24 April 2018

CITY OF LONDON LAW SOCIETY COMPETITION LAW COMMITTEE

RESPONSE TO THE CMA'S CONSULTATION ON "GUIDANCE ON INTERNAL DOCUMENT REQUESTS IN MERGER INVESTIGATIONS"

1 Introduction and summary

1.1 This response is submitted by the Competition Law Committee of the City of London Law Society (**CLLS**) in response to the Competition and Market Authority's (**CMA**) consultation on "Guidance on internal document requests in merger investigations" (the **Consultation Paper**), published on 28 March 2018.

1.2 The CLLS represents approximately 15,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to competition law matters.

1.3 The Competition Law Committee members with primary responsibility for the preparation of this response are:

- Ian Giles (Norton Rose Fulbright LLP, Chairman Internal Documents Working Party)
- Charles Bankes (Simmons and Simmons LLP)
- Robert Bell (BCLP LLP, Chairman CLLS Committee)
- Jenine Hulsman, (Clifford Chance LLP)
- Nicole Kar (Linklaters LLP)
- Dorothy Livingston (Herbert Smith Freehills LLP)
- Becket McGrath (Cooley LLP)

1.4 The CLLS welcomes the opportunity to respond to the Consultation Paper. In summary, our views are:

- We recognise that parties' internal documents are a useful source of evidence for the CMA (and other global competition authorities) when conducting merger assessments. However, it is vital that appropriate regard should be given to the context in which such documents are created and their accuracy, as well as the weight of other evidence, when the content of internal documents is factored into the CMA's assessment.

- In particular, the greater the extent of internal document review carried out in merger reviews, the more important it is that appropriate judgement is applied by CMA case teams when evaluating and placing evidential weight on such material. In our experience, there is a risk of too much weight being placed on offhand comments from (sometimes junior) employees, often unconnected to a transaction, which are clearly inconsistent with the broader body of evidence. The CMA will appreciate that companies may not have easy visibility of all the materials held in their systems, and that searching such systems can be extremely onerous and costly for the businesses involved. Accordingly, care should be taken to ensure that any requests for internal documents should be proportionate in nature including reasonable timeframes for responses.

- We are aware of the parallel consultation being carried out by the European Commission on these issues, and a suggestion of 10 working days as a suitable response timeframe for document requests likely to produce more than 10,000 responsive documents. We recognise that the CMA has not adopted such a specific position, and while we appreciate the pressure of statutory deadlines, we would emphasise that establishing the relevant databases, setting up search protocols and teams, and carrying out forensic searches takes time – and if rushed may well result in mistakes. Businesses executing transactions do not have additional resource easily available to carry out such exercises and we would ask that the CMA is mindful of the business disruption – and consequent harm to business performance – that such onerous requests can entail. Extensive internal document requests in our view should only be made where there is a clear expectation that the results will justify the costs.

- In this context, we note the comparison with the US regime where extensive internal document disclosure is only required in the "Second Request" phase of the review – i.e. where it has been determined that there may be serious concerns as to the consequences of a proposed transaction, and evidence analysed in the initial phase indicates that such further detailed scrutiny is justified. The US regime has significant experience of the burdens and benefits of forensic document reviews, and has not – to the best of our knowledge – sought to expand its powers to require such detailed disclosure earlier in the review process. In this context, we would suggest that requests for disclosure of internal documents that are likely to require forensic search techniques and result in voluminous responses should be kept to Phase 2 of the CMA's reviews unless the parties expressly request such disclosure take place at an earlier stage.

- The CMA should particularly be conscious of making extensive requests for internal documents of smaller companies or in respect of smaller transactions (which may be caught by the UK's share of supply jurisdictional threshold, but might be considered too small to merit review in other jurisdictions on the basis of the revenues of the parties alone). Equally, the CMA should be mindful that smaller companies may well not have anything like the volume of documents, or formalised documentation of decision making, that is seen at large multinationals – and an inability to produce specified categories of documents in such contexts should not be considered inherently suspicious.

- We note the CMA's proposal to use its section 109 powers by default in requesting companies' internal documents. We query whether this is necessary or proportionate in a context of companies seeking to execute transactions and where no allegation of illegal behaviour is being made. We would ask that the CMA consider whether this is the appropriate approach without strong evidence that the historic use of informal requests has led to material failures in the review process.

- In this context, and to the extent that CMA is committed to making more extensive use of formal section 109 powers, the CMA should commit to sharing draft information requests with parties if it intends to use its section 109 powers when requesting documents. It is in all parties' interests (including the CMA's) for document requests to be appropriately scoped, noting that requests place a significant burden on merging parties, as well as the CMA if the result is being inundated with large volumes of irrelevant material.

- The CMA must also appreciate that forensic search techniques are not flawless, and material may not be responsive to searches and subsequently come to light through different search techniques. In this regard, CLLS believes that the CMA should give a level of comfort to parties that good faith efforts to comply with document requests, and

transparency of approach with the CMA, are unlikely to lead to a finding of non-compliance with a section 109 notice.

- Finally, in the context of international transactions, we would ask that the CMA explicitly recognise that it will seek to coordinate with other agencies where making requests for internal documents to avoid an additional burden on parties having to respond to multiple and potentially unaligned requests.

1.5 We set out more detailed responses on certain specific points below.

2 Response to Questions for Consideration

2.1 In its Consultation Paper, the CMA sets out six specific questions[1] for stakeholders to consider, as well as seeking the views of stakeholders on any other aspects of the draft guidance. In our response below, we have not sought to answer each specific question posed, but have instead structured our response according to the issues that in our view are of most importance.

(a) Role of internal documents in merger review

2.2 It is still the exception rather than the norm for global competition authorities to request that parties submit internal documents, although we recognise such documents can be important evidence to an authority's assessment. However, while internal documents can provide useful insights into parties' unfiltered views about the impact of the merger in question and competitive conditions more generally, these documents are often hastily created by individuals not thinking about the broader context, or inaccurately presenting facts or opinions. Where the weight of other evidence is not consistent with such documents, the CMA should bear in mind the realities of internal document creation and not place undue weight on such documents in its assessment.

2.3 Requests for internal documents and other data place a significant burden on parties, both in terms of the administrative burden of identifying, collecting and reviewing potentially responsive documents, and the associated financial costs of these tasks. Forensic document searches are particularly costly and should be reserved for cases where there are likely to be serious doubts and primarily used only in Phase 2 (unless parties choose to engage in a forensic review at the pre-notification stage, with the aim of avoiding a possible Phase 2 review).

2.4 In this context, we welcome that the Consultation Paper acknowledges that in most cases parties are unlikely to be asked to provide "material volumes" of additional internal documents (i.e. beyond those required by the merger notice or an enquiry letter), and that requests for internal documents are likely to be more extensive in Phase 2 (i.e. after the CMA has identified possible competition concerns) than in Phase 1 (see paragraphs 10 and 11). However, we note that parties and the CMA may have differing views about whether a request is seeking "material volumes" of information, and the Consultation Paper is silent about what volumes the CMA believes to be "material". Also, it is important to bear in mind that all requests for documents inevitably impose an unwanted burden on a party's business regardless of the volume of material sought – and therefore need to be proportionate and appropriately scoped.

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[1] These ask whether the draft guidance provides sufficient information in relation to: (a) the CMA's practice generally in relation to internal document requests, or further information would be useful on any aspects; (b) the circumstances in which parties may be asked to provide material volumes of internal documents; (c) the circumstances in which the CMA will use its statutory powers to request internal documents; (d) the likely scope of internal document requests; (e) the CMA's likely approach to IT issues and legally privileged materials; and (f) the likely format of document requests (in particular, the proposed standard question for explanation of methodology and the use of compliance statements).

2.5 Even where internal documents are requested at Phase 2, care should be taken to ensure the scope and content of the request is proportionate. There are examples at EU level of the European Commission collecting very significant volumes of documents, such as in *Hutchison 3G UK/Telefonica UK* (2016)[2], where the Commission sent over 500 requests for information to the parties and various third parties in Phase 1 and Phase 2 combined, and collected over 300,000 internal documents from the parties in Phase 1 alone. A pattern is also emerging of the Commission needing to "stop the clock" twice in complex Phase 2 reviews while parties complete their responses to information requests, such as in *Bayer/Monsanto* (2018)[3], *Qualcomm/NXP Semiconductors* (2018)[4] and *Dow/DuPont* (2017)[5]. While not a merger review, we note that in the Commission's recent investigation of Qualcomm's practices[6], Qualcomm argued that complying with one of the Commission's requests would have resulted in costs in excess of €3 million. While the General Court ruled that Qualcomm could afford to bear these costs and seek compensation, we believe it is worth reflecting on whether it is appropriate for a competition authority to be making such intrusive and expensive demands in the context of a transaction review in which the companies involved are not alleged to have engaged in any anticompetitive activity, and where analysis and conclusions may be drawn from a variety of lighter touch approaches.

2.6 These cases suggest a move towards overly onerous document requests at EU level, and we would encourage the CMA to avoid following the same path. In this context, we would note that collection and review of internal documents is by no means universal amongst global competition agencies:

- In the US, document disclosure under items 4(c) and 4(d) of the Hart Scott Rodino (HSR) Form are very similar to disclosure requirements under section 5(4) of the Form CO, or Part III of the Merger Notice. More extensive document disclosure is only required in the US where the review moves to the Second Request phase;

- Among other global agencies, the vast majority do not require internal document production as part of their review process.

2.7 We believe there is a legitimate concern that the level of onerous requests seen in certain recent cases, notably at EU level, could have a chilling effect on parties willingness to engage in pro-competitive transactions as they cause transaction costs to spiral. The CMA should be mindful of this in further developing its policy.

(b) Use of section 109 powers and draft information requests

2.8 The Consultation Paper proposes that future CMA information requests will generally be by way of the CMA's powers under section 109 Enterprise Act 2002 (**EA02**), regardless of whether the request is made at Phase 1 or Phase 2 (see paragraph 15). This is a departure from the existing approach described in "Mergers: Guidance on CMA's Jurisdiction and Procedure" (CMA2). Aside from the single example of the penalty imposed on Hungryhouse Holdings Limited in November 2017, it is not clear from the Consultation Paper why this wholesale change in approach is proposed, and it may be helpful for the CMA to elaborate on this. We also note that, separate to any use of the CMA's section 109 powers, individuals in any event

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2 Case M.7612 – *Hutchison 3G UK/Telefonica UK*, 11 May 2016 (see paragraphs 42 and 43 of the decision).

3 Case M.8084 – *Bayer/Monsanto*, 21 March 2018. Phase 2 deadline suspended twice under Article 11(3) of the EU Merger Regulation from 21 September 2017 to 13 October 2017 and from 10 October 2017 to 3 November 2017.

4 Case M.8306 – *Qualcomm/NXP Semiconductors*, 18 January 2018. Phase 2 deadline suspended twice under Article 11(3) from 28 June 2017 to 16 August 2017 and from 17 August 2017 to 16 November 2017.

5 Case M.7932 – *Dow/DuPont*, 27 March 2017. Phase 2 deadline suspended twice under Article 11(3) from 1 September 2016 to 26 September 2016 and from 13 October 2016 to 7 November 2016.

6 See Case AT.40220 – *Qualcomm*, 25 January 2018 and application for annulment Case T-371/17.

commit a criminal offence and risk fines and imprisonment under section 117 EA02 if they knowingly or recklessly supply false or misleading information to the CMA, and our belief based on experience is that such conduct is very rare.

2.9 Where internal documents are requested, of course, companies should be accountable for complying with requests, but requests must be reasonable and proportionate, bearing in mind the cost, time and disruption involved in responding. Increased use of the CMA's section 109 powers in this context is acceptable, provided this is on the basis of consultation with parties using draft requests, reasonable response timeframes and a presumption that good faith efforts to comply and transparency of approach will not lead to a finding of non-compliance with a section 109 notice.

2.10 The Consultation Paper states (at paragraph 26) that the CMA "*may, where it is practicable and appropriate*" share draft document requests with parties before issuing a section 109 notice. In our view, the CMA's standard approach should be to share draft document requests. We also query whether it is appropriate for the CMA to use its section 109 powers to request information in circumstances where it is not practicable or appropriate to share a draft request in advance with the parties; in such circumstances, an informal information request would seem to be more appropriate. We also believe that informal document requests are generally more appropriate at Phase 1 where the CMA is making more targeted requests for information, such as to address a gap in evidence. To the extent that the CMA is unwilling to adopt a standard approach of issuing draft requests – notwithstanding the obvious benefits of doing so – it is our view that draft requests should always be used in context where the request for documents is significant in size, where it includes information which may not be readily available to the company or companies concerned, or where the request imposes a tight deadline or is otherwise onerous.

2.11 We also think the Consultation Paper should offer a level of comfort that the CMA is unlikely to pursue a beach of a section 109 notice where a party has acted in good faith and been transparent with the CMA on its approach. Instead, the Consultation Paper states that, after engaging with parties to ensure that the proposed approach is sensible and practical and would not result in a disproportionate number of documents being produced, the CMA will not provide pre-emptive assurances that no breach of a section 109 notice would occur if relevant material later comes to light which could and should have been provided (paragraph 27). The Consultation Paper also highlights that the CMA may be more likely to impose an administrative penalty for failure to comply with investigatory requirements where the CMA has shared a draft document request (footnote 13). While we recognise that the CMA will not want to "tie its hands", complying with document requests can be complex and difficult for parties, such that parties should not face sanctions where they act in good faith and on the basis of an approach agreed with the CMA, for example in respect of search terms. The position should, of course, be different if parties wilfully do not provide responsive documents that fall within the methodology used and ought to have been disclosed.

(c) Document metadata

2.12 The Consultation Paper indicates that, unless agreed otherwise in a particular case, a document will be responsive to the CMA's request if any "creation date", "sending date" or "last editing/modification date" recorded in the document or its metadata fall within the specified period. In most cases, the CMA will also require parties to provide the relevant metadata, although parties are encouraged to contact the CMA as soon as possible if metadata is unlikely to be available or providing it is likely to be particularly burdensome.

2.13 Absent use of forensic search tools, we query how easily parties can identify and record metadata, such as where individuals are self-selecting responsive documents. While the Consultation Paper envisages that individuals might self-select responsive documents, the CMA's standard methodology, given the importance it places on metadata, seems to envisage use of forensic search tools and we think needs to be applied flexibly if such tools are not being used. This is especially the case for Phase 1 document requests, where we think requiring companies to carry out forensic document searches should generally be avoided.

(d) IT environment

2.14 The Consultation Paper states that responses to document requests will typically be expected to cover all parts of a custodian's IT environment where relevant documents might be stored, and could potentially include chats on instant messaging systems. Absent a specific discussion between the CMA and merging parties in each particular case, we think it is likely to be unclear to parties what exactly is the scope of the IT environment that needs to be searched. Potentially this could even differ between individuals working within the same organisation, depending on their working practices.

2.15 As a general principle we would caution against extending document requests to cover all parts of a custodian's IT environment on the off chance that relevant material may be found. For example, if chats on instant messaging systems might potentially include relevant information but the likelihood of this is small based on how these systems are used in practice by the parties/individuals concerned, they should not be within the scope of the material searched. Instead, document searches should be limited to those IT systems that relevant individuals use as a matter of course to discuss or record issues of relevance to the CMA's substantive assessment.

We hope that you will find the comments above helpful in further advancing the CMA's policy in respect of internal document review in merger reviews. If you have any further questions or wish to discuss the aforementioned, please let us know.

CLLS Competition Law Committee

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