

# Guidance on internal document requests in merger investigations

Consultation document

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# Contents

|                                      | <i>Page</i> |
|--------------------------------------|-------------|
| 1. About the consultation .....      | 2           |
| 2. Questions for consideration ..... | 6           |

# 1. About the consultation

## Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting on draft guidance in relation to requests for internal documents in merger investigations.
- 1.2 In some cases, the CMA will require parties to provide internal documents (*i.e.*, documents that merging parties have generated internally in the ordinary course of business) to inform its investigation.<sup>1</sup> The CMA's proposed guidance is intended to help merging parties to provide complete and accurate responses to document requests to enable the CMA to carry out its statutory functions.

## Scope of the consultation

- 1.3 The scope of this consultation covers the CMA's draft guidance in relation to requests for internal documents in merger investigations.
- 1.4 The draft guidance should be read in conjunction with paragraphs 7.2 to 7.20 and 11.11 to 11.40 of Mergers: Guidance on CMA's Jurisdiction and Procedure (CMA2). Together with the guidance provided in CMA2, this draft guidance is intended to set out how the CMA will use requests for internal documents, including those requests made pursuant to section 109 of the Enterprise Act 2002 (the Act). The penalties for failure to comply with a section 109 request are set out in Administrative penalties: Statement of Policy on the CMA's approach (CMA4).
- 1.5 Where there is any difference in emphasis or detail between this draft guidance and other guidance produced or adopted by the CMA, the most recently published document will take precedence.

## Background

### Context

- 1.6 The CMA is a non-ministerial department formed on 1 April 2014. It is the UK's primary competition and consumer authority which took over a number

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<sup>1</sup> As explained in the draft guidance, section 109 of the Act provides the CMA with a mandatory information-gathering tool. Unless otherwise stated, references to 'requests' for internal documents within this consultation document (as well as the guidance) include notices requiring the production of documents under these mandatory powers.

of functions formerly performed by the Office of Fair Trading and those of the Competition Commission. The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy.

- 1.7 The CMA has responsibility for review of mergers under the Act. As noted above, in some cases, the CMA will ask parties to provide internal documents to inform its investigation. The CMA can issue requests for information ‘informally’ or pursuant to the powers provided by section 109 of the Act. This provision provides the CMA with a mandatory information gathering tool for ‘permitted purposes’ (including any aspect of its mergers-related functions).

### ***The draft guidance***

- 1.8 The CMA is proposing to introduce additional guidance to supplement and clarify the guidance in CMA2.
- 1.9 This guidance is primarily intended for merging parties and legal advisers advising on a transaction that may be subject to merger investigation by the CMA. The draft guidance should also be used by third parties that have been requested to provide information in merger investigations.
- 1.10 The draft guidance is intended to provide further clarification in relation to the circumstances in which the CMA will request the production of internal documents, either through informal requests for information or under the statutory powers provided by section 109 of the Act. The draft guidance also explains how CMA case teams may approach such requests and how merging parties are likely to be expected to respond.

### **Consultation process**

- 1.11 We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments. We would welcome your comments on the content of the draft guidance and, in particular, the questions raised in Chapter 2 of this document. We want to ensure that the guidance is clear, comprehensive and useful for its intended users.

### ***How to respond***

- 1.12 We are seeking the views of interested parties, particularly merging parties and legal advisers that have been involved in transactions in relation to which internal documents have been requested. We encourage you to respond to

the consultation in writing using the contact details provided in paragraph 1.15 below.

- 1.13 When responding to this consultation please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 1.14 In pursuance of our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please also provide a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive at the same time.

### ***Duration***

- 1.15 The consultation will run for four weeks, from **28 March 2018 to 25 April 2018**. Responses should be submitted by post or email, and should be sent to:

Amanda Town  
Competition and Markets Authority  
Victoria House  
37 Southampton Row  
London WC1B 4AD  
Email: Amanda.Town@cma.gsi.gov.uk

### ***Compliance with government consultation principles***

- 1.16 In consulting, the CMA has taken into account the government consultation principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders. Full details can be found on GOV.UK.

### ***Data use statement for responses***

- 1.17 Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our

opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business.

- 1.18 Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.
- 1.19 If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

***After the consultation***

- 1.20 After the consultation, we will publish a final version of the guidance and a summary of the responses received that fall within the scope of the consultation. As noted above, we propose to publish non-confidential versions of the responses received. These documents will be available on our webpages and respondents will be notified when they are available.

## 2. Questions for consideration

- 2.1 As noted in paragraph 1.10 above, the draft guidance is primarily intended to provide further clarification in relation to the circumstances in which the CMA will request the production of internal documents, how CMA case teams may approach such requests, and how merging parties are likely to be expected to respond.
- 2.2 To that end, the CMA would encourage stakeholders to particularly consider the following questions:
- (a) Does the draft guidance generally provide sufficient information in relation to the CMA's practice in relation to internal document requests? Are there any aspects of the CMA's practice on which further information would be useful?
  - (b) Does the draft guidance provide sufficient information in relation to the circumstances in which merging parties may be asked to provide material volumes of internal documents?
  - (c) Does the draft guidance provide sufficient information in relation to the circumstances in which the CMA will use its statutory powers to request internal documents?
  - (d) Does the draft guidance provide sufficient information in relation to the likely scope of internal document requests?
  - (e) Does the draft guidance provide sufficient information in relation to the CMA's likely approach to IT issues and legally privileged materials?
  - (f) Does the draft guidance provide sufficient information in relation to the likely format of document requests (and, in particular, in relation to the proposed standard question for explanation of methodology and the use of compliance statements)?
- 2.3 The CMA would also welcome the views of stakeholders on any other aspects of the draft guidance.