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Norton Rose Fulbright LLP

Response to the Competition and Markets Authority consultation on "Guidance on requests for internal documents in merger investigations"

1 Introduction

1.1 Norton Rose Fulbright LLP welcomes the opportunity to respond to the Competition and Markets Authority (**CMA**) consultation on "Guidance on requests for internal documents in merger investigations" published on 28 March 2018 (the **Guidance**).

1.2 Overall, we support the CMA's proposal to provide guidance on its proposed approach to requesting parties' internal documents for its merger assessments. In summary, our comments and suggestions on the content of the Guidance are:

- It is not clear whether the Guidance is intended to coincide with any increase in CMA requests for internal documents in its merger reviews, but we caution against this – especially at Phase 1. While internal documents can provide useful information for the CMA's assessment, care is needed to ensure such documents are considered in the context of who created them (including their seniority) and for what purpose, and that undue weight is not placed on their content if this is inconsistent with the weight of other evidence. It is also vital that document requests are proportionate, with reasonable timeframes to respond, bearing in mind the significant burden these can create for parties and the context in which they are being asked for – parties requesting clearance for legitimate activity rather than being investigated for illegal behaviour.

- The proposed use of Section 109 notices as standard should include offering parties the opportunity to discuss draft requests and search methodology. In cases where sharing a draft is not considered pragmatic for reasons of timing, we think the CMA should request documents on an informal basis. If, in a particular case, the CMA has concerns that sharing a draft is not appropriate because this may prompt a less than candid response from a party, such concerns ought to be based on a genuine belief and we expect this scenario will be rare in practice.

- Our view is that parties should not face the risk of penalties for non-compliance with a Section 109 notice if they have been transparent with the CMA about their approach and acted in good faith. Bearing in mind that responding to document requests can be complex and difficult, we think the Guidance should offer a level of comfort in this regard, even if this cannot be absolute and the CMA must consider the facts in each case.

- There are complexities around the importance the CMA proposes to place on metadata, and the requirement for parties to search a custodian's entire "IT environment". Absent further clarification in the final Guidance, we believe parties will need to discuss these issues with the CMA on a case-by-case basis. Forensic document searches (including recourse to metadata and searching of entire IT environments) are particularly onerous and costly, and should generally be restricted to Phase 2 reviews. It is also not clear to us that all the proposed formalities (including compliance statements) are necessary, especially for Phase 1 requests.

- It is not in the CMA's or merging parties' interests for large volumes of irrelevant materials to be submitted. Accordingly, we think the Guidance should provide that it is acceptable for parties to redact irrelevant material from responsive documents provided the approach taken is explained to the CMA. We also think the CMA's standard approach should be to request only final versions of documents and most recent versions of documents that are close to being final (i.e. that have been subject to senior review), but not also most recent versions of other documents that have not been finalised. We have significant reservations over the CMA placing value on draft material in its substantive assessment.

1.3 We set out the detail of our response below, which is structured as follows: (i) reliance on internal documents in merger review (section 2); (ii) use of Section 109 notices (section 3); (iii) the "IT environment" to be searched (section 4); (iv) relevance of metadata (section 5); (v) draft documents and irrelevant material (section 6); and (vi) compliance statements (section 7). Although we have not structured our response to follow the specific questions[1] set out in the CMA's consultation, our response includes, as relevant, our views on those questions.

1.4 We would be happy to participate in any further consultation or engagement on this subject and are available to provide additional information in relation to our submission, should this be helpful to the CMA.

2 Reliance on internal documents in merger review

2.1 We recognise it is attractive for competition authorities to request parties' internal documents, given these can reveal views about the possible impact of the merger under review and market conditions more generally. However, such documents, which are often drafted in the context of fast-moving commercial discussions, may contain inaccurate, poorly phrased or exaggerated language. Careful judgement is vital to avoid placing undue weight on such documents in any merger assessment, especially if their content is inconsistent with the weight of other evidence. For example, it is critical that statements drafted by junior employees or individuals not close to the relevant markets are not given inappropriate importance in the CMA's assessment. By contrast, some businesses do not create a lot of formal internal documentation and thus the lack of documents addressing a particular issue should not be taken to indicate it is not important.

2.2 In that context we caution against any significant increase in the use and scope of CMA information requests in its merger reviews – especially at Phase 1 in cases that do not raise concerns based on primary areas for analysis such as the parties' competitive overlaps and market shares. We also note that, while there is no consistent approach across authorities globally, authorities including in the US and the European Commission typically limit extensive document requests to in-depth second phase reviews. We therefore welcome that the Guidance states that in most cases parties are unlikely to be asked to provide material volumes of additional internal documents beyond those required by the merger notice or an inquiry letter, and that document requests are generally likely to be more extensive in Phase 2 than Phase 1 (paragraphs 10 and 11). However, we think the CMA could helpfully clarify what it means by "material volumes", noting that merging parties may have different views to the CMA about what is "material". Materiality may also differ depending on the size of the parties and transaction, as well as the extent of the competition issues, in a particular case.

2.3 We also think it is important to keep in mind that all document requests should be appropriately scoped and proportionate, regardless of the volume of material sought and whether the request is made at Phase 1 or Phase 2. All document requests unavoidably impose a burden on parties' businesses and create cost, so should be limited as far as possible. Even where the CMA is not seeking large volumes of documents, parties can face a significant burden if the request requires them to search a wide range of potentially responsive material and sources of documents (noting parties may not have easy visibility of all materials in their IT systems), or if the deadline is particularly challenging.

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[1] Those questions ask whether the Guidance provides sufficient information in relation to the: (i) CMA's practice generally in relation to internal document requests, or there are any aspects on which further information would be useful; (ii) circumstances in which parties may be asked to provide material volumes of internal documents; (iii) circumstances in which the CMA will use its statutory powers to request internal documents; (iv) likely scope of internal document requests; (v) CMA's likely approach to IT issues and legally privileged materials; and (vi) likely format of document requests, in particular, the proposed standard question for explanation of methodology and the use of compliance statements.

3 Use of Section 109 notices

3.1 Under the Guidance, in future cases the CMA will generally request documents using its powers under Section 109 Enterprise Act 2002 (**EA02**), both at Phase 1 and Phase 2 (paragraph 15). This departs from the CMA's existing guidance, *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) which (at paragraphs 7.3 and 11.18) indicates that use of the CMA's Section 109 powers is likely to be in specific circumstances, and likewise our experience of CMA merger reviews where requests have generally been informal.

3.2 The Guidance states that the most recently published guidance takes precedence where there is any difference in emphasis or detail between two sets of guidance. However, if there are beginning to be significant differences between the content of CMA2 and other newer CMA guidance, or indeed the CMA's approach in practice, we consider that it would be helpful for the CMA to consider revising CMA2. CMA2 is particularly important as the CMA's main guidance on its jurisdiction and procedure for merger reviews.

3.3 In terms of the proposal to use Section 109 notices as standard, it is not clear to us why this change in approach is needed and we think it would be helpful if the CMA could elaborate on this. The CMA imposed a penalty on Hungryhouse Holdings Limited in November 2017 for failing to respond fully to an information request, but it is not apparent why concerns in a single case might prompt a general change in approach. Also, we note that regardless of the possible penalties on parties for failing to comply with a Section 109 notice, individuals face possible criminal sanctions under Section 117 EA02 if they knowingly or recklessly submit false or misleading information to the CMA.

3.4 The proposed increased use of Section 109 notices, together with other new formalities (such as the focus on metadata, suspension of document deletion processes and compliance statements) could be seen to suggest a view that parties generally do not comply as fully as they should with information requests. This is not the case based on our experience. They also seem more akin to the types of steps that are appropriate in cartel investigations where the CMA has a reasonable suspicion of wrongdoing than a forward-looking merger assessment.

Draft document requests

3.5 To the extent that the CMA proceeds with its proposal to use Section 109 notices as a matter of course, it is vital that the CMA shares draft information requests with parties and their advisers in advance and that requests are proportionate and have reasonable timeframes for responses. Document requests impose a significant burden on businesses and it is not in anybody's interests for requests to be overly broad, to capture irrelevant documents and/or to impose unrealistic timeframes.

3.6 The Guidance states that the CMA may provide drafts "*where it is practicable and appropriate*", and this is particularly likely where the document request is complex or extensive and therefore responding may impose a material burden on the parties (paragraph 26). We think the CMA should share draft requests with parties, and discuss any issues as appropriate, whenever it intends to use its Section 109 powers, regardless of the complexity or scope of the request. In our experience, parties generally find information requests to be burdensome, and the CMA should not underestimate the benefits of sharing draft document requests in advance.

3.7 We also query whether the CMA should generally use its Section 109 powers in circumstances where the CMA believes it is not practicable or appropriate to share a draft document request. In circumstances where timing does not allow for a draft to be shared it seems more appropriate for the CMA to request the relevant documents using its informal powers – as it may be the case that it is simply not possible for the party to respond fully or within the designated deadline. This scenario should be distinguished from circumstances in which the CMA has concerns that a party may be less than candid if a draft is shared and therefore sharing a draft is inappropriate. However, the latter scenario ought to be based on genuine concerns in the particular case in question and we expect would be rare in practice.

Risk of penalties

3.8 The Guidance provides (at paragraph 27) that, after engaging with parties to ensure their proposed approach is sensible and pragmatic and will not impose a disproportionate burden or result in a disproportionate number of documents being produced, the CMA will not be able to give pre-emptive assurances that the parties will not breach a Section 109 notice if relevant material later comes to light which parties could and should have produced. The Guidance (at footnote 13) also highlights that parties may be at greater risk of penalty where the CMA has shared a draft request. Our view is that parties should not generally be at risk of penalties where they have been transparent on the approach they are taking and discussed/agreed that approach with the CMA. It is important to keep in mind that complying with document requests can be difficult and complex for parties, and even forensic search techniques are not faultless. While we recognise that the CMA might not wish to provide parties with unconditional comfort, we think the Guidance adopts the wrong emphasis in this regard at the moment. A more balanced approach could be achieved if the Guidance indicated that parties are unlikely to face sanctions where they have been transparent with the CMA and acted in good faith, but each case needs to be assessed on its facts.

Phase 1/Phase 2

3.9 It is our view that complex, extensive and forensic document searches should be limited to Phase 2 cases, and are disproportionate at Phase 1 (unless parties voluntarily wish to engage in such a search at Phase 1). As noted above, we welcome that the Guidance offers a level of comfort that parties are unlikely to have to provide material volumes of documents at Phase 1.

3.10 The Guidance highlights four example scenarios in which the CMA may be likely to request additional documents from parties at Phase 1 – namely where: (i) documents provided in response to questions 9 and 10 of the CMA's merger notice (or equivalent questions in an enquiry letter) do not appear to capture the parties' full analysis of the merger or competitive conditions (e.g. because commercial decisions are taken via email); (ii) documents provided with the merger notice (or enquiry letter) refer to other seemingly material documents; (iii) the parties submit that an "exiting firm" counterfactual is appropriate, and the parties have not proactively provided the relevant supporting internal documents; or (iv) there is an evidence gap.

3.11 The examples above suggest relatively targeted document requests. However, we have concerns around whether and how the CMA might determine that documents submitted with a merger notice/inquiry letter are not complete, and therefore whether a Section 109 notice is appropriate in that case (i.e. the first example above). Businesses can differ significantly in the approaches they take to analyse mergers and competitive conditions, and the extent to which they document any such analysis.

3.12 In terms of the third example, it is notoriously difficult to persuade the CMA that an exiting firm scenario is the appropriate counterfactual, especially at Phase 1. We would welcome the CMA being more receptive to exiting firm arguments at Phase 1, and it would be a good use of pre-notification discussions to agree the extent to which the parties can and should submit internal documents to support their case in this regard. However, we caution against the CMA compelling (or potentially even encouraging) parties to submit large volumes of such documents at Phase 1 if, regardless of what they submit, a Phase 2 review will be needed because of the high threshold for the CMA to accept an exiting firm scenario at Phase 1. In such cases, it may be more appropriate to fast-track the case to Phase 2 than for the CMA to seek extensive internal documents at Phase 1.

4 The "IT environment" to be searched

4.1 The CMA proposes that responses to document requests, both at Phase 1 and Phase 2, should typically cover all parts of a custodian's "IT environment" where all relevant documents might be

stored. The Guidance highlights this could include instant messaging systems, as well as more traditional sources like email and document storage systems (paragraphs 18 and 22(a)).

4.2 The Guidance states that the CMA is likely to seek to understand what IT facilities are available to custodians and what facilities custodians use in practice. We think that, in practice, the CMA will need to have a discussion with parties in each case for parties to understand which IT facilities they are expected to search. In particular, parties are unlikely to have sufficient certainty if a document request simply refers to searching all of a custodian's "IT environment", with a few examples of what this could comprise.

4.3 Certainty over which IT facilities need to be searched is particularly important if the CMA's request is made pursuant to its Section 109 powers. However, as explained above, our view is that complex, extensive and forensic searches should generally be restricted to Phase 2 requests. In that context, we do not believe that Phase 1 searches should be scoped to cover all of a specific custodian's IT environment; this seems disproportionate and targeted searches should be used at Phase 1 instead.

4.4 The scope of the IT environment that needs to be searched (whether at Phase 1 or Phase 2) should also be limited to those IT facilities that are likely to contain relevant material, and not extended to IT facilities that might potentially or theoretically contain relevant information – i.e. the search should not become a fishing expedition. For instance, instant messaging systems are unlikely to be used for significant strategy discussions or informed comments on the market, competitors etc. Again, we would note that these are merger cases, not enforcement cases.

4.5 Further, while the Guidance envisages that parties may be able to respond to a document request by having relevant individuals self-select responsive documents, their ability to do this would be limited if the search needs to include instant messaging systems and individuals do not have access to historic messages sent through those systems. For this reason, we think instant messaging systems should generally be excluded from the scope of document requests, certainly at Phase 1 (absent a good reason in a particular case why they should be included).

5 Relevance of metadata

5.1 The Guidance indicates that the CMA intends to place significant weight on document metadata. It states that a document will generally be responsive to a request (unless otherwise agreed with the CMA) if its "creation date", "sending date" or "last editing/modification date", as recorded in the document or its metadata, is within the specified period (footnote 9). The Guidance also states that parties will generally be expected to provide the metadata of "digital material", although are encouraged to contact the CMA as early as possible if this is unlikely to be available or particularly burdensome (paragraph 22(e)).

5.2 Consistent with our view that forensic searches should be limited to document requests at Phase 2, we do not think parties should need to review or provide metadata at Phase 1. The merger notice does not require parties to submit or use metadata to identify the types of documents that it requests. Where parties are asked to provide additional documents at Phase 1, such as because the documents provided with the merger notice refer to other documents or do not appear to be complete, it seems inconsistent to require them to provide metadata or to base their search on dates within metadata.

5.3 Given the Guidance states that documents need to be submitted in their native format, we assume the separate requirement to provide metadata means providing a document setting out the metadata for each document submitted. However, it would be helpful if the CMA clarified this in the final Guidance. Assuming that is the CMA's intention, this exercise could potentially be a significant one and we query how necessary and proportionate this is, i.e. whether the CMA is actually likely to review metadata for each and every document submitted.

5.4 We also query whether the CMA intends that parties should provide metadata for all types of "digital material" submitted (e.g. including emails and, potentially, instant messages), or whether

this would be limited to only certain material (e.g. Word, PDF and Excel documents) – and likewise whether metadata is relevant to identify whether all or only some types of digital material are within the specified period. We assume in both cases this is intended for certain material only, but this should be made clear in the final Guidance. For instance, whether an email is within the specified period ought to be easily determined by the date it is sent, without any need to revert to metadata. Similarly, it would be helpful if the final Guidance identified the specific metadata that needs to be provided and, if relevant, whether/how this differs for different types of digital material.

5.5 If a party's search methodology involves relevant individuals self-selecting responsive documents, this will be difficult and much more onerous if those individuals need to review metadata to determine whether the document is responsive and then record that metadata. This will be all the more onerous if this exercise needs to be undertaken for all types of digital material. We think the final Guidance should clarify the approach to metadata where individuals are self-selecting documents, to the extent the CMA continues to insist that parties generally provide metadata for all documents submitted.

6 Draft documents and irrelevant material

6.1 We welcome the general position that, unless otherwise stated, parties will not be required to provide draft documents (paragraph 22(i)). However, we have concerns about the suggestion that CMA requests will generally cover "*the final (or most recent) versions*" of a responsive document. While, of course, the CMA should be able to request final versions of responsive documents, we do not believe CMA requests should request the "*most recent*" version of every potentially responsive document that has not been finalised.

6.2 Parties may have many examples of draft documents that have not been taken forward to a final version, and we have significant reservations about the CMA basing its substantive assessment on draft material that has not been finalised (particularly where drafts may have been prepared at a junior level in the business and not yet been subject to senior review). Where material from an unfinished document is incorporated into another document, there are also potential complexities around whether the first document is the most recent version of an unfinished document (and therefore needs to be submitted under the Guidance), or a draft version of a different final document (so not submitted because only the final version is submitted). A simpler and more proportionate approach would be to limit requests to final documents and the most recent versions of documents that are near final (i.e. have been subject to senior review).

6.3 We also have concerns about the statement in the Guidance that, in some circumstances, draft files may be requested (e.g. where the CMA has reason to believe that the content of certain draft documents may be material to its investigation). It is not clear to us in what circumstances the CMA might believe that draft content from internal documents is material to its investigation, and whether/how the CMA would weigh the importance of such content against other evidence. It would be helpful if the final Guidance elaborated on this. In any event, we would expect any such request for draft material to be very rare in practice.

6.4 Draft documents also need to be submitted to the CMA, if attached to a responsive email, given the proposed approach to email "families" (paragraph 22(f) and footnotes 10 and 12). Again, we do not agree with this approach; our view is that a draft document should not need to be submitted even if it is attached to a responsive email. The proposed approach seems overly inclusive and increases the prospects of the CMA basing its substantive assessment on inappropriate evidence – i.e. documents that are not in final (or near final) form. It also potentially complicates the assessment of whether the cover email is itself responsive.

6.5 Similarly, our view is that parties should be able to redact material from responsive documents if the material is irrelevant, noting also it is not in the CMA's interests to receive large volumes of irrelevant material. Strategy documents may contain highly sensitive material that is unrelated to the merger at hand, perhaps because it relates to a separate market or a different jurisdiction.

In our experience parties would generally prefer not to disclose such material, even on a confidential basis to the CMA. To the extent that parties choose to redact irrelevant material, they could provide something akin to the CMA's proposed log for withheld privileged material to give the CMA comfort that the redacted material is not relevant to the CMA's assessment. In the context of a merger assessment there is no suggestion of any wrongdoing on the part of the parties and so parties should therefore have leeway to redact irrelevant material if this is appropriate.

7 Compliance statements

7.1 The Guidance proposes the introduction of compliance statements signed by a party's CEO or General Counsel confirming that a Section 109 request has been complied with (paragraphs 34 and 35). This is explained on the basis of a need to ensure parties (not only their legal advisers) are aware of the nature of the request and the approach taken to respond, given the consequences of an incomplete response fall on the business, and is particularly likely where a request is extensive, the CMA has encountered difficulties in evidence-gathering to date, or senior individuals have self-selected material.

7.2 While we recognise there are reasons why compliance statements might be attractive to the CMA, it is not entirely clear from the Guidance how the CMA envisages using such statements, and this could be usefully clarified. A compliance statement could, of course, be used to head off any potential assertion by a party that they did not fully understand the consequences of failing to comply with a Section 109 notice. However, we doubt the CMA would be persuaded by any such assertion even absent a compliance statement.

7.3 Our view is that having parties sign a compliance statement is unlikely to have any real impact on the approach parties take to identify responsive documents and the completeness of submitted responses. For instance, if the CMA is using its Section 109 powers to request documents, parties will generally want to discuss a draft request in advance with the CMA and agree the methodology used, especially for extensive, onerous requests. Thus, the CMA may be asking parties to undertake an extra step with little or no benefit, albeit that the act of signing a statement is relatively quick and simple for any individuals concerned.

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