting business was marketed to potential purchasers;
- ii. to whom it was marketed;
- iii. if any expressed an interest; and
- iv. what bids were offered, and provide any internal documents assessing the bids.

Where merger parties submit that the acquired firm and/or the acquirer would have exited or would inevitably exit the market absent the merger, they should provide the name and contact details (including address, email address and telephone number) for all relevant insolvency practitioners or company voluntary arrangement practitioners working with the companies and for lenders (secured or unsecured) that have provided the exiting firm with financing.

## **PART VII – Market definition**

11. Describe the product(s) or service(s) and geographic area(s) where the merger parties overlap, where they have a vertical relationship, or where they supply related products/services.

### **Guidance Note to Part 7**

The relevant product and geographic markets serve to identify the scope within which the market power of the new entity resulting from the merger must be assessed. When presenting relevant product and geographic markets, the merger party or parties must submit their market studies and internal documents.

Horizontal overlaps include any business activity in which both merger parties are active.

Vertical relationships include any product/service or product/service types which one of the merger parties supplies, and which another merger party purchases (or could purchase as a substitute for other products), within the same geographic area. For the purposes of this Notice, it is not necessary for there to be a direct supply or purchase arrangement between the merger parties in order to constitute a vertical relationship.

Related products/services are those which do not lie within the same market, but which are nonetheless related in some way; for example, because they are complements (so that a fall in the price of one product/service increases the customer's demand for another), or because there are economies of scale in purchasing them (so that customers buy them together).

Merger parties should provide an overview and explanation of the product/services and geographic areas the merger parties supply (where they overlap, or have a vertical relationship, or where the products/services are related). Where merger parties consider it might be helpful for the Commission in understanding the products/services, provide any documents (for example, sales documentation) describing the products/services. It is not expected that this response will discuss market definition, which should be covered below.

- 12 Identify (and explain the rationale for identifying):
- i. the narrowest Affected product/service and geographic market(s) where the merger parties overlap, and (if the parties have a vertical relationship or supply related

- products/services)<sup>5</sup> the narrowest Affected product/service and geographic market(s) at each level of the vertical supply chain and for each related product/service (the Narrowest Affected Market(s)).
- ii. any other plausible Affected product/service and geographic market(s)<sup>6</sup> where the merger parties overlap, have a vertical relationship, or supply related products/services (together with the Narrowest Affected Market(s), the Affected Market(s)).

### **Guidance Note to Part 7**

Merger parties should explain (by reference, for example, to the market definition principles) why they consider that each Affected Market would or would not be an appropriate market definition for the purposes of the Commission's assessment of the competitive effects of the merger, and provide supporting evidence where reasonably practicable. Merger parties should refer, in particular, to demand-side and (if relevant) supply-side substitution considerations. Merger parties are encouraged also to refer to previous merger decisions published by the Commission and its predecessors.

Where relevant, the response should include a description of the catchment area or flows (where this is the basis on which the Commission or other relevant authorities have previously assessed mergers in the relevant sector) for the geographic area(s).<sup>7</sup>

## **PART VIII- Structure of demand and supply in affected markets**

### ***Share of supply***

- 13 Provide the structure of supply and demand (by value and, where appropriate, volume) for the undertakings and each of their principal competitors for the Affected Markets.
- 14 Provide brief explanation on the following:
  - a. Degree of product differentiation in each of the Affected Markets;
  - b. Significant entry or expansion into any affected market in the last five years;
  - c. Significant exit from any affected market in the last five years.

### **Guidance Note to Part 8 (13, 14)**

The merger parties should provide the structure of supply and demand of the merger parties and their principal competitors (typically competitors with a share of supply of 5% or more) for the Affected Market(s).

The Commission will also typically request the merger parties to provide an estimate of each of the merger parties' share of supply and demand in any other Affected Market(s) in which they have a significant combined share of supply (e.g. more than 25%).

<sup>5</sup> These are products or services which do not lie within the same market, but which are nevertheless related in some way; for example, because they are complements (so that a fall in the price of one product/service increases the customer's demand for another), or because there are economies of scale in purchasing them (so that customers buy them together).

<sup>6</sup> This may include, for example, the products/services and geographic area(s) in the Narrowest Affected Market(s) together with other products/services and geographic areas that might be considered substitutes with such products/services and geographic area(s).

<sup>7</sup> Where local markets (not national in scope) exist, the Commission strongly encourages merger parties to discuss in pre-notification the method for identifying geographic area(s) of overlap and the data they use for the same.

For the purposes of calculating share of supply, merger parties should use each undertaking's internal data and refer to third party data sources where available. Merger parties should use the most recent figures available and specify the period that they cover (in most cases, annual data for the most recent complete year should be provided).

The merger parties should identify the sources for their estimates and explain the methodology used to calculate share of supply (i.e. how these have been derived and any underlying assumptions). Merger parties should also provide a copy of any underlying third-party data used in its original format and any working files used to produce the market share calculations.

In most cases, a Satisfactory Notification will require annual data for the most recent complete year. Where shares of supply may vary significantly from year to year, it may be required to provide share data for several years (typically three to five years).

Depending on the nature of the sector in which the merger parties operate, it may be necessary to supply figures only by value (i.e. share of total value of sales in the Affected Market(s)) or volume (ie share of total units sold in the Affected Market(s)). Merger parties are encouraged to discuss this with the Commission during pre-notification if they think only one or the other will provide meaningful figures in their sector.

Where merger parties are unsure about the data that should be provided in response to this question, this should be discussed with the Commission.

### ***Horizontal effects/Merger***

- 15 Provide a description of how competition works in each Affected Market where the merger parties overlap. The description of such competitive dynamics in the Affected Market should include (but not necessarily be limited to):
  - i. information on the competitive constraint posed by each of the merger parties on each other and on the competitive constraint posed by the other principal suppliers in the Affected Market(s);
  - ii. an explanation of what drives customer choice for the overlap product/services. Where relevant, the response should include the identification of separate customer groups, if any, and an explanation of how the competitive dynamics differ across these customer groups;
  - iii. a description of the parameters of competition (for example, price, quality, service, innovation) and their importance relative to one another;
  - iv. an explanation of the role and significance of product/service differentiation (including an explanation of the extent to which the merger parties' products/services are differentiated);
  - v. an explanation of how pricing is determined (for example, whether set by suppliers, negotiated between suppliers and customers, or the result of a bidding process organised by customers), including, in appropriate cases (as explained below), supporting documentation; and

- vi. an explanation of the supply chain (including distribution channels) for the product(s)/services(s), and of any differences between separate geographic areas, where the merger parties overlap, in relation to the supply of the same products/services.

### **Guidance Note to Part 8**

The extent and detail of information that the merger parties need to provide in response to this section for satisfactory notification will depend on the complexity of the merger and on the potential competition concerns on which the Commission is likely to focus its investigation, which will typically differ between cases and sectors.

For an indication of what this might include, merger parties are encouraged to refer to previous merger decisions published by the Commission. If the merger parties are unsure as to what information may be responsive to this question in their case, the Commission encourages merger parties to contact the Commission to discuss this in pre-notification.

Where the merger parties' activities overlap within many local geographic areas and they propose to undertake filtering analysis to identify specific areas for which to provide detailed competitive assessment, merger parties are encouraged to engage with the Commission in relation to the approach to filtering before providing those individual assessments.

In most cases, the Commission's assessment is likely to focus on potential horizontal unilateral effects (ie the post-transaction ability of the merged entity to raise prices on its own without needing to coordinate with its rivals). If the Commission considers that the merger could give rise to coordinated effects, the merger parties may be required to provide additional information in relation to that potential theory of harm.

#### **Supporting documentation on determination of pricing**

Where the merger parties' combined share of supply in an Affected Market does not exceed 15%, merger parties will not typically have to provide supporting documentation in relation to how pricing is determined in that Affected Market in order for the Commission to be able to confirm that the notification is satisfactory.

Where the merger parties' combined share of supply in an Affected Market exceeds 15%, merger parties are encouraged to consider the specifics of their case and, if appropriate, discuss with the Commission in pre-notification the extent to which any such supporting documentation is necessary for a Satisfactory Notification.

In some limited cases, the Commission may – having regard to the specific circumstances of the case at hand – consider that certain supporting documentation in relation to a Affected Market is required in response to this question before it can confirm that a notification is satisfactory, even where the merger parties' combined share in that Affected Market does not exceed 15%.

Any supporting documentation provided should include, where relevant, documentation outlining the merger parties' price setting process and any analysis used to set prices.

### **Capacity, switching data and variable profit margins**

Where the merger parties' combined share in a Affected Market does not exceed 15%, merger parties will not typically have to provide information on capacity, switching data and variable profit margins in relation to that Affected Market in order for the Commission to be able to confirm that the notification is satisfactory.

Where the merger parties' combined share of supply in a Affected Market exceeds 15%, merger parties are encouraged to consider the specifics of their case and, if appropriate, discuss with the Commission in pre-notification the extent of any information on capacity, switching data and variable profit margins in relation to that Affected Market necessary for a Satisfactory Notification.

In some limited cases, the Commission may – having regard to the specific circumstances of the case at hand<sup>8</sup> – consider that, in relation to a Affected Market, certain further information on substitutability, such as information on capacity, switching data and/or profit margins, is required in response to this question before it can confirm that the notification is satisfactory, even where the merger parties' combined share in that Affected Market does not exceed 15%. Any information on capacity, switching data and/or profit margins provided should include:

- (a) an estimate of total capacity in each Affected Market, the proportion of total capacity accounted for by each of the merger parties (including a description of the location and capacity of the production/manufacturing facilities of each of the merger parties) and their principal competitors, the respective rates of capacity utilisation for each of the merger parties and their principal competitors;
- (b) if available, any data of customers switching between suppliers in the past three to five years or, more generally, information that points to the degree of competitive interaction between suppliers,<sup>9</sup> and
- (c) variable profit margins (sales revenue minus direct cost of sales) for each of the products/services where the merger parties overlap. Provide details about the income and all of the costs for each product/service and an explanation of whether such costs are fixed (and therefore excluded) or variable costs

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<sup>8</sup> For example, whether the parties' products are differentiated, whether the transaction would affect different customers in different ways, whether shares could have been calculated on a narrower basis, whether the merger involves a business with a promising pipeline product or whether shares are not an accurate reflection of market presence or power.

<sup>9</sup> This information can take various different forms and may involve pricing and volume information over time and/or in different geographic areas or competitive contexts. Merger parties may also be required to identify any relevant events (such as significant price changes) that can be illustrative, through the analysis of customers' behaviours in response to them, of customers' preferences for different suppliers.



### ***Bidding Data***

- 16 For Affected Markets characterised by bidding processes and/or where customers typically issue requests for quotations, provide bidding data setting out any bids made by each of the merger parties to win business in the overlapping markets.

#### **Guidance Note to Part 8 (16)**

##### **Bidding data**

Bidding data need only be provided for Affected Markets characterised by bidding processes and/or where customers typically issue requests for quotations. In such cases, provide details of any bids made by each of the merger parties in the last one to five years to win business in the overlapping markets, indicating for each bid (to the extent available):

- (a) whether the bid was won or lost;
- (b) if known, the reason why the bid was won or lost;
- (c) the suppliers that participated in the bid;
- (d) the winner and the ranking of the other bidders;
- (e) the date of the bid;
- (f) the value of the bid, and
- (g) the date and duration of the final contract.

The period for which bidding data are likely to depend on the circumstances of the case (but is, in practice, likely to vary between one and five years). For example, for markets in which bids are submitted relatively infrequently, the period for which bidding information should be provided is likely to be longer in order to provide a sufficiently representative sample size.

Merger parties are encouraged to use pre-notification discussions with the Commission to discuss the appropriate scope of bidding information in their case.

##### ***Increase in the merger parties' buyer power***

- 17 If applicable, for any product(s) (including raw materials) or service(s) which the merger parties both purchase, provide details of the merger parties' ability to obtain more favourable commercial conditions from suppliers as a result of this merger and the effects, if any, of such increased ability on competition at any levels of the supply chain.

### **Guidance Note to Part 8 (17)**

Where the merger parties' combined share of procurement of the products/services they both purchase on an Affected Market does not exceed 25%, merger parties will not typically have to provide any details, in relation to that Affected Market, on the merger parties' ability to obtain more favourable commercial conditions from suppliers as a result of the merger in order for the Commission to be able to confirm that the notification is satisfactory. In such cases, merger parties should indicate that the merger parties' combined share of procurement is less than 25%.

Where the merger parties' combined shares of procurement on an Affected Market exceed 25%, merger parties are encouraged to consider the specifics of their case and, if appropriate, discuss with the Commission in pre-notification the extent to which, in relation to that Affected Market, any information on the merger parties' ability to obtain more favourable commercial conditions from suppliers as a result of the merger is necessary for a Satisfactory Notification.

In some limited cases, the Commission may – having regard to the specific circumstances of the case at hand – consider that, in relation to an Affected Market, certain information relating to merger parties' buyer power is required in response to this question before it can confirm that the notification is satisfactory, even where the merger parties' combined share in that Affected Market does not exceed 25%.

In relevant cases, responses should include (but not necessarily be limited to):

- (a) the merger parties' combined share of procurement from the market upstream to the product(s) or service(s) that they supply (that is, the procurement of product(s) or service(s) which are used as input to a product or to provide a service, or that are sold on as bought);
- (b) an explanation of whether, in merger parties' view, any such ability could result in the suppliers being forced or induced to offer less favourable conditions to the merger parties' competitors. For example, where the supplier incurs fixed costs, it may recover such costs by charging a larger proportion of them to the merger parties' competitors than to the merger parties, as a result of the merger parties' increased buyer power (known as the 'waterbed effect'); and
- (c) details of the merger parties' ability and incentive to reduce demand in order to reduce the purchase price (known as 'demand withholding'), as a result of the merger parties' increased buyer power.

### ***Loss of potential competition***

- 18 Describe whether any merger party has plans or has attempted in the last three years to start supplying product(s)/service(s)/geographic area(s) which it does not currently supply but which the other merger party is already supplying (or expected to supply). If so:
- i. Provide any internal documents setting out plans of any merger party to expand in the overlapping product(s), service(s) and/or geographic area(s) or to enter a market where another merger party is operating.

- ii. Explain what barriers to entry or expansion exist for each merger party to start supplying product(s)/service(s)/geographic area(s) which it does not currently supply but which the other merger party is already supplying (or expected to supply).

### ***Vertical effects/Merger***

19 If the merger parties operate at different levels of the supply chain (that is, a merger party is engaged in activities upstream or downstream of the activities in which the other merger party is engaged), describe the impact of the merger on the ability and incentive of the merged entity to foreclose rivals (including partial and/or full foreclosure) post-transaction, either by limiting the supply of key inputs or access to customers.

### **Guidance Note to Part 8 (19)**

Where the merger parties' individual and (where relevant) combined shares of supply do not exceed 25% in either of a pair of upstream and downstream Affected Markets where they have a vertical relationship, responses to this question can typically be limited to:

- (a) a description of the vertical supply chain (including each of the merger parties' and their key competitors' roles at each stage and the extent of pre and post-merger vertical integration); and
- (b) for input foreclosure, a description of the general importance of relevant inputs to the downstream product or service; and/or
- (c) for customer foreclosure, a description of the importance of the merged entity as a customer for the upstream product or service.

Where the merger parties' individual or combined shares of supply exceed 25% on either (or both) of a pair of upstream and downstream Affected Markets where they have a vertical relationship, a more comprehensive response to this question is likely to be required.

In this case, merger parties are encouraged to consider the specifics of their case and, if appropriate, discuss with the Commission in pre-notification the extent to which, in relation to that pair of Affected Markets, any of the information indicated below or any other information may also be necessary for a Satisfactory Notification:

- (a) a description of the pricing mechanism at any stage of the vertical supply chain where any of the merger parties operates (as well as in each other relevant stage);
- (b) variable profit margins (sales revenue minus direct cost of sales) for each of the products/services supplied by each party in the vertical supply chain. Provide details about the income and all of the costs for each product/service and an explanation of whether such costs are fixed (and therefore excluded from the calculation of variable profit margin) or variable costs;
- (c) the ratio between average upstream and average downstream price for each of the products/services supplied by each merger party in each level of the vertical chain;

- (d) the degree of economies of scale or scope in the input product or service in vertical supply arrangements, if any, and the extent to which demand is characterised by network effects (that is, when the value of a product increases when the number of customers using the product increases);
- (e) if available, an estimate of cost-pass through;
- (f) a list of exclusivity agreements (to which one or other of the merger parties is a party) relating to the upstream or downstream product(s) or service(s) in the vertical supply chain and internal documents discussing plans to put in place an exclusivity agreement regarding the same in the future; and
- (g) supporting documents in relation to the products/services where the merger parties have a vertical relationship.

If merger parties are unsure what may be responsive, or if, in their case, the question results in a large number of responsive documents, the Commission recommends that merger parties discuss the process for gathering these documents with the Commission in pre-notification. Where merger parties provide no or limited documents (or if the documents provided contain limited information of substance), the Commission may request other documents that may contain the information it would expect to appear in the supporting documents described in question 9, for example, substantive emails to or from certain key individuals.

### ***Conglomerate effects/Merger***

20 If the merger parties are active in “related” markets (e.g. products that are complementary or that belong to a range of products generally purchased by the same set of customers) and their individual share in any such related Affected Market exceeds 25%, describe the impact of the merger on the ability and incentive of the merged entity to foreclose rivals (including partial and/or full foreclosure) post-transaction, either by limiting the supply of inputs or access to customers.

### **Guidance Note to Part 8 (20)**

Where the merger parties have common customers in related Affected Markets and their individual share in any such related Affected Market exceeds 25%, merger parties are encouraged to consider the specifics of their case and, if appropriate, discuss with the Commission in pre-notification the extent to which information on potential conglomerate effects is necessary for a Satisfactory Notification.

Where information on conglomerate effects is required, this is likely to include:

- (a) each of the merger parties' share of supply in each of the related product(s) or service(s) and geographic area (to the extent not already provided in response to Questions 15 & 16);
- (b) the merger parties' variable profit margins (sales revenue minus direct cost of sales) for each of the products/services supplied by each merger party in each of the related product categories. Provide details about the income and all of the costs for each product/service and an explanation of whether such costs are fixed (and therefore excluded) or variable;
- (c) the extent to which customers purchase the products/services together as a bundle or from the same supplier;
- (d) customer preferences for variety/range and one-stop shopping; and
- (e) the costs to rivals of providing variety/range and one-stop shopping at a scale to enable them to compete effectively with the merged undertaking.

### ***Entry or expansion/ Actual and potential import competition***

- 21 Where merger parties would like the Commission to consider whether or not the merged entity will be subject to constraints from potential entry or expansion, provide a description of the barriers to entry and expansion with respect to the Affected Market(s).

### **Guidance Note to Part 8 (21)**

Where merger parties may wish the Commission to consider potential entry or expansion, merger parties should provide the following information for the purposes of a Satisfactory Notification:

- (a) how easy it is to start supplying the products/services in the appropriate geographical areas/ ease of entry;
- (b) how easy it is for customers to switch between competitors' products or services, with an estimate of any switching costs;
- (c) an estimate of the capital expenditure and time required to enter the market on a scale necessary to gain a 5% share of supply, both as a new entrant, and as a company which already has the necessary technology and expertise (for example, a company located overseas);
- (d) an estimate of the scale of annual expenditure on advertising/promotion required to achieve a 5% share of supply;

- (e) details of any other factors affecting entry, for example, planning restraints, technology or research and development requirements, availability of raw materials, regulations (import & export), length of contracts including where possible, actual or estimated time and cost necessary to overcome these factors;
- (f) an assessment of the ease of exit from the market (including an estimate of to what extent costs are recoverable);
- (g) an assessment of sunk costs, i.e. irrecoverable expenses; and
- (h) an explanation as to whether entry would be timely, likely and sufficient.

Merger parties are required to take cognizance of the information requirements specified in the Guidelines and to the extent possible, make their submissions to address the identified evidentiary requirements therein.

- 22 (1) If the merger parties wish the Commission to consider potential entry or expansion in its competitive assessment, merger parties should provide:
- i. details of any expansion, entry or exit in any of the Affected Markets over the past five years; and
  - ii. details of any companies that the merger parties believe are likely, post-merger, to enter or expand into any of the Affected Markets in a sufficiently timely manner so as to adequately constrain the merged entity,

including, in either case, any available evidence for that submission and contact details for any companies named.

- (2) If the merger parties wish the Commission to consider actual and potential import competition in its competitive assessment, merger parties should provide:
- i. estimates of the actual level of import competition in the Affected Market/s over the past three years; and
  - ii. details of the price of imports as opposed to domestic production in the Affected Markets and an explanation of any divergence in these prices

### **Guidance Note to Part 8 (22)**

Merger parties may wish to submit that one or more third parties, in particular, are likely to start supplying or expand their supply of products or services in competition with the merger parties in the near future to such an extent that any competition concern regarding the merger is mitigated or neutralised.

Where merger parties wish the Commission to consider such potential entry or expansion, merger parties should, for the purposes of a satisfactory notification:

- (a) identify such entrant(s);
- (b) explain whether such entrant(s) would have started supplying the products/services in the absence of the merger and the extent to which such entry would lead to greater competition;
- (c) provide evidence of any undertakings which do not currently supply the product(s) or service(s) but which, nevertheless, could readily enter;
- (d) provide evidence of any existing smaller suppliers that could readily expand; and
- (e) explain whether any such entry would be timely, likely and sufficient.

Merger parties are required to take cognizance of the information requirements specified in the Guidelines and to the extent possible, make their submissions to address the identified evidentiary requirements therein.

### ***Countervailing buyer power***

- 23 Where merger parties would like the Commission to consider whether or not the merged entity will be subject to countervailing buyer power, explain with reference to the Regulations and the Guidelines, with any available evidence how the merged entity will be subject to this constraint.

### **Guidance Note to Part 8 (23)**

The type of information that the merger parties should provide if they would like the Commission to consider whether or not the merged entity will be subject to countervailing buyer power, they should, for the purposes of a Satisfactory Notification, include (but not necessarily be limited to) the following:

- (a) whether there are single customers or groups of customers holding particular negotiating strength with the merger parties in any of the Affected Markets (for example, where the customer(s) can easily switch its/their demand away from the supplier, can sponsor entry or supply the product(s) itself/themselves);
- (b) whether and, if so, how customers outside such groups would be able to benefit from the negotiating strength of the customers within the group. For example, explain whether contracts are negotiated individually with single customers and the extent to which it is possible for the supplier to discriminate pricing across customers of varying negotiating strength; and
- (c) how (and the extent to which) the merger will affect customers' negotiating strength.

Merger parties are required to take cognizance of the information requirements specified in the Guidelines and to the extent possible, make their submissions to address the identified evidentiary requirements therein

***Efficiencies and customer benefits***

24 Where merger parties would like the Commission specifically to consider at phase 1 any efficiencies or relevant customer benefits that the merger parties believe will arise from the merger, describe such efficiencies and provide any documents prepared internally or by external consultants that discuss such expected efficiencies or relevant customer benefits.

**Guidance Note to Part 8 (24)**

Where merger parties would like the Commission to consider whether or not the merger gives rise to efficiencies, any description should include (but not necessarily be limited to) the following:

- (a) a detailed explanation of how the merger would generate such efficiencies;
- (b) if reasonably practicable, a quantification of any such efficiencies, specifying the timeframe required to achieve them;
- (c) an explanation of the extent to which the efficiencies would be sufficient to prevent a substantial lessening of competition;
- (d) an explanation of the reasons why such efficiencies could not be achieved in the absence of this merger; and
- (e) any documents prepared internally or by external consultants discussing the expected efficiencies.

Where merger parties wish to submit that the merger gives rise to relevant customer benefits, any description should include (but not necessarily be limited to) the following:

- (a) a detailed explanation of how the merger would generate such relevant customer benefits;
- (b) if reasonably practicable, a quantification of any relevant customer benefits, specifying the timeframe required to achieve them;
- (c) an explanation of the extent to which the benefits generated by the merger are likely to be passed on to customers and final consumers;
- (d) an explanation of the reasons why such relevant customer benefits could not be achieved in the absence of this merger or a similar lessening of competition; and
- (e) any documents prepared internally or by external consultants discussing the expected relevant customer benefits.



### **Guidance Note part 8**

Merger parties who intend to submit information responsive to questions 21 to 24 are advised to do so during pre-notification in order to ensure that the Commission is able to fully verify the submissions made by the merger parties within the 60 business-day statutory timeframe.

Where the merger parties submit information after the Commission has given notice of a Satisfactory Notification, the Commission may not be able to fully verify these claims during its Phase 1 investigation (and therefore may only be able to place limited weight on these submissions) For the avoidance of doubt, in the event merger parties do not put forward such arguments for the purposes of the Commission's Phase 1 investigation, they will not be prevented from doing so in the event of a reference for a Phase 2 investigation.

### ***Other information***

- 25 Provide any other information that the merger parties consider may be relevant to the Commission's Phase 1 investigation.

### **Guidance Note to Part 8 (25)**

Merger parties should, of course, provide any other information they consider relevant in the context of the Act, the Regulations and the Guidelines. Parties should take into account that this Guidance Note only sets out the minimum information for the purposes of ascertaining a Satisfactory Notification but the Commission will be guided in its review by the Regulations and the analytical framework specified in the Guidelines.

In addition, parties may provide information that they consider relevant. These may include references to earlier decisional practice within the same markets, contacts with other government departments or regulators about the merger, either because they have responsibilities in the relevant areas or because they are customers, and any contacts with overseas competition authorities.

Merger parties are also welcome to give their own views on the competition implications or any other effects of the merger.

## **PART IX – Third party contact details**

- 26 Provide contact details for the relevant competitors and customers of the merger parties for (where applicable):
- a. each of the Affected Markets in which they overlap;
  - b. each of the Affected Markets in which the merger parties have a vertical relationship (providing contact details for the relevant competitors and customers of the merger parties in the upstream and downstream markets on which each merger party is active); and
  - c. each of the Affected Markets in which each of the merger parties provides related products/services.
- 27 To the extent applicable, provide contact details for relevant suppliers providing an estimate of the annual value and/or volume of purchases.
- 28 To the extent applicable, provide contact details for each of the companies that the merger parties consider are likely to enter and expand into any of the Affected Markets.
- 29 Provide the name and contact details, including address, and email address and telephone number, of:
- a. any relevant regulatory authorities covering the industry in which the merger parties overlap, have a vertical relationship, or supply related product(s)/service(s).
  - b. any trade associations which cover the industry in which the merger parties overlap, have a vertical relationship, or supply related product(s)/service(s).

### **Guidance Note to Part 9 (26- 29)**

#### **Third party contact details to be provided**

Contact details are used by the Commission principally for the purposes of, early in its investigation, testing the competitive effects of the merger with third parties in the sector. Merger parties are required to make their best efforts to provide those contacts and should be aware that providing incomplete or erroneous contact details may delay the Commission's investigation of the merger. In all cases:

- (a) A specific contact person for each third-party contact should be provided, along with the full contact details for that person;
- (b) Such contact details must, in particular, include a specific and direct email address and telephone number for the named contact identified (e.g. eve.adams@xyz.com and not info@xyz.com); and
- (c) All contact details must be provided using the Excel template provided in Annex 1 to this Form.

Merger parties are encouraged to discuss with the Commission in pre-notification the number of contact details required for each category in their case for a Satisfactory Notification. The guidance provided below sets out the information that is likely to be required by the Commission in the majority of cases.

### **Customer and competitor contact details**

*Affected Markets in which there is horizontal overlap between the merging parties' activities*

The merger parties are requested to provide named contact details for customers and competitors of each merger party in each Affected Market where the merger parties overlap.

By way of guidance, in the majority of cases, this should include, for each party:<sup>10</sup>

- (a) contact details for at least the top five competitors (by volume or value) (including overseas companies/importers) for each Affected Market;
- (b) contact details and estimated share of the merger party's business of at least the top ten customers (by volume or value) of each of the merger parties for each Affected Market (including overseas customers if appropriate);
- (c) to the extent that an Affected Market is characterised by bidding processes (see question 16), the contact details for the entity or entities running each bidding process in which either of the merger parties have participated, or of which merger parties are aware, in relation to that Affected Market. If this means a larger number of responsive contact details (that is, more than ten such entities for each Affected Market), merger parties are encouraged to contact the Commission to discuss in pre-notification.

Where there are marked differences in the size or other features of the merger parties' customers, such that some customers may purchase goods or services by different means or in significantly different quantities, provide these same details for at least five representative customers (by value or volume) for each group of customers identified (for example, five large, five medium and five small customers). Where this may be relevant, merger parties are encouraged to contact the Commission to discuss in pre-notification how to delineate each customer group.

The Commission may – having regard to the specific circumstances of the case at hand (in particular, the extent to which contacts for five competitors and/or ten customers would allow for adequate market testing) – consider that full contact details for further competitors or customers are required in response to this question before it can give notice that it has a Satisfactory Notification. The number of customers and competitors whose contact details are required will vary from case to case, depending on the total number of customers/competitors the merger parties have, how representative of the parties' overall customer/competitor set a given sample of such customer/competitors would be, and the extent to which the contact details would permit the Commission to carry out an adequate market test having regard to the specific circumstances in the case at hand.

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<sup>10</sup> For the avoidance of doubt, where one or both of the merger parties have less than the 10 competitors or customers, the Commission will only require contact details for the amount of competitors and customers that they actually have.

*Affected Markets in which there is vertical relationship between the merging parties' activities*

Where the merger parties do not have common customers in related Affected Markets or where their individual shares of supply do not exceed 25% in any of the related Affected Markets, merger parties will not typically have to provide contact details of their customers and competitors in each upstream or downstream Affected Market where they have a vertical relationship.

In some limited cases, the Commission may – having regard to the specific circumstances of the case at hand – consider that contact details are required in response to this question before it can confirm that the notification is satisfactory, even where the merger parties do not have common customers in related Affected Markets or where their individual shares of supply do not exceed 25% in any of the related Affected Markets.

Where the merger parties have common customers in related Affected Markets and their individual share in any such related Affected Market exceeds 25%, the merger parties need to provide contact details of their customers and competitors in each upstream or downstream Affected Market where they have a vertical relationship for a Satisfactory Notification.

By way of guidance, in the majority of cases, merger parties should provide:

- (a) at least the top five competitors (by value or volume) of the merger parties in each upstream and downstream Affected Market (to the extent they have not been provided as competitor operating in the same Affected Market of the merger parties); and
- (b) at least the top ten customers (by value or volume) of the merger parties in each upstream and downstream Affected Market. Where there are marked differences in the size or other features of the customers, such that some customers may purchase goods or services by different means or in significantly different quantities, provide these same details for five representative customers for each customer group identified (to the extent they have not been provided as competitor operating in the same Affected Market of the merger parties). Where this may be relevant, merger parties are encouraged to contact the Commission to discuss in pre-notification how to delineate each customer group.

In some limited cases, the Commission may – having regard to the specific circumstances of the case at hand<sup>11</sup> – consider that, in relation to an upstream or downstream Affected Market, full contact details for more than five competitors or customers are required in response to this question before it can give notice that it has a Satisfactory Notification.

*Affected Markets in which conglomerate effects could arise*

Where the merger parties do not have common customers in related Affected Markets or where their individual shares of supply do not exceed 25% in any of the related Affected Markets, merger parties will not typically have to provide contact details in response to this question in order for the Commission to be able to confirm that the notification is satisfactory.

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<sup>11</sup> Including, for example, if five competitor or customer contact details would not allow for an adequate market test.

Where the merger parties have common customers in related Affected Markets and their individual share in any such related Affected Market exceeds 25%, merger parties are encouraged to consider the specifics of their case and, if appropriate, discuss with the Commission in pre-notification the extent to which these contact details are necessary for a Satisfactory Notification.

In some limited cases, the Commission may – having regard to the specific circumstances of the case at hand – consider that contact details are required in response to this question before it can confirm that the notification is satisfactory, even where the merger parties do not have common customers in related Affected Markets or where their individual shares of supply do not exceed 25% in any of the related Affected Markets.

By way of guidance, in the majority of cases, merger parties should provide:<sup>12</sup>

- (a) at least the top five competitors (by volume or value) of the merger parties in each related Affected Market (to the extent they have not been provided as competitor operating in the same Affected Market of the merger parties); and
- (b) at least the top five customers (by value or volume) of the merger parties in each related Affected Market (to the extent they have not been provided as competitor operating in the same Affected Market of the merger parties). Where there are marked differences in the size or other features of the customers, such that some customers may purchase goods or services by different means or in significantly different quantities, provide these same details for five customers for each group of customers identified (to the extent not already provided in response to question 18). Where this may be relevant, merger parties are encouraged to contact the Commission to discuss in pre-notification how to delineate each customer group.

In some limited cases, the Commission may – having regard to the specific circumstances of the case at hand<sup>13</sup> – consider that full contact details for further customers or competitors are required in response to this question before it can provide confirmation that it has a Satisfactory Notification

### **Supplier contact details**

#### *Circumstances in which supplier contact details may not be required*

Where the merger parties' combined share of procurement of the products/services they both purchase on a Affected Market does not exceed 25%, merger parties will not typically have to provide, in relation to that Affected Market, contact details of relevant suppliers in response to question 18 in order for the Commission to be able to confirm that the notification is satisfactory.

Where the merger parties' combined share of procurement on a Affected Market exceeds 25%, merger parties are encouraged to consider the specifics of their case and, if appropriate, discuss with the Commission in pre-notification the extent to which, in relation to that Affected Market, contact details of relevant suppliers are necessary for a Satisfactory Notification.

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<sup>12</sup> For the avoidance of doubt, where one or both of the merger parties have less than the five competitors or customers, the Commission will only require contact details for the amount of competitors and customers they actually have.

<sup>13</sup> Including, for example, if five competitor or customer contact details would not allow for an adequate market test.

In some limited cases, the Commission may – having regard to the specific circumstances of the case at hand – consider that certain contact details in relation to an Affected Market are required in response to this question before it can confirm that the notification is satisfactory, even where the merger parties’ combined share of procurement in relation to that Affected Market does not exceed 25%.

#### *Relevant suppliers*

Relevant suppliers are generally those that supply the input for the overlap product or service (or of a product bought if sold on in the same state). However, they may include contact details for upstream suppliers other than the merger parties’ suppliers (where this would be necessary in order for the Commission to carry out an adequate market test).

#### *Number of supplier’s contact details*

Merger parties are encouraged to contact the commission to discuss in pre-notification what number of supplier contact details is appropriate in their case. However, by way of guidance, in the majority of cases, the response should include contact details for at least the top five (by value or volume) of each of the merger parties’ suppliers.

However in some limited cases, the Commission may – having regard to the specific circumstances of the case at hand<sup>14</sup> – consider that full contact details for more than five suppliers are required in response to this question before it can provide confirmation that it has received a Satisfactory Notification.

#### **New entrants**

The merger parties should provide contact details for each company identified in response to question 21.

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<sup>14</sup> For example, if the contact details of five supplier would not allow for an adequate market test. This could be the case where the top five suppliers account for a very small proportion of suppliers.

## **PART X – Reasoned Submission**

30. Provide merger parties' views or submissions on the overall impact of the merger on competition in the market buttressing the legal and economic bases that support the merger including on the issues of market definition, the counterfactual, the merger factors under section 94(2) of the Act, efficiency and public interest considerations and theories of harm.

### **Guidance Note to Part 10**

Under this part, merger parties may articulate their views on the overall impact of the merger in the market linking the relevant legal and economic opinions on market definition, the counterfactual, the merger factors under section 94(2) of the Act, efficiency and public interest considerations and the theories of harm.

Merger parties are also welcome to rely on cases and theories from other jurisdictions as a persuasive basis for the views that they advance. Where possible, a link to foreign authorities should be provided or copies annexed to this Part, as necessary.

## **Part XI- Declaration**

### ***Declaration***

This Declaration must be signed by a duly authorised person or on behalf of each of the merger parties:

*I declare that, to the best of my knowledge and belief, the information given in response to the questions in this Notice is true, correct, and complete in all material respects.*

*I understand that:*

*It is a criminal offence under section 112 of the Federal Competition and Consumer Protection Act, 2018 for a person knowingly to supply to the Commission information which is false or misleading in any material respect. This includes supplying such information to another person or any officer of the Commission knowing that the information is to be used for the purpose of supplying information to the Commission;*

*The Commission shall reject any Notice if it is discovered that it contains information which is false or misleading in any material respect;*

*The Commission conducts both Phase 1 and Phase 2 investigations. In the event that the merger is referred for a Phase 2 investigation, information provided to the Commission during the course of the Phase 1 investigation will also be used for the Phase 2 investigation; and*

*The Commission will publish to the public some information described in this Notice, and the fact that the merger has been notified, as prescribed by the Act.*

*Signed:*

*Name: (block letters)*

*Position: (block letters)*

*Date:*

In addition to the above Declaration, the Declaration below should also be signed by a duly authorised person or on behalf of each of the merger parties if the undertakings are appointing legal representatives:

*I confirm that the representative(s) (if any) named in reply to question 1(b) is/are authorised for the purposes of proceedings related to the arrangements described under question 2 to act on behalf of the merger parties respectively specified in response to question 1(b) of this Form/Guidance Note. I hereby specify the address of the representatives named in reply to question 1(b) as an address at which [name of merger party] will accept service or take receipt of documents.*

*Signed:*

*Name: (block letters)*

*Position: (block letters)*

*Date:*

### **Guidance Note to Part 11**

As noted above, see the Commission's webpages for information on how to submit a Notice. The information required in this Notice must be complete and correct, to the best of the merger parties knowledge and belief, as confirmed in the declaration to be signed by the merger parties at the end of the Notice.

The Commission will not accept a Notice unless the section 112 Declaration has been signed by a duly authorised person, by the merger party or by each of the merger parties in anticipated mergers. The authorised person is defined as any person carrying on an enterprise to which the notified arrangements relate. The Declaration must be signed by a person or persons with authority to bind each merger party. An authorised person may use an electronic signature to sign the Declaration. Where a Notice is submitted jointly, each merger party must sign the Declaration that the notice is true, correct and complete in all material respects.

The authorised persons may, appoint representatives (such as a firm of solicitors) to complete the Merger Notice on their behalf and to act for them in further correspondence with the Commission. If they wish to appoint such a representative, the authorised persons should also sign the confirmation of authorisation, ensuring that they comply with the requirements of section 126 of the Act when doing so. For the avoidance of doubt, where a notice is submitted jointly (anticipated merger) each merger party may wish to sign the confirmation appointing a representative for the purpose of receiving service.



The Declaration draws merger parties' attention to two important provisions of the Act. The first relates to the provision of false or misleading information. Under section 112 and 159 (2) of the Act, it is an offence:

- knowingly gives to the Commission information that is false or misleading in a material respect, either in the Notice, or in reply to any additional questions raised by the Commission during the consideration period; or
- knowingly supplies information to a third party that is false or misleading in a material respect, for example an authorised representative or legal adviser, in the knowledge that they will then supply it to the Commission.

The penalties for breach of this provision as provided for in Section 112 of the Act may include a fine not exceeding N10,000,000.00, a maximum of two years' imprisonment, or both.

The Commission also has powers to reject the Notice, at any time before the period for assessment expires, where it discovers that any information given in the Notice, or in response to further enquiries, is false or misleading.

The effect of rejection is that such a proposal may be re-visited within a period of four months after the date of its completion (subject to any extension in some circumstances). Secondly, the Declaration reminds merger parties that the Commission will publicise the existence of the merger as notified in both completed and anticipated cases. The Commission will also draw the merger to the attention of third parties in order to seek their views. The Commission will have regard to the provisions of Sections 95 and 97 of the Act in relation to disclosure of information in determining how much information should be disclosed. Its aim in publicising the merger is solely to ensure that those with an interest in the merger are given an opportunity to comment.

The Commission is very aware of the need to protect commercially sensitive information it receives from parties. Whenever the commission considers whether or not to disclose specified information it must have regard, amongst other considerations, to (a) the need to exclude from disclosure (so far as practicable) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the to which it relates and (b) the extent to which the disclosure of the information is necessary for the purpose for which the Commission is permitted to make disclosure. The Commission's published reports commonly excise commercially sensitive information.

The Declaration also confirms the authorisation of any representative named in the notification to act on behalf of a merger party and accept service in accordance with section 158 of the Act.