CMA consultation

Guidance on requests for internal documents in merger investigations

(CMA77 CON)

1. Introduction

1.1. Herbert Smith Freehills LLP welcomes the opportunity to provide comments on the CMA's consultation document of 28 March 2018 on "Guidance on requests for internal documents in merger investigations" (**"draft guidance"**). The comments set out below are those of Herbert Smith Freehills LLP and do not represent the views of any of our individual clients.

1.2. We have structured our response by considering relevant issues in the order they are addressed in the draft guidance, rather than responding to the separate consultation questions.

2. General comments

2.1. Internal document requests have become increasingly common under both EU and UK merger control. Expansive requests can be expensive and intrusive for the parties involved and guidance on the circumstances in which the CMA will request the production of internal documents, how the case teams will approach these requests and how the parties are expected to respond is therefore welcome.

2.2. We note the CMA's position that the draft guidance is primarily intended to provide further clarification in relation to the circumstances in which the CMA will request the production of internal documents, how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. But in addition to such further clarification the draft guidance clearly also represents a general tightening-up of the CMA's approach, in particular where the CMA makes it clear that it is likely to use section 109 notices as standard in future investigations where internal documents are requested from the main parties, both in phase 1 and phase 2. In view of the increased burden and the risks this entails for the parties, which includes both corporate and individual penalties, we would urge the CMA to take a proportionate and pragmatic approach to its requests, bearing in mind the cost, disruption and time involved in responding to requests for internal documents. Proportionality should extend to the timeframes for responding imposed on the parties.

2.3. The draft guidance focuses on the use, scope and format of document requests but does not address the issue of assessment by the CMA of internal documents. It would be helpful to include some guidance on the CMA's approach to the assessment of internal documents, which should be made in context and take into account factors such as the source of the document, the status of the originator, their role in the transaction and whether or not they are a decision maker in relation to the transaction. Emails or WhatsApp messages, for example, will not have been prepared with the same degree of rigour as a board report, and may be an inaccurate or partial reflection of facts or opinions. They should not override conflicting evidence in more formal, and more rigorously prepared, documents.

2.4. It is also worth considering the impact of Brexit on document requests under UK merger control. Once the CMA has jurisdiction over large cross-border transactions which currently fall under the jurisdiction of the EU Merger Regulation, an expansive approach to internal documents may result in large amounts of foreign language documents and the CMA will have to consider a strategy for its approach to such documents, including translation requirements and adjusting deadlines.

3. Production of additional documents beyond those responsive to questions 9 and 10 of the merger notice

3.1. The CMA notes that one of the scenarios where additional internal documents will be required is the case where "commercial decisions are taken via email (rather than at set-piece events such as meetings of a board of directors) or where internal reporting takes place via email (rather than in reports or presentations). It would be helpful for the draft guidance to expand on what is meant by "commercial decision-making" in this context, which should be construed narrowly in order to exclude general commercial discussion relating to non-strategic matters. As listed companies would be subject to stringent governance requirements and require board authorisation for any significant M&A, it seems that this requirement is most likely to fall on smaller companies with potentially limited administrative resource.

4. The use of statutory powers to request internal documents

4.1. We recognise the benefits of formal section 109 requests, but these should not rule out the use of informal requests in appropriate circumstances, in the interest of proportionality, in particular in cases where the size of the transaction is small (but does not benefit from the de minimis exemption) and where the transaction does not raise any real substantive issues. Many smaller business may also not have the extensive IT support network and

resource to support technical requests and targeted informal requests, where necessary, will be more appropriate here.

4.2. Given the significant penalties for failure to comply with a section 109 notice, there should be a presumption of good faith under which the CMA will not impose sanctions where the parties acted in good faith and on the basis of an approach agreed with the CMA. Additional guidance on what constitutes a "reasonable excuse" under section 110(1) of the Enterprise Act would also be helpful in this context. This will be particularly important where it was left to the parties to 'self-select' potentially responsive documents.

5. The likely scope of internal document requests

5.1. Appropriate scoping of the request should avoid large volumes of irrelevant material and will be essential, as it will reduce the burden both on the parties and on the CMA and avoid unnecessary delays. The draft guidance currently provides that the CMA may share document requests in draft before issuing a section 109 notice where the document request is complex or extensive (paragraph 26). We would argue for draft requests to be shared with the parties as a matter of course, as this will ensure that the request is relevant and targeted and should avoid a disproportionate number of irrelevant documents being generated.

5.2. Periods for which internal documents are requested will vary depending on circumstances of the case but the CMA expects the period covered by a request for internal documents would run from no earlier than three years before the date of the request. This is still a lengthy period and is likely to result in large amounts of documents to be reviewed. Internal document requests under section 10 of the merger notice only go back to the last two years, and the CMA should consider adjusting the period for additional requests in line with the merger notice.

6. Approach to IT issues

6.1. The CMA expects responses to document requests to cover all parts of the custodian's IT environment where relevant documents may be stored, which may include chats and instant messaging. Including such wide ranging media should be considered carefully and will only be relevant in exceptional circumstances. Focus should be on those IT systems which custodians use as a matter of course to record relevant documents.

6.2. In most cases the CMA is likely to require the parties to provide the metadata for responsive documents. Unless forensic search tools are being used it may be difficult for the parties to comply with this. We note the CMA's willingness to discuss any such difficulties with the parties, but we would also argue that any requirement for use of

forensic IT tools should be proportionate and should therefore typically be limited to phase 2 document requests.

6.3. The CMA is asking for the production of 'family' items and requests these documents in their entirety, without redaction of non-relevant sections. This may result in large volumes of drafts and irrelevant materials and it is not clear why this is necessary. It will increase the burden on the CMA and the parties and potentially delay the process.

Herbert Smith Freehills LLP

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