SLAUGHTER AND MAY

Slaughter and May response to CMA consultation on the draft "Guidance on requests for internal documents in merger investigations" document

1. Introduction and summary

1.1 Slaughter and May welcomes the opportunity to respond to the CMA's consultation on the draft "Guidance on requests for internal documents in merger investigations" document (the "**Draft Guidance**").

1.2 We commend the CMA for producing guidance in relation to the CMA's proposed use of s.109 requests for internal documents; the Draft Guidance will provide businesses and legal advisors with a better understanding of the CMA's practices and its expectations of parties. Given the time pressure in merger investigations, it is important that both the CMA and parties/their legal advisers are clear about what is required.

1.3 We have considered the CMA's questions in the consultation document. On the whole we consider that the Draft Guidance takes a sensible approach to the issues raised in internal document requests. However, we set out in this paper some areas where we think the CMA could provide greater clarity, or could re-evaluate its approach to ensure that s.109 requests issued are not disproportionate. In summary:

(i) We welcome the CMA's position that s.109 requests for internal documents will not be required in the majority of cases. We suggest some clarifications to the Draft Guidance to ensure that **s.109 requests are limited to the small category of complex cases where the information is critical to the CMA's analysis** to avoid the imposition of significant costs on business for limited benefit to the CMA. To support this, we request the CMA to **consider implementing appropriate internal safeguards** to ensure that adequate consideration is given to the necessity of a s.109 request being issued in each case and to ensure that a consistent approach is adopted between case teams.

(ii) The Draft Guidance would benefit from some **clarity on expected time periods for responding to a s.109 request** and the CMA should consider extending the remit of the Procedural Officer such that challenges to the Procedural Officer can be made in respect of deadlines.

(iii) The Draft Guidance would also benefit from some **additional clarity on sanctions for non-compliance**.

(iv) We consider that the CMA should **re-evaluate the principles it will apply to IT issues as in some instances the proposed approach may be disproportionate** – we suggest some amendments for the CMA's consideration.

(v) In order to meet the CMA's objectives that requests are appropriate and proportionate, the CMA should **consider sharing draft s.109 requests with merging parties as a matter of course** (unless there are special reasons not to). The CMA could also clarify that parties can raise issues encountered in responding to information requests after a s.109 request has been issued.

1.4 We note that while internal documents may at times provide a useful source of evidence, other sources of evidence may exist which are more robust and/or more easily accessible. In addition, some internal documents may not be reliable evidence, for example if they are written by a junior member of staff trying to impress senior management of their achievements. Accordingly, we encourage the CMA to consider the probative value of internal documents in the round and balance this alongside other sources of evidence.

1.5 If the CMA has any questions on the issues raised in this paper please feel free to contact Neha Dhaun (neha.dhaun@slaughterandmay.com or 020 7090 4218) or Jackie Holland (jackie.holland@slaughterandmay.com or 020 7090 4030).

2. Question (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?

2.1 We support the CMA's approach that "*[i]n most cases, merging parties are unlikely to be asked to provide material volumes of additional internal documents*". The CMA already receives a number of key internal documents in response to the Merger Notice questions.

2.2 Requests for internal documents as envisaged by the CMA are likely to impose a material burden on businesses and will have significant cost and time implications for businesses. On many occasions this will require use of a document review platform given the number of documents involved. In our experience, it can be expensive and time-consuming to set up a third party document review platform and complete a document review process, which would typically involve the following steps:

(i) Suitable providers need to be identified and cost proposals prepared based on the scope of the review. Management time is required to review and approve proposals before the platform is set up.

(ii) The business needs to identify the data sets which could contain responsive documents and so will need to be reviewed.

(iii) Uploading the documents onto the platform can take some time. There can sometimes be issues encountered in integrating a business' documents with the document review platform's system.

(iv) The documents will then need to be searched for potential relevance to the CMA's request, which is often not a straight-forward task:

(a) First, the search terms need to be agreed and tested so that they are identifying a manageable set of potentially relevant documents to review. These may need to be agreed with the CMA case team.

(b) Secondly, reviewers (usually lawyers) need to be trained on the purpose of the review so that they can identify responsive documents and code these correctly. Privileged documents need to be identified and redacted where appropriate. Data protection issues also need to be considered.

(v) Responsive documents then need to be collated for submission to the CMA, sometimes with an explanation of the key documents found.

2.3 In light of this, in our view it is imperative that s.109 requests for internal documents are only issued in circumstances where it is absolutely necessary for the CMA's analysis, as the examples at paragraph 10 of the Draft Guidance aim to illustrate. This is particularly important at Phase 1 when there is limited time to carry out an extensive document review. At Phase 1, targeted requests for specific documents may be more reasonable and proportionate. The CMA should also be willing to consider proposals from the business to carry out a 'light touch' document review, for example to search specific email folders or ask individuals to provide responsive documents rather than a systematic extensive document review. We note that such a 'light touch' review is contemplated in paragraph 33 for smaller parties or less material requests. We suggest that the wording is clarified to explain that a 'light touch' review may also be appropriate in other cases where this is agreed between the case team and the party.

2.4 Secondly, we consider it important that the CMA put in place appropriate internal safeguards to ensure checks and balances on the use of the s.109 power. For example, given the cost and burden to businesses of requests of this nature, we consider that it may be more appropriate that a decision to issue a s.109 request is taken at senior level (e.g. Director level). This approach would also help ensure consistency across case teams and assist with ensuring adequate consideration is given to whether a s.109 request is necessary in the specific circumstances or whether other types of evidence could be requested that would address the CMA's concerns through informal requests.

2.5 Finally, we are of the view that the Draft Guidance should provide some clarity on expected time periods for responding to a s.109 request. As noted in paragraph 2.2 above, internal document requests are typically time consuming and burdensome to comply with. We also note that merging parties will need to ensure compliance with data protection laws, which could add to the complexity of responding to a request.

2.6 We recognise that the CMA cannot commit to a set time period for responding to s.109 requests. However, we consider that it would be helpful if there was some recognition in the Draft Guidance that the deadlines set will be reasonable and proportionate to the request e.g. if a third party document review platform needs to be engaged given the likely scale of the request, it would be unreasonable to set a deadline of less than 7 – 10 working days.

2.7 We note in this regard that unreasonable deadlines should not be imposed simply as a means to 'stop the clock' unless such an approach is agreed between the case team and the parties before the s. 109 request is issued.

2.8 To provide merging parties with adequate procedural safeguards, we also consider that the remit of the Procedural Officer should be extended in respect of mergers to match

that of antitrust, such that challenges to the Procedural Officer can be made in respect of deadlines set for responses to s.109 requests.[1]

3. Question (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?

3.1 We support the CMA's proposal of including examples in the Draft Guidance to illustrate when in practice the CMA would expect to issue a s.109 requests for internal documents.[2] This will be very helpful for businesses and legal advisors.

3.2 We have concerns that the examples in paragraph 10(a) and paragraph 10(d) may (unintentionally) be overly broad and/or create uncertainty:

(i) Paragraph 10(a) of the Draft Guidance – This scenario notes that a s.109 request could be issued where internal documents provided in the merger notice "*do not appear*" to capture the merger parties' assessment of the merger. This is potentially very broad and could apply to a large number of circumstances depending on the subjective view of the case team. The Draft Guidance should clarify in this paragraph that the CMA would test such an assessment with the merging parties before issuing a draft request e.g. the CMA could check with the merging parties if commercial decisions are indeed made via email. We note in this context that pre-notification discussions could be helpful for these purposes – in general, merging parties are incentivised to assist the CMA and would be willing to provide further background, particularly if this would avoid unnecessary requests.

(ii) Paragraph 10(d) of the Draft Guidance – This scenario notes that a s.109 request could be issued where there is a "*material*" evidence gap for example where evidence is "*inconsistent*" with other evidence the CMA has received. We are concerned that "*material*" is a relatively low threshold in light of the burden of such a request on businesses, especially at Phase 1. In particular, evidence obtained from third parties could often be inconsistent with the merging parties' evidence on a variety of issues, some of which may not be critical to the CMA's assessment (e.g. different views on the appropriate market definition where there is no need for the CMA to reach a final conclusion on market definition). We therefore consider that this inconsistency alone should not be sufficient for a s.109 request to be issued (as is suggested by the current drafting). Rather we assume that the CMA's aim is that internal documents should only be requested where the evidence is considered critical or key to the CMA's assessment at Phase 1. We suggest the CMA clarifies this in the Draft Guidance. In addition, it is unclear whether the last sentence of paragraph 10(d) means that the CMA is likely to refer

[1] The CMA website provides that the remit for the Procedural Officer in respect of mergers is limited to handling disputes relation to confidentiality: https://www.gov.uk/guidance/procedural-officer-raising-procedural-issues-in-cma-cases.

[2] Draft Guidance, paragraph 10.

a case to Phase 2 where a material amount of further evidence is required – we would welcome clarification in the drafting of this paragraph.[3]

4. Question (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?

4.1 We consider that the Draft Guidance is clear in respect of when the CMA will use its statutory powers to request internal documents. However, we would welcome further clarity in the Draft Guidance on the sanctions for non-compliance with a s.109 request.

4.2 We note the CMA's statements in the Draft Guidance that it will not pre-emptively give the merging parties assurances that no breach of s.109 will occur if they follow an approach agreed during discussions on draft s.109 requests.[4]

4.3 While we understand the CMA's position, we consider that this statement in isolation is likely to be disconcerting for businesses as it does not reflect the restriction on the CMA's ability to impose penalties where a party has a "reasonable excuse" for non-compliance.[5] It seems reasonable to assume that a party would have a "reasonable excuse" if they have agreed the approach they will take in relation to the s. 109 request with the CMA in advance and have followed this approach.

4.4 We suggest the CMA adds further clarity by cross-referring, or directing merger parties, to the CMA's administrative penalties guidance, which sets out the CMA's broader policy approach as regards whether or not to impose a penalty.[6] In particular, it would be helpful to explain that where parties have good faith intentions to comply with a s.109 internal documents request but are unable to due to technical or unforeseeable reasons, this will be taken into account when assessing penalties.

4.5 In addition, paragraph 13(c) notes that the CMA can reject a merger notice where "*a section 109 notice is sent to the merging parties who have notified their transaction by way of a merger notice*". We assume this should refer to situations where the merging parties have not complied with a section 109 notice[7] rather than to all situations where a s. 109 notice is issued (i.e. even where the parties have complied in full with the request within the deadline provided).

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[3] The last sentence of paragraph 10(d) reads: "*In practice, where a material volume of further evidence (including evidence from internal documents) would be needed to dismiss competition concerns in relation to a broad range of substantive issues, it may be difficult for the CMA to undertake this kind of information gathering within the context of a Phase 1 investigation*".

[4] Draft Guidance, paragraph 27 and 30.

[5] Section 110(1), Enterprise Act 2002.

[6] Administrative penalties: Statement of Policy on the CMA's approach

[7] The suggested wording would be more consistent with section 99(5)(c), Enterprise Act 2002.

5. Question (d): Does the draft guidance provide sufficient information in relation to the likely scope of internal document requests?

5.1 The CMA states that requests would run no earlier than 3 years before the date of the request. We note that three years should not become the CMA's benchmark time period for internal document requests and as short a period as possible should be requested in order to ensure the request is proportionate. For example, in fast-moving industries it is unlikely to be necessary to request documents for a period of three years.

6. Question (e): Does the draft guidance provide sufficient information in relation to the CMA's likely approach to IT issues and legally privileged materials?

6.1 We recognise that the CMA is seeking to balance as best as possible the need in certain circumstances for the CMA to gather further evidence and the burden imposed on businesses. We welcome the CMA's statements that "*the CMA will carefully consider the appropriate scope and nature of a document request in light of the circumstances of the case in order to ensure that such requests are proportionate*" and that the CMA *"may engage with merging parties on whether the proposed approach is sensible and practical (and, in particular, seek to ensure that specific questions do not impose a disproportionate burden on the merging parties)*".[8]

6.2 However, we have concerns that certain of the CMA's principles may be overly broad when applied in practice and therefore may be disproportionate for merging parties to comply with:

(i) Metadata. The CMA's approach that metadata will be required in most cases will be onerous for parties to comply with and we query the value to the CMA in receiving this data in the majority of cases. We consider it would be more proportionate for the CMA to request metadata only where necessary and relevant, (for example in relation to certain key documents of interest to the CMA where the author or date of creation is important) or where it is easy for the party to provide the metadata.

(ii) 'Family' documents. The CMA's approach that all 'family' documents should be provided along with responsive documents could be disproportionate and result in the CMA receiving a significant number of unnecessary documents (e.g. emails with multiple unrelated attachments, or company logos that are typically categorised as a separate attachment). We suggest that the Draft Guidance could note that the CMA will be open to discussing whether 'family' documents need be provided if the merging parties consider this would result in a disproportionate number of documents being provided to the CMA. It would, of course, remain open to the CMA to request specific family documents that it considers relevant.

(iii) Responsive documents to be provided in entirety. The CMA's position that responsive documents should, as a matter of course, be provided in their entirety is in our view disproportionate and likely to result in the CMA having to review a

[8] Draft Guidance, paragraph 17 and 26.

significant number of materials that are not responsive to its request. For example, board minutes may contain sections that are responsive to search terms but other sections which are not and are completely unrelated to the merger or the assessment of competitive conditions. We request that the CMA consider allowing parties to redact non-responsive parts of documents.

(iv) De-duplication. The CMA notes that it may request parties to de-duplicate. We note that de-duplication may be onerous if a large number of documents are involved, and may not be practical in a short period of time if a document review platform is not engaged. In particular, case de-duplication may be burdensome as it would require documents already submitted to the CMA to be uploaded onto the document review platform with the associated complexities that involves and then de-duplicated against the new responsive documents. This may delay the response to a s.109 request. Therefore, we urge the CMA to take these considerations into account in its case by case assessment.

(v) Draft documents. The CMA's approach is that parties will not be expected to produce draft documents unless specified in the request.[9] However, footnote 12 notes that "*a draft document will typically be considered as a responsive document where attached to a responsive email (even where a final or most recent version of the attached document is also available".* This potentially undermines the general position that draft documents will not be required (as it is common for draft documents to be circulated over email) and is therefore likely to result in the CMA receiving a large number of unnecessary documents. We suggest that merging parties should be able to remove draft documents attached to responsive emails and submit the final/most recent version of documents as a general rule, although it remains open to the CMA to request that specific draft documents be provided as envisaged in the Draft Guidance.

7. Question (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)?

7.1 We welcome the CMA's approach that "*[t]he CMA may, where it is practicable and appropriate, share documents requests in draft with parties before issuing a notice"* and that "*this is particularly likely to be appropriate where the document request is complex or extensive (and therefore responding may impose a material burden on the parties)*".[10]

7.2 For the reasons explained in paragraph 2.2 above, internal document requests are by their very nature likely to be complex and impose a material burden on merging parties. Therefore, in practice we suggest that this threshold will be met in the majority of cases. We also note more generally that it is in both the CMA and merging parties' interests to make sure that document requests are appropriate and can be delivered in a suitable timeframe. For example, the CMA case team in Phase 1 would not wish to be deluged

[9] Draft Guidance, paragraph 22(i).

[10] Draft Guidance, paragraph 26 and 27.

by thousands of responsive documents that do not help them to take forward their analysis.

7.3 Therefore, we consider that the Draft Guidance should provide that the starting point is that the CMA will seek to share and discuss draft information requests with merging parties. This would align more closely with the CMA's approach in antitrust cases where the *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* provides relatively narrow grounds for when it would not be appropriate to share a draft s.26 notice; where to do so would prejudice the investigation or it would be inefficient because the request is for a small amount of information (we note the latter is highly unlikely to apply to a request for internal documents unless it is a very focused request for a small number of named documents).[11]

7.4 The Draft Guidance could also clarify that merging parties can raise concerns after s.109 requests have been formally issued if new issues arise e.g. technical issues or an unanticipated level of results perhaps requiring refinement of search terms.

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[11] Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998, paragraph 6.8 and 6.9.