Baker McKenzie.

RESPONSE TO CMA CONSULTATION: GUIDANCE ON INTERNAL DOCUMENT REQUESTS IN MERGER INVESTIGATIONS

Baker McKenzie welcomes the opportunity to comment on the CMA's consultation on guidance on internal document requests in merger investigations. Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on UK merger control.

1. Does the draft guidance generally provide sufficient information in relation to the CMA's practice in relation to internal document requests?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?

1.1 We welcome the introduction of guidance on internal document requests in merger investigations. The UK merger control process requires the provision of a significant amount of internal documents which can prove burdensome for the notifying parties. We note that many other key jurisdictions, such as Germany and the US, do not ask for internal documents during Phase 1 but we acknowledge that such documents can be useful for the CMA's assessment. It is worth bearing in mind that the US approach to disclosure of documents is based on a system of merger control that is judicial rather than administrative in nature. It is questionable whether a heavy-handed, overly burdensome approach to internal document requests is necessary in an administrative system.

1.2 The adoption of a proportionate approach to requests for internal documents should be a guiding principle underlying this guidance. To this end, we would note that the International Competition Network's Recommended Practice for Merger Notification and Review Procedures states that: "*competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties and third parties in connection with merger investigations*".[1]

1.3 Paragraph 8 of the draft guidance states that "*the CMA would not typically expect to receive documents such as emails, handwritten notes, or instant messages*" in response to questions 9 and 10 of the Merger Notice. We consider that such documents, which are very onerous for the parties to produce, are unlikely to be necessary in the majority of merger investigations. We suggest that the wording highlighted above be amended to "*the CMA would only expect to receive documents such as emails, handwritten notes, or instant messages in exceptional circumstances*" and that further guidance is given on these exceptional circumstances.

1.4 Paragraph 10 of the draft guidance in particular helpfully clarifies the CMA's practice. We would however welcome clarification on the CMA's approach to the pre-notification stage. It would be helpful if the CMA would confirm that it will use its judgment to decide whether it is necessary to request internal documents and emails at that stage in a particular case. As the CMA is aware, the collection of internal documents and emails can be extremely time-consuming and disruptive to the parties. In our view, it is not appropriate for the CMA to expect companies to engage in extensive email trawls or to incur additional costs during pre-notification, for example through requests that necessitate the engagement of external forensic data companies.

1.5 The draft guidance does not detail how the CMA will handle confidential business secrets contained in internal documents. It would be helpful if the CMA could clarify whether it would consider disclosing such documents to a third party (e.g. pursuant to the CMA's duty to respect rights of defence) and if so, how it would address confidentiality. This is particularly

[1] http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf at page 19.

relevant to documents that have been created by third parties which may need to be disclosed to the CMA under section 109. We consider that the approach set out by the European General Court in *Tetra Laval v Commission*[2] is appropriate, that is, only disclosing non-confidential summaries of such documents. It would be helpful for the CMA to confirm this position in its guidance.

2. 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?

2.1 Yes, subject to our comment above regarding further clarification on the pre-notification stage. It is helpful that the draft guidance confirms that in most cases merging parties are unlikely to be asked to provide material volumes of additional internal documents (i.e. in addition to those already provided in responses to questions 9 and 10 of the Merger Notice).

3. 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?

3.1 We agree that it is acceptable for the CMA to exercise its section 109 powers in the circumstances described in paragraph 7.3 of *Mergers: Guidance on the CMA's jurisdiction and procedure*. However, we would have a concern that this guidance would lead to the section 109 powers being used increasingly as a standard method for obtaining information from parties, especially in Phase 1 where we consider that the use of section 109 instead of informal requests is not appropriate. We would consider the habitual use of these power to be unnecessary - particularly in respect of third parties - especially in the light of the CMA's section 117 powers (which states that it is a criminal offence to provide misleading information to the CMA). The CMA has not explained why it is necessary to issue section 109 notices as standard practice and it would be useful to have clarification on the CMA's thinking behind this proposed change of practice.

3.2 Given the consequences of non-compliance, we urge the CMA to confirm that in circumstances in which it is considering using section 109, it will first engage with the parties, particularly if it is minded to use this power as standard practice going forward. In our view the CMA should commit to always engaging with the parties to discuss the scope of the section 109 notice and always provide a draft request for discussion. This is particularly important where the CMA is asking for large volumes of internal documents and/or where a tight deadline is imposed (as acknowledged by the CMA in paragraph 26 of the draft guidance). Consultation with the parties prior to sending the section 109 notice will allow the information request to be more targeted and help the parties to understand the CMA's concerns. This in turn will enable the parties to submit documents that address these concerns.

3.3 In our experience, the CMA typically asks for extensive internal documents, even in Phase 1, which are extremely onerous for the parties to obtain. In particular, forensic document searches are extremely expensive and should be limited to cases which are likely to raise significant competition issues and primarily used only in Phase 2. The CMA should not underestimate the level of resources and costs that are required in order to respond to document-heavy information requests and we urge the CMA to be mindful of the need for proportionality. This applies equally to informal requests as well as section 109 notices.

[2] Case T5/02 *Tetra Laval v Commission.*

4. Does the draft guidance provide sufficient information in relation to the likely scope of internal document requests?

4.1 As stated above, we strongly encourage the CMA to consult with the parties on the scope of the information request and share draft requests so that the parties can respond appropriately. The general exclusion of draft internal documents is to be welcomed.

4.2 Importantly, we would encourage future document requests to be properly considered and targeted so that the scope of any request is not inadvertently left wide open (and not simply at the level of "any potentially relevant document" as set out in paragraph 17). A further example would be avoiding a request to provide "all documents referred to in documents provided in response to Questions 9 and 10 of the Merger Notice".

4.3 Furthermore, where a Phase 2 request for documentation follows a Phase 1 request for documentation, it would be helpful for the guidance to specify exactly how the CMA expects the parties to respond and to acknowledge that the parties need not duplicate their Phase 1 efforts - even if the Phase 2 request targets a different substantive area of inquiry. At no point in the process should the parties be required to produce the same document twice. A system of cross-referral can, for example, be used in a submission to avoid duplication.

4.4 In addition, we note that paragraph 20 provides that the period covered by any request would not be expected to run earlier than three years before the date of the request (and it is noted that materially shorter or longer periods could be justified). We would suggest that a two year period is a more appropriate period for a request, with the option for a lengthier or shorter period to be applied if merited in the circumstances.

4.5 We think that some guidance should be provided to the relative probative value of certain categories of document. Whilst we acknowledge that certain categories of document (e.g. handwritten notes, instant messages) are veritable sources of evidence, we consider that in a merger control environment, these categories of documents are less likely to provide meaningful insight on the business' perspectives of the relevant subject matters. In circumstances where it is appropriate for such documents to be disclosed, we think it would be helpful for the guidance to note that these documents may reflect the personal views of individuals rather than the business, and that the CMA will use its discretion to determine - taking into account all the relevant facts - the probative value of such evidence.

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

5.1 We welcome the section in the draft guidance on Approach to IT issues. Again, we encourage the CMA to engage closely with the parties on the scope of IT searches prior to issuing the information request. Forensic searches can be extremely expensive and time-consuming, and may not be appropriate or necessary in many cases. Early engagement with the parties will enable the CMA and the parties to agree on the correct parameters for conducting IT searches. In particular, the scope of any suspension of internal document deletion principles should be discussed so as not to unduly disrupt the ordinary operation of the parties' overall IT environments.

5.2 We agree with the CMA's proposed approach to legally privileged materials, although guidance as to when the CMA would consider it would be appropriate for a privilege log to be produced would be welcome.

6. 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)?

6.1 The proposed question for explanation of methodology is very helpful. There may of course be variations on a case by case basis, and it will be necessary for the CMA and the parties to discuss the best approach (as stated in paragraph 31 of the draft guidance).

6.2 However, we do have concerns that internal document submissions will henceforth require a compliance statement from the CEO or the General Counsel of a company. In the first instance, we would question whether such statements are required given the statutory scheme of sections 109 and 117 (imposing liability on the business).

6.3 If such a suggestion cannot be resisted, we consider the guidance should note that the ultimate responsibility of compliance is with the business (and not on any individual or any external advisor representing the business).

6.4 In addition, the requirement to have very senior level management sign such compliance statements may raise considerable practical issues (especially under time pressure). We note that a compliance statement is not mandatory (and this is to be welcomed); but if one is required, latitude should be given as to the relevant party to decide itself who is best placed to sign on behalf of the company (and provide evidence of their power to do so).

6.5 Finally, we recommend that the CMA provide some guidance on the typical timeframes that it would consider appropriate for compliance with any such document request. Any such timeframe must be based on a very reasonable basis taking into account the total volume of documents involved, the extent to which redaction or privileged log work is required, and whether a third party forensic data company is involved.

April 2018

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