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Response to the CMA's draft guidance on requests for internal documents in merger investigations

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We are pleased to have an opportunity to comment on the CMA's draft guidance on requests for internal documents in merger investigations. We frequently advise on transactions before the CMA – not only on behalf of larger clients but also in respect of transactions involving smaller firms (particularly in the industrial sector) where commercial decisions may be taken by email and/or where there may be no central IT system which can be searched. For those clients, a merger investigation by the CMA is an intensive process, which requires significant management time, and is also costly once advisers' fees and the CMA's filing fee are factored in.

In our experience, clients understand and place significant weight in practice on the need to respond fully and accurately to requests for information from the CMA (including the request for internal documents in questions 9 and 10 of the merger notice) and are aware that it is a criminal offence to provide false or misleading information to the CMA. Further, our clients understand that, in cases where there may be a realistic prospect of a substantial lessening of competition, it is incumbent on the merging parties to provide evidence to address any potential competition concerns which the CMA may identify, and failure to identify those documents or produce other compelling evidence to counter the CMA's theory of harm would mean that the CMA has a statutory duty to refer the transaction to a Phase 2 investigation. Finally, failure to provide those documents in a timely fashion prior to notification means that the pre-notification period is lengthened and there will be delays to the overall transaction timetable.

For all of these reasons, clients have every incentive to ensure that they provide all relevant internal documents – both in response to questions 9 and 10 of the merger notice and (as they are frequently requested to do) to provide further documents in response to requests for information by the CMA – in a timely and accurate fashion. In that sense, the CMA's interests and the parties' interests are closely aligned in practice.

We therefore welcome the emphasis in paragraph 10 of the draft guidance that, in most cases, merging parties are unlikely to be asked to provide material volumes of additional internal documents and in paragraph 17 that the CMA will carefully consider the appropriate scope and nature of a documentary request in light of the circumstances of the case to ensure that any such requests are proportionate. This is critical – particularly for transactions involving smaller firms.

We are, however, concerned that the approach to IT issues, and the detailed description of the methodology which merging parties are required to produce (as set out in paragraph 28 of the draft guidance) risks importing a forensic IT standard which the CMA typically uses in cartel enforcement cases (and therefore substantial additional expense and complexity) into merger cases. Complying with

the detailed description of the methodology will be very challenging, even for sophisticated clients involved in larger transactions, and will take a significant amount of time to implement in practice.

We note the CMA's comments in paragraph 33 that this does not mean that an extensive document review will need to be carried out in response to all section 109 document requests but we would strongly encourage the CMA to ensure that the scope of any section 109 document request (and the methodology required to comply with the request) are indeed proportionate to the theory(ies) of harm identified.

Our specific comments on the questions in the CMA's consultation request are set out below.

(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?

Yes – we think the guidance does provide sufficient information in relation to the CMA's practice.

(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?

Yes – paragraphs 10 and 11 of the draft guidance provide a clear indication of the circumstances in which material volumes of internal documents will be requested.

(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?

We welcome the clarification in paragraph 15 of the draft guidance regarding the CMA's intended use of section 109 notices when requesting internal documents. We would, however, encourage the CMA to ensure that the scope (see (d) below) is suitably tailored to the potential theories of harm which the CMA is considering as part of its Phase 1 or Phase 2 investigation.

We also welcome the clarification in paragraph 16 that, where information is material to the CMA's investigation (for example in relation to future entry or expansion), that the CMA's policy will be to request information using its formal powers of investigation. Although these requests should be limited to circumstances where the information in question is material to the outcome of the CMA's investigation, it will help to ensure that the CMA is in possession of information of sufficient quality so that it can take an informed decision on the competitive impact of the transaction.

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

The guidance is clearly drafted, but the scope of the internal document requests (in particular, the references to handwritten notes and notebooks and chats on instant messaging systems) and the language used in paragraphs 18 and 19 (for example, "custodians") indicate a significant departure to the CMA's current practice and suggest a move towards a forensic IT standard in merger cases which, until now, has only been used in competition enforcement cases where the CMA has a reasonable suspicion that the company under investigation may have engaged in hardcore cartel activity. These paragraphs could usefully distinguish between the likely scope of section 109 requests in Phase 1 and Phase 2 cases (i.e. the CMA may

request more information in the context of a Phase 2 investigation), effectively reiterating that any request for information issued during Phase 1 will be both targeted and proportionate to the theory of harm.

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

A similar comment applies to the principles which the CMA has identified at paragraph 22 which should be followed by merging parties when preparing their responses to section 109 document requests: this section contains a huge amount of technical detail which will be familiar to forensic IT specialists which are engaged by the parties to a Competition Act 1998 and/or Enterprise Act 2002 competition enforcement investigation and import quasi-criminal standards of evidence gathering into a merger control procedure which, particularly in the context of the Phase 1 merger timetable, is likely to create significant timing challenges in practice. Even for sophisticated clients which have dedicated IT resource in-house, it is likely to be very challenging to adhere to these guidelines in practice, and to provide the CMA with the requisite level of assurance, without engaging a third party forensic IT specialist. This will add both time and cost to what is a burdensome process.

We accept that the CMA has flagged that it is committed to ensuring that section 109 requests will be deployed in a proportionate and targeted manner, but these concerns nevertheless remain based on our reading of sub-paragraphs (a) to (j) and we would encourage the CMA to emphasise (as it does later in paragraphs 31 to 33) that it will consult with the merging parties and may (particularly in the context of Phase I investigations) agree that the merging parties can apply a more focused set of principles.

(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)?

Yes – we agree that the guidance provides sufficient information. We also welcome the CMA's comment in paragraph 26 of the draft guidance that, where appropriate, the CMA will share document requests in draft before issuing a section 109 notice. We would encourage the CMA to adopt this approach in all cases (even if the deadline for comments is short) and not to limit this to cases where the document request is complex or extensive (as the draft guidance indicates).

As noted above, we welcome the comments in paragraphs 31 to 33 inclusive in relation to proportionality.

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