Anticipated acquisition by Iron Mountain Incorporated of Recall Holdings Limited

Decision to refer

ME/6568/15

The CMA's decision to refer under section 33(1) of the Enterprise Act 2002 given on 14 January 2016. Full text of the decision published on 5 February 2016.

Please note that [✂] indicates figures or text which have been deleted at the request of the parties for reasons of commercial confidentiality.

1. Iron Mountain Incorporated (**Iron Mountain**) has agreed to acquire Recall Holdings Limited (**Recall**) (the **Merger**). Iron Mountain and Recall are together referred to as the **Parties**.

2. On 30 December 2015, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**). Terms defined in the SLC Decision have the same meaning in this decision on reference unless otherwise indicated.

3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to the Parties of the SLC Decision. However, in order to allow the Parties the opportunity to offer undertakings to the CMA for the purposes of section 73(2) of the Act, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision.

4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so within the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that if no undertakings for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period, ie by 7 January 2016, or the Parties indicated before this deadline that they did not wish to offer

such undertakings, then the CMA would refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

5. Pursuant to section 34ZA(2) of the Act the CMA is not prevented from making a reference under section 33 of the Act in the event that it decides that the duty to refer does not apply because it is considering whether to accept undertakings under section 73 of the Act but no such undertakings are offered or accepted.

6. On 7 January 2015, the Parties offered the CMA the following undertaking (the **Proposed Undertaking**):

Alternative 1

(a) The Parties offered to divest:

(i) All facilities and related assets (contracts, equipment, vehicles, operational staff) required by a potential purchaser to recreate Recall's existing footprint of RMS and OSDP across England by divesting a Recall site in any local area where a potential purchaser was not present.

(ii) All facilities and related assets formerly operated by C21 Data Services in Aberdeen and Dundee.

(together the **Alternative 1 Divestment Business**).

(b) The Alternative 1 Divestment Business would be divested to a single local/regional supplier of RIMS that is currently active in the UK and able to immediately supply existing customers from the Alternative 1 Divestment Business. The Alternative 1 Divestment Business would not be sold to a supplier of RIMS currently identified as potentially able to supply 'national' customers in the SLC decision. An agreement for the sale and purchase of the Alternative 1 Divestment Business with a purchaser would be approved by the CMA before the CMA finally accepted the Proposed Undertaking (**up-front purchaser condition**).

Alternative 2

(c) In the event that Alternative 1 above could not be completed in the period allowed to the CMA for consideration of undertakings under s73A(3) of the Act, the Parties offered to divest the entirety of Recall's UK business in the UK including all facilities and related assets (**Alternative 2 Divestment Business**) to a single local/regional supplier of RIMS that is

currently active in the UK and able to immediately supply existing customers from the Alternative 2 Divestment Business.

(d) Divestment of the Alternative 2 Divestment Business would not be subject to an up-front purchaser condition.

Assessment of the Proposed Undertaking

7. In the SLC decision, the CMA concluded that it is or may be the case that the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in relation to the supply of:

   (a) RMS to national customers in the UK;

   (b) Physical OSDP to national customers in the UK; and

   (c) RIMS, including specialist services, to oil and gas customers in Aberdeen and Dundee.

8. The CMA also considered whether the Merger may be expected to result in an SLC in the supply of each of RMS and OSDP to local/regional customers on a local/regional basis.[1] As set out in the decision, given the relatively high market shares in these areas and the limited remaining competition, the CMA could not rule out that the Merger may result in a realistic prospect of an SLC in these areas. However, on the basis that the Merger gives rise to a realistic prospect of an SLC on a national basis for the supply of RMS and OSDP, the CMA did not find it necessary to conclude on whether the Merger gives rise to a realistic prospect of an SLC in the supply of RMS and OSDP to local customers.

9. Section 73(2) of the Act states that the CMA may, instead of making a reference and for the purpose or remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which, in relation to anticipated mergers, may be expected to result from it, accept undertakings in lieu of a reference (UILs) to take such action as it considers appropriate.

10. In accordance with section 73(3) of the Act, when deciding whether to accept UILs, the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it.

[1] SLC decision, paragraphs 140–142.

11. In this regard, in order to accept undertakings, the CMA must be confident that all the potential competition concerns that have been identified in its investigation would be resolved by means of the proposed undertaking without the need for further investigation.[2] Therefore, undertakings are appropriate only where the remedies proposed are 'clear-cut' and capable of 'ready implementation'.[3]

12. The CMA's starting point in deciding whether to accept a proposed UIL is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC (rather then accepting a remedy that simply mitigates the competition concerns).[4]

13. The CMA considers that the Proposed Undertaking does not offer a clear-cut solution to the potential competition concerns identified in the SLC decision for the following reasons.

14. First, Alternative 1 does not offer a comprehensive and clear-cut solution to all the potential competition concerns identified by the SLC Decision. In particular, the CMA cannot be confident that Alternative 1 would resolve or mitigate competition concerns in any local areas except for Aberdeen and Dundee since the UILs would not require the Parties to divest a Recall site in any local area where the purchaser was already present. Given that the CMA could not rule out a realistic prospect of an SLC arising in all of the local areas where Recall is present in the UK, Alternative 1 does not resolve all of the potential competition concerns identified in the SLC Decision.[5]

15. Second, Alternative 1 may not restore competition to pre-Merger levels in relation to national customers. In particular, it may not enable the potential purchaser to provide the same level of competitive constraint as Recall provided pre-Merger.The potential purchaser will not acquire any Recall facility where they are already currently present in the same local area as Recall. If the potential purchaser is smaller in that local area, then their post-Merger national capacity/scale may be smaller than Recall's, even if their geographic footprint is the same. In these circumstances, Alternative 1 would only mitigate the SLC found in relation to national customers rather than comprehensively remedying it.

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[2] *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122, December 2010 (***Exceptions Guidance***), adopted by the CMA as set out in *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), Annex D), paragraph 5.6.
[3] Exceptions Guidance, paragraph 5.7.
[4] Exceptions Guidance, paragraph 5.11.
[5] SLC decision, paragraphs 140–142.

16. Third, although Alternative 2 may resolve all potential competition concerns identified in the SLC Decision, this option is only available in the event that Alternative 1, which does not offer a clear-cut solution for the reasons above, fails in its implementation. It is therefore not capable of being readily implemented independently by the CMA. If the CMA were to accept the Proposed Undertaking it would allow the Parties to implement Alternative 1, a solution which is not as comprehensive as is reasonable and practicable.

17. The Proposed Undertaking also raises concerns regarding implementation as:

(a) In relation to Alternative 1, [✂]. Identification of the necessary contracts to allow a potential purchaser to compete effectively on a national basis and resolve the concerns identified in the SLC decision may therefore be difficult to implement without significant further investigation.

(b) Notwithstanding the comments in paragraph 16 above, no up-front purchaser provision is offered in relation to Alternative 2. The CMA will seek an up-front buyer where the risk profile of the remedy requires it, for example where there is only a small number of candidate suitable purchasers for the divestment business that would remedy the competition concerns.[6] In the context of the large scale of the divestment package, which would entail a significant increase to any RIMS supplier's business, the CMA considers that there is likely to be only a small number of candidate suitable purchasers for the divestment business and, in these circumstances, considers it prudent to approve the identity of any proposed purchaser before relinquishing its ability to refer the Merger to phase 2.

18. Following careful consideration of the Proposed Undertaking, in light of the considerations above and in accordance with the CMA's jurisdictional and procedure guidance,[7] the Parties were given a short time-frame by the CMA to modify their proposal and to confirm that they would be prepared to offer Alternative 2 on a stand-alone basis and with an up-front purchaser provision. However, no confirmation was forthcoming within the time-frame provided and the Proposed Undertaking remained unmodified and therefore incapable of achieving as comprehensive a solution as is reasonable and practicable.

Decision

19. For the reasons set out above, after examination of the Proposed Undertaking, the CMA does not believe that it would achieve as

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[6] Exceptions Guidance, paragraph 5.33.
[7] *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), paragraph 8.20 and 8.21.

comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.

20. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept undertakings in lieu of reference.

21. Therefore, pursuant to sections 33(1) and 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

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Competition and Markets Authority
14 January 2016