COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST AND INTERNATIONAL LAW ON THE U.K. COMPETITION & MARKETS AUTHORITY PUBLIC CONSULTATION ON INFORMATION REQUESTS IN MERGER CONTROL

The views expressed herein are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association ("ABA") and, accordingly, should not be construed as representing the position of the ABA.

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I. Introduction

The American Bar Association Sections of Antitrust and International Law ("the Sections") appreciates the opportunity to submit these comments on the public consultation document issued by the Competition & Markets Authority (the "CMA") entitled *Guidance on Requests for Internal Documents in Merger Investigations* (the "*Guidelines*").[1] These comments reflect the Sections' experience and expertise with respect to the application of merger control laws in the United States, the European Union, and numerous other jurisdictions and with important related international best practices, notably the International Competition Network's *Recommended Practices for Merger Notification and Review Procedures*[2] (the "*ICN Recommended Practices*") and the Organization of Economic Cooperation and Development's *Recommendation on Merger Review* (the "*OECD Recommendation*").[3]

The Sections appreciate the substantial thought and effort reflected in the *Guidelines*, and the CMA's effort to "provide further clarification in relation to the circumstances in which the CMA will request the production of internal documents"[4] from merger parties. The Sections applaud the CMA's desire to increase transparency by issuing public guidelines on, and establishing a public consultation process regarding, this important topic.

The Sections offer these comments to share their experience and provide suggestions to enhance the effectiveness of the *Guidelines* and their conformity with international best practices. The comments reflect the Sections' underlying views that the number of antitrust merger review regimes globally is large and increasing, resulting in continuing growth in the individual and collective burdens imposed on the public by the notification process, and that individual agencies should structure their respective review processes to avoid imposing burdens except as strictly necessary to execute their mandates.

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[1] U.K. Competition & Mkts. Auth., *Guidance on Requests for Internal Documents in Merger Investigations* (Mar. 28, 2018), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695203/draft-guidance-on-internal-docs-merger_investigations.pdf [hereinafter *CMA Guidance*].

[2] INT'L COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES (2017), *available at* www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf [hereinafter ICN RPs].

[3] OECD, RECOMMENDATION OF THE COUNCIL ON MERGER REVIEW (Mar. 22, 2005), *available at* https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0333 [hereinafter OECD RECOMMENDATION].

[4] *CMA Guidance*, *supra* note 1, ¶ 5.

II. Commentary on the *Guidelines*

The Sections endorse and acknowledge the CMA's observation that "[i]nternal documents can be an important source of evidence in a merger investigation and it is imperative that merger parties provide complete and accurate responses to document requests to enable the CMA to carry out its statutory functions."[5] In the Sections' view, however, the collection of documents should be guided by an important counter-balancing principle espoused by the *ICN Recommended Practices*, namely that "[c]ompetition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties and third parties in connection with merger investigations."[6]

The Sections read the draft *Guidelines* as showing sensitivity to that principle. For example, paragraph 10 states that "[i]n most cases, merging parties are unlikely to be asked to provide material volumes of additional internal documents (*i.e.*, 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)."[7] And paragraph 17 notes that although the CMA may request "any potentially relevant document" — aside from materials subject to legal privilege, the Sections infer — it 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."[8] These considerations have particular significance given the large volume of internal documents that merger parties will typically have provided the CMA when notifying a proposed transaction, pursuant to sections 8, 9, and 10 of the Merger Notice form. The provision of a complete and accurate set of these materials in each transaction is backed up by statutory penalties in section 117 of the Enterprise Act of 2002.

The limited suggestions that the Sections offer below are predicated on the assumption and expectation that the CMA will execute under the *Guidelines* with comparable sensitivity and sophistication as it has shown in drafting the *Guidelines*. The substantial burdens imposed by additional materials, particularly those requiring extensive IT involvement, should be limited to appropriate cases, and the demands for internal documents should be appropriately tailored to the particulars of the investigation and no more intrusive than necessary for a good faith evaluation of competition merits.

(1) Approach to IT Issues

IT-based production is often cumbersome and costly, so (i) it should be limited to appropriate cases that justify the burdens, probably those in Phase 2, and (ii) the issues are bespoke and should be handled accordingly. Beyond that general principle, the Sections note two particular issues under the *Guidelines*.

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5 *Id.* ¶ 3.

6 ICN RPs, *supra* note 2, Recommended Practice VI.E. The OECD Recommendation similarly advises that OECD member countries should "ensure that their merger laws avoid imposing unnecessary costs and burdens on merging parties and third parties." *See* OECD RECOMMENDATION, *supra* note 3, ¶ I.A.1.2.

7 *CMA Guidance*, *supra* note 1, ¶ 10.

8 *Id.* ¶ 17.

First, the one-line reference to "the production of chats on instant messaging systems"[9] masks an issue that calls for careful balancing. In the Sections' experience, searching and reviewing IM platforms will often impose substantial burden on the merging parties, but the utility to the reviewing agency will depend on the culture in which the platform is deployed, including how the communications are used within the firm and industry and by whom. Although chat tools are sometimes used in technology firms as a preferred communication vehicle among corporate decision-makers, they are more commonly used in business settings for brief, informal, casual or personal communications, and may not contain meaningful content for merger review analysis. Because the burden is likely to exceed the utility in most instances, requests for IM data should be made judiciously, limited to circumstances where chats are as an important means of internal communication relevant to competition analysis in the particular industry.

Second, at paragraph 22(h), the *Guidelines* address the issue of de-duplication of records provided in response to CMA information requests. This is a natural and reasonable topic to address in the *Guidelines*. The paragraph distinguishes among the possibilities of so-called "'case de-duplification' (*i.e.*, documents already produced to the CMA during the case in question should not be reproduced), 'custodian de-duplification' (*i.e*., duplicate files within a set of responsive documents relating to the same custodian should be removed), and 'production de-duplification' (*i.e*., duplicate files within the set of documents produced in response to the full information request should be removed)."[10] The experience of the Sections is that "production de-duplification" may typically, on balance, represent a more efficient and effective approach. "Case de-duplification" will often be a hindrance rather than a benefit to the CMA in transactions where multiple information requests have been issued. In such a circumstance, rather than having a complete information record available on the particular issue covered by a second or subsequent information request, materials previously provided (*i.e*., in response to a prior information request) would have been deliberately removed from the second or subsequent production in a "case de-duplification" scenario, requiring the CMA case team to then locate those removed documents from the prior production.

(2) Time Scope of Internal Document Requests

Paragraph 20 of the *Guidelines* indicates that the CMA will typically will seek production of internal documents in the three-year period preceding the information request.[11] Particularly in the rapidly changing modern global economy, the Sections question whether, as a rule of general application, documents dating back three years would always remain relevant to a merger review. Again, weighing the burden of document production requests against the principles of the *ICN Recommended Practices*, the Sections respectfully suggest that the CMA consider instead applying a two-year period for document requests. This would be consistent with the general practice of the U.S. antitrust agencies in issuing Second Requests under the

9 *Id*. ¶ 18.

10 *Id*. ¶ 22(h).

11 *Id*. ¶ 20.

Hart-Scott-Rodino Act[12] and of the Canadian Competition Bureau in issuing Supplementary Information Requests under the Canadian Competition Act.[13] Both of these jurisdictions use a two-year period as a default for document requests in merger review.

(3) Engagement on Complex Document Requests in Draft Form

Paragraph 26 of the *Guidelines* notes that the CMA "may, where it is practicable and appropriate, share document requests in draft with parties before issuing a notice under section 109."[14] The Sections encourage the CMA to engage in such dialogue with merger parties in all instances where a section 109 notice is issued. Depending on the breadth and scope of a particular request, such dialogue may be very brief and may not elicit any feedback from the parties. As the *Guidelines* note, however, sharing a draft information request with the merger parties in advance can generate many benefits for *both* merger parties and the CMA. Those benefits include the elimination of irrelevant, duplicative, or superfluous requests; confirmation of whether the parties maintain the types of documents or data sought by the CMA; the narrowing of requests to more closely target the issues that the CMA wishes to analyze; and the avoidance of large productions of documents or data that are unlikely to be helpful to the CMA, but will require significant CMA resources in order to be reviewed.

The U.S. antitrust agencies typically engage in such consultation in all instances,[15] as does the Canadian Competition Bureau (whose guidelines acknowledge the value of such "pre-issuance dialogue"[16]). The adoption of such a process is also supported by the *ICN Recommended Practices*, which advise that "[a]pplicable laws and rules should permit the case team (*i.e.,* agency staff responsible for conducting the investigation) to modify information requests in an effort to avoid unnecessary or unreasonable costs and burdens" and that "[t]he case team should be willing to consider possible modifications proposed by the parties."[17] Similarly, the *OECD Recommendation* provides that "[m]erging parties should be given the opportunity to consult with competition authorities at key stages of the investigation with respect to any significant legal or practical issues that may arise during the course of the investigation."[18] In the Sections' views, the issuance of information requests is one such "practical issue" on which the merger parties' views should be sought.

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[12] *See, e.g.*, U.S. FED. TRADE COMM'N, MODEL REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIALS (SECOND REQUEST), ¶ 11 (Rev. Aug. 2015), *available at* www.ftc.gov/system/files/attachments/merger-review/guide3.pdf [hereinafter MODEL SECOND REQUEST].

[13] *See, e.g.*, COMPETITION BUREAU CANADA, MERGER REVIEW PROCESS GUIDELINES, ¶ 3.3.1 (Sept. 8, 2015), *available at* www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/merger-review-process-2015-e.pdf/$FILE/merger-review-process-2015-e.pdf [hereinafter CANADIAN PROCESS GUIDELINES].

[14] *CMA Guidance*, *supra* note 1, ¶ 26.

[15] *See, e.g.*, MODEL SECOND REQUEST, *supra* note 12, at 2 (all Second Requests issued by the Federal Trade Commission "invite recipients to discuss possible modifications with staff").

[16] CANADIAN PROCESS GUIDELINES, *supra* note 13, § 3.2.

[17] ICN RPS, *supra* note 2, Recommendation VI.E, Comment 2.

[18] OECD RECOMMENDATION, *supra* note 3, ¶ I.A.4.

(4) Other Issues Not Addressed in the Guidelines

The Sections also respectfully suggest that the CMA consider making provision in the *Guidelines* for an internal or external process, by which merger parties can seek review of information requests that, in their view, are excessively broad, request information of limited relevance to the CMA's review, or require the production of documents or data that would be unduly costly and burdensome to the parties. Such review mechanisms are consistent with the advice of the *ICN Recommended Practices*, which stipulate that "[d]isagreements between the case team and a merging party relating to whether a request is reasonable or unduly burdensome or whether the merging party has adequately complied with the request should be subject to timely review mechanisms,"[19] including internal appeal procedures within the competition agency or to an independent outside tribunal. Based on the U.S. experience, there is some question as to whether internal procedures alone are adequate. Accordingly, CMA may wish to consider use of a different or additional model, possibly including independent review, in order to achieve genuine enhancement to the efficiency of the investigation process.

IV. Conclusion

The Sections appreciate this opportunity to comment on the *Guidelines*. The Sections would be pleased to respond to any questions that the CMA may have regarding these comments or to provide any additional comments or information that may assist the CMA in finalizing the *Guidelines*.

[19] ICN RPs, *supra* note 2, Recommendation VI.E, Comment 5. *See also* MODEL SECOND REQUEST, *supra* note 12, at 2; and U.S. DEP'T OF JUSTICE, ANTITRUST DIV., SECOND REQUEST INTERNAL APPEAL PROCEDURE (Rev. June 2001), *available at* www.justice.gov/atr/public/8430.pdf; and CANADIAN PROCESS GUIDELINES, *supra* note 13, § 3.7 .