

# Guidance on requests for internal documents in merger investigations

© Crown copyright 2018

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit [www.nationalarchives.gov.uk/doc/open-government-licence/](http://www.nationalarchives.gov.uk/doc/open-government-licence/) or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

DRAFT

## Contents

	<i>Page</i>
1. Introduction .....	2
2. The use and scope of internal document requests .....	4
3. The format of internal document requests .....	11

DRAFT

## 1. Introduction

1. 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 guidance should also be used by third parties that have been requested to provide information in merger investigations.
2. In some cases, the CMA will ask parties to provide internal documents (*i.e.*, documents that merging parties have generated internally in the ordinary course of business) to inform its investigation. The CMA requires certain internal documents, such as studies, reports, and presentations, to be produced as a matter of course as part of the merger notice (or in response to an enquiry letter where a merger is not voluntarily notified to the CMA). In some circumstances, other types of document – in particular emails sent or received by the merging parties' officers or employees – that are relevant to the CMA's investigation – will be requested by the CMA. For the purposes of this guidance, all types of document in the merging parties' possession, which have been prepared, sent or received by an officer or employee of the merging parties, are referred to as '*internal documents*.'
3. Given the importance to businesses and consumers of the CMA's substantive decisions in mergers, and the need for such decisions to be taken in accordance with statutory timescales, it is vital for the CMA to be able to take decisions based on information that is accurate and complete, and to gather that information as quickly as possible. Internal documents can be an important source of information in a merger investigation and it is imperative that merging parties provide complete and accurate responses to document requests to enable the CMA to carry out its statutory functions. The CMA recognises, however, that requests for internal documents can be onerous for merging parties. The CMA (*i.e.*, inquiry groups and case teams) will therefore 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.
4. The CMA can issue requests for information '*informally*' or using the powers provided by section 109 of the Enterprise Act 2002 (the Act). Section 109 of the Act provides the CMA with a mandatory information gathering tool for '*permitted purposes*' including any aspect of its mergers-related functions).
5. This 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.<sup>1</sup> The guidance also explains how CMA case teams may approach such requests and how merging parties are likely to be expected to respond.

6. The 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 guidance is intended to set out how the CMA will use requests for internal documents, including those requests made using section 109. 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 \(CMA4\)](#).
7. Where there is any difference in emphasis or detail between this guidance and other guidance produced or completed by the CMA, the most recently published document will take precedence.

---

<sup>1</sup> As explained in further detail in paragraphs 12 to 16 below, 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 guidance include notices requiring the production of documents under these mandatory powers.

## 2. The use and scope of internal document requests

### The use of internal documents in CMA merger investigations

8. The CMA's [merger notice](#) requires merging parties to provide copies of certain documents in their possession that relate to the rationale and impact of the merger (under question 9 of the merger notice) and provide competitive analysis of the potential segments within which their activities overlap (under question 10 of the merger notice). As the guidance notes to questions 9 and 10 make clear, the CMA would not typically expect to receive documents such as emails, handwritten notes, or instant messages in response to those questions.
9. In cases where a merger is not voluntarily notified to the CMA, but where the CMA learns of it through another route, the CMA will consider whether to seek further information about the case by sending the acquiring party or parties an enquiry letter.<sup>2</sup> The enquiry letter sent by the CMA will typically request similar internal documents to those requested by the merger notice.
10. In most cases, merging parties are usually only be asked to provide material volumes of additional internal documents beyond those responsive to questions 9 and 10 of the merger notice (or the equivalent questions in an enquiry letter in a Phase 1 investigation). Additional internal documents may, however, be requested depending on the circumstances of the case. This might be the case, for example, where

The documents provided in response to questions 9 and 10 of the merger notice (or the equivalent questions in an enquiry letter) do not appear to fully capture the merging parties' analysis of the merger or their assessments of competitive conditions within the markets at issue. This might be the case, for example, 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.

- b) The documents provided in response to questions 9 and 10 of the merger notice refer to other documents that the CMA considers may be material to its investigation.
  - c) The merging parties submit that an exiting firm scenario is the appropriate counterfactual for competitive assessment.<sup>3</sup> In this circumstance, internal

---

<sup>2</sup> See paragraphs 6.15 to 6.19 of [Mergers: Guidance on CMA's Jurisdiction and Procedure \(CMA2\)](#).

<sup>3</sup> See paragraphs 4.3.8 to 4.3.18 of the [Merger Assessment Guidelines \(CC2/OFT1254\)](#).

documents are likely to be required (where not proactively provided by the merging parties) to substantiate whether the firm would have exited the market (whether through failure or otherwise) and whether there would have been an alternative purchaser for the firm or its assets to the acquisition under consideration.

d) There is an evidence ‘gap’ in relation to an issue (or relatively narrow set of issues) that is material to the CMA’s Phase 1 investigation. This might be the case, for example, where the submissions and evidence provided by the merging parties on a given issue appear to be incomplete or inconsistent with other evidence obtained by the CMA in its investigation. 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.

11. This guidance relates to requests for internal documents in both Phase 1 and Phase 2 merger investigations. Documentary evidence gathered in Phase 1 will also be used by the Inquiry Group in Phase 2. In general, requests for internal documents are likely to become more extensive in a Phase 2 investigation. Questionnaires issued to the merging parties at the start of the Phase 2 investigation may request internal documents relating to the transaction (which might cover things like valuations, alternative commercial options, present the merger economics, customer, suppliers, product characteristics, competitor analysis, pricing, marketing, bidding strategy, and barriers to entry, expansion and exit). Follow-up document requests may then be issued where relevant to any of the matters under investigation.

### **The use of statutory powers to request internal documents**

12. The CMA can issue requests for information ‘*informally*’ or using its section 109 powers. Section 109 provides the CMA with a mandatory information-gathering tool for ‘*permitted purposes*’ including any aspect of its mergers-related functions). The definition of ‘*permitted purpose*’ includes assisting the CMA in any aspect of its mergers-related functions, for any matter that is subject to a reference or a possible reference.<sup>4</sup> Under section 109(2) of the

---

<sup>4</sup> Section 109 can also be used by the CMA when assisting the Secretary of State in its merger functions under the Act. Given that this has limited relevance to the CMA’s use of section 109 notices, this is not considered further in this document.

Act, the CMA can require, by a given deadline, the production of certain documents in a person's custody and control.<sup>5</sup>

13. Non-compliance with a notice sent under section 109 (a section 109 notice) can have a number of consequences. In particular:
  - a Where the CMA considers that a section 109 notice has not been complied with in the absence of a reasonable excuse, an administrative penalty may be imposed under section 110 (1) of the Act;<sup>6</sup>
  - b Where a merging party has not complied with a section 109 notice by the stated deadline, the CMA may 'stop the clock' and extend the statutory timetables for reviewing the merger;
  - c Where a section 109 notice is sent to merging parties who have notified their transaction by way of a merger notice (rather than responding to an enquiry letter) the CMA can reject the entire merger notice; and
  - d Under section 110(2) of the Act it is a criminal offence to intentionally alter, suppress, or destroy any information that the CMA has required to be produced.
14. Separately to the consequences provided for by section 110 of the Act, it is, under section 111 of the Act, a criminal offence punishable by a fine or a maximum of two years' imprisonment (or both) either to knowingly or recklessly supply false or misleading information to the CMA, or to give false or misleading information to any third party knowing that they will then supply it to the CMA.
15. The CMA's practice in relation to whether to request internal documents using informal or statutory requests has varied in previous investigations. To support the CMA's ability to carry out its statutory functions, which is dependent, in large part, on being able to rely on the accuracy and

---

<sup>5</sup> Through a section 109 notice, the CMA can also require the attendance of a named individual to give evidence (under section 109(1)) or the production of certain "*estimates, forecasts, returns or other information*" (under section 109(3)). This document is intended to provide guidance on the CMA's approach to the production of internal documents and therefore these powers are not considered further.

<sup>6</sup> See Penalty notice under section 110 of the Enterprise Act 2002 – Addressed to Hungryhouse Holdings Limited, Anticipated acquisition by JUST EAT plc of Hungryhouse Holdings Limited, Case ME/6659-16, 24 November 2017.

<sup>7</sup> Where an act is capable of constituting both a failure warranting an administrative penalty and a criminal offence, the CMA cannot impose an administrative penalty if the person who has failed to comply with a section 109 information request has been found guilty of the criminal offence (see sections 110(8) and 174A(7) of the Act). Similarly, a criminal offence is not committed by a person who has failed to comply with a section 109 information request where the CMA has imposed an administrative penalty in respect of the same act (see sections 110(6) and 174A(5) of the Act).



comprehensiveness of merging parties' submissions, the CMA is likely to use section 109 notices as standard in future investigations where internal documents are requested from main parties in both Phase 1 and Phase 2 merger investigations.

16. Section 109 notices can also be addressed to third parties, so long as the request is being made for a permitted purpose. The CMA will, however, typically request information from third parties informally in the first instance.<sup>8</sup> Section 109 notices will be used where third parties fail to respond to informal requests and the evidence requested is material to the CMA's investigation.

### **The likely scope of internal document requests**

17. The CMA may request any potentially relevant document. However, as noted above, 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.
18. The types of document included within the scope of requests for internal documents will be driven by the way in which a party conducts its commercial operations. To this end, the CMA may engage with merging parties to discuss their decision-making procedures and the way in which they gather, assess and disseminate competitive analysis. In practice, most requests for internal documents are likely to relate to specific categories of emails (including the files attached to those emails and internal analyses (such as studies, presentations, spreadsheets, surveys *etc*). In some circumstances, the CMA may request the production of written materials (such as handwritten notes or notebooks). Similarly, where appropriate, the CMA may require the production of chats on instant messaging systems.
19. The identity of the custodians included within the scope of requests for internal documents is likely to be driven by involvement in or influence over commercial decision-making in relation to the matters under investigation. In advance of issuing a request for internal documents, the CMA may request information relating to the decision-making processes of the merging parties, or certain of their business activities (such as organisation charts and details of reporting lines and decision-making bodies and processes), in order to

---

<sup>8</sup> As noted in footnote 216 of Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2), section 109 notices can be used, without first issuing an informal request, where parties request that the CMA require them to provide such information using its powers under section 109 of the Act, for example where they have regulatory concerns about providing the data voluntarily.

understand which business people are likely to hold potentially responsive documents.

20. The periods for which internal documents are requested will vary depending on the circumstances of the case and, in particular, on the history of the markets at issue. In most cases, the CMA would expect that the period covered by a request for internal documents would run from no earlier than three years before the date of the request (but notes that materially shorter or longer periods could be justified by the circumstances of a given case).<sup>9</sup>

### **Approach to IT issues**

21. The CMA notes that the technology used by businesses in their day-to-day work and the technology used in document review and production processes tend to evolve rapidly. The CMA's approach to technical issues may therefore vary on a case-by-case basis to reflect these developments.
22. While there may therefore be some differences between the IT systems used in different businesses, the CMA will typically expect parties responding to a request for internal documents to apply the following principles in preparing their responses:
  - a) *Responses should typically cover all of a custodian's IT 'environment.'* Responses to document requests will typically be expected to cover all of the custodian's IT environment where relevant documents might be stored. The CMA is therefore likely to seek to understand what IT facilities are available to custodians (e.g., in terms of email clients, instant messaging systems, document storage systems etc.) and what facilities custodians use in practice.
  - b) *Appropriate measures should be taken to ensure that potentially responsive documents remain available for production.* The CMA may ask parties what measures have been taken to ensure that potentially responsive documents in the parties' custody or under their control on the date of the request remain available for production (e.g., through the suspension of internal document deletion processes).
  - c) *A robust search methodology should be used to identify responsive documents.* The CMA may ask parties to provide a full description of the search terms used – broken down by specific question and custodian

---

<sup>9</sup> Unless otherwise agreed with the CMA, a document will be responsive if any of the following dates, as recorded in the document or its metadata, fall within the specified period: document creation date, document sending date, document last editing/modification date.

where appropriate), including all Boolean searches used, as well as any technology-assisted review tools (such as predictive coding that have been used. The CMA may also ask parties to explain to what extent documents were manually searched (and the approach adopted to such review).

- (d) *Documents should be text-searchable.* All documents produced in response to requests for internal documents should be text-searchable. Where applicable (*i.e.*, in the relatively limited circumstances in which such documents fall within the scope of document requests), the CMA will ask how handwritten documents and scanned materials have been uploaded and whether they are searchable. Where such documents are not text-searchable, the CMA may request the manual review of these documents.
- e *Parties may also be required to provide the metadata of digital material.* In most cases, the CMA is likely to require the merging parties to provide the metadata for responsive documents. If metadata for certain responsive documents are unlikely to be available (or if providing metadata is likely to be particularly burdensome), this should be discussed with the CMA as early as possible.
- f *'Family' items will typically be considered as being responsive to the document request:* Parties should ensure that all 'family' attachments are included along with responsive documents.<sup>10</sup>
- g *Responsive documents should be provided in their entirety.* Parties should ensure that documents are provided in their entirety, including the parts of a document that deal with matters that are not specified in the request. Emails should include the entire email chain (and should also, as described above, include all relevant attachments).
- h *Parties may be expected to ensure that document submissions do not contain duplicate files.* The CMA may ask parties to ensure that duplicate files have been removed from a response to a document request. Depending on the circumstances of the case, the CMA may request 'case de-duplication' (*i.e.*, documents already provided to the CMA during the case in question should not be reproduced), 'custodian de-duplication' (*i.e.*, duplicate files within a set of responsive documents relating to the same custodian should be removed), and 'production de-duplication'

---

<sup>10</sup> An email 'family' commonly refers to a 'parent' email and all attachments (e.g., an email and a word document attached to that email). The same principle applies where the parent document is a different type of file (e.g., where a word document or excel file is embedded in another word document).

*i.e.*, duplicate files within the set of documents produced in response to the full information request should be removed).<sup>11</sup> The CMA may ask parties to provide an explanation of any steps taken to exclude duplicate files from the final production.

- i Parties may not be expected to produce draft documents.* Unless otherwise stated, requests for internal documents will cover the final (or most recent) versions of a responsive document and not any drafts (or previous versions) of the document.<sup>12</sup> In some circumstances, the CMA may request the production of draft files (e.g. where the CMA has reason to believe that the content of certain draft documents may be material to its investigation). The CMA may ask parties to provide an explanation of any steps taken to exclude draft files from the final production.
- j Documents should be provided in a readable format.* All documents should be submitted to the CMA in the readable format. Individual documents must not be password-protected.

### **Approach to legally privileged materials**

- 23. Where parties inform the CMA that privileged materials have been redacted or removed from the final production, the CMA is likely to ask the parties to describe the process used to identify and withhold privileged materials. Parties may also be requested to provide a privilege log describing the documents withheld from production (or produced in redacted form) in non-privileged terms.

---

<sup>11</sup> For example, if production de-duplication is requested in relation to an information request in which A and B are relevant custodians, where a given email from A to B is produced because it has been sent by A, the same email should not be produced a second time within the same response because it has been received by B.

<sup>12</sup> In keeping with the principle set out in paragraph 22(f), 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).

### 3. The format of internal document requests

24. As noted in paragraph 10 above, the scope and nature of a document request will vary in light of the circumstances of the case (in particular in order to ensure that such requests are appropriately targeted and proportionate). The specific questions included within requests for internal documents will therefore vary considerably from case-to-case. This section of the guidance explains other aspects of the likely format of document requests that are likely to arise in most cases.

#### Engagement on complex document requests in draft form

25. As the content of document requests is likely to vary considerably from case-to-case, it is not possible to provide further guidance on the specific questions likely to be included in document requests (beyond the general principles set out in paragraphs 17 to 20 above).
26. The CMA may, where it is practicable and appropriate, share document requests in draft with parties before issuing a notice under section 109.<sup>13</sup> 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). Sending document requests in draft can be helpful in prompting parties to identify whether any suggested questions (or other parameters of the request, such as the targeted custodians) are likely to be irrelevant. It can also be helpful in assessing the likely volume of responsive documents, as the CMA may consider whether it would be appropriate to narrow the scope of a document request if the volume of responsive documents is likely to be disproportionate.
27. It is ultimately the parties' responsibility to ensure that relevant material is produced in response to a document request. 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). The CMA may, in particular, engage with parties on the number of responsive documents generated by specific search terms in order to ensure that approach envisaged would not result in a disproportionate number of documents being produced. The CMA will not, however, be able to pre-emptively give assurances that no breach of

---

<sup>13</sup> In paragraph 4.3 of Administrative Penalties: Statement of Policy on the CMA's approach (CMA4), the CMA notes that it may be more likely to impose a penalty for failure to comply with investigatory requirements where the CMA has provided a draft request.

the section 109 notice would occur in the event that relevant material later comes to light which parties could and should have provided.

### **Standard question for explanation of methodology**

28. While the content of document requests will vary on a case-by-case basis, such requests will typically include a standard question intended to verify the approach adopted to document collection, search, and review. This standard methodology question the full version of which is set out in the box below is intended to help the CMA assess whether a party has adopted an appropriate approach to document collection, search, and review.

*Provide a detailed description of the methodology used to identify and produce the documents and information responsive to Question [X]. This description should identify:*

- a. The relevant custodians whose documents have been reviewed;*
- b. The time parameters used for the review of potentially responsive documents;*
- c. The parts of the custodian's IT environment that have been searched (e.g., email, local folders, shared folders, cloud services, external media etc.), and the approach taken to retrieving this data;*
- d. Any measures taken to ensure that potentially responsive documents remain available for production;*
- e. The approach adopted if applicable to documents that are not text searchable;*
- f. The approach adopted to family items (e.g. attachments) in responsive emails;*
- g. The approach adopted to the transfer of metadata of digital material such as document created dates etc);*
- h. The search terms used to identify responsive documents (including any Boolean search terms used);*
- i. The approach adopted if applicable to remove duplicate or draft files; and*
- j. The approach adopted if applicable to redact or remove any privileged materials.*

29. The use of a methodology question is intended to ensure that the CMA has sufficient clarity about the approach adopted by parties in responding to requests for internal documents.

30. The CMA may request a party's proposed response to the methodology question to be submitted in draft before responsive documents are produced to the CMA. This may form part of the CMA's engagement with parties on document requests in draft form. The CMA may engage with merging parties on whether the proposed approach is sensible and practical but will not, as explained above, be able to pre-emptively give assurances that no breach of the section 109 notice would occur in the event that relevant material later comes to light which parties could and should have provided.
31. In keeping with the CMA's objective to adopt a proportionate approach to document requests, it will not use the full version of the methodology question in all cases. The CMA will also typically be willing to engage with parties to discuss whether the proposed approach is sensible and practical.
32. In this regard, it will typically be appropriate to ask merging parties to answer the main part of the methodology question – *i.e.*, how they have gathered the documents produced to the CMA – in all cases. Whether responses to these sub-questions intended to highlight specific aspects of the approach adopted by the respondent are required will be considered on a case-by-case basis. The CMA considers that it is likely that parts (a) to (c) of the question, along with part (j), would be used in almost all cases. Parts (d) to (i) of the question might only be appropriate in cases where a more extensive document production is also envisaged.
33. The standard methodology question should not be taken to suggest that an extensive document request should be undertaken to respond to all section 109 document requests. In particular, in some cases (e.g., for smaller parties or where the information sought is not material to the matters that the CMA is investigating), it might be appropriate, for example, for a party simply to state that certain business 'people self-selected' potentially responsive documents (e.g., based on searching their own email folders).

### **The use of compliance statements**

34. The CMA may include a request for the Chief Executive Officer or General Counsel (or equivalent) to sign a 'compliance statement' confirming that the business has complied with the section 109 notice when it provides its response to the document request. This is intended to ensure that the merging parties (and not just their external advisers) are appropriately aware of the nature of the request and the approach that has been adopted in responding to it. This is particularly important because a section 109 notice is typically addressed to the business, rather than the advisers, and therefore the consequences of an incomplete response to the request will fall on the business.

35. The production of a compliance statement is particularly likely to be appropriate in circumstances where a document request is extensive or where the CMA has encountered difficulties in its information-gathering within the case to date. It may also be appropriate where senior individuals have 'self-selected' relevant emails from their email inboxes and outboxes rather than documents having been produced through a more forensic document retrieval and review process.

DRAFT