Competition & Markets Authority ("CMA")
Guidance on internal document requests in merger investigations

Response of Bryan Cave Leighton Paisner LLP

1. INTRODUCTION

Bryan Cave Leighton Paisner LLP ("**BCLP**") welcomes the opportunity to respond to the CMA's consultation on its draft "Guidance on requests for internal documents in merger investigations" (the "**Draft Guidance**").

BCLP has considerable experience advising on merger control for a diverse range of clients. The comments provided in this response do not necessarily reflect the views of any of our clients. BCLP would be happy to engage further with the CMA in relation to any of the below responses if that would be useful.

2. RESPONSES TO QUESTIONS 2.2(A) TO (F)

(a) Does the draft guidance generally provide sufficient information in relation to the CMA's practice in relation to internal document requests?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?

Subject to our responses to questions (a) to (f) below, we consider that the Draft Guidance generally provides sufficient information in relation to the CMA's practice in relation to requests for internal documents. We note that much of the Draft Guidance reflects the CMA's existing practice and welcome the fact that the CMA is now providing further, public guidance on its approach.

(b) Does the draft guidance provide sufficient information in relation to the circumstances in which merging parties may be asked to provide material volumes of internal documents?

We note that paragraph 10(d) of the Draft Guidance indicates that additional internal documents may be required in cases where the CMA identifies "*an evidence gap*". In some circumstances, this 'gap' may simply be that such documents do not exist. We would note, for example, that some merger parties (particularly smaller businesses) do not conduct a competitive analysis of the transaction before engaging in merger discussions. It would be helpful if the CMA could acknowledge this fact in the Draft Guidance.

(c) Does the draft guidance provide sufficient information in relation to the circumstances in which the CMA will use its statutory powers to request internal documents?

Merger parties, in our experience, are keen to engage in constructive dialogue with the CMA and do not seek to mislead case-teams. We note that the CMA addressed a penalty notice to HungryHouse Holdings Limited last year for failure to adequately respond to a section 109 request[1] but consider this to be an exceptional case. We would therefore urge the CMA not to use its statutory powers to request internal documents from merger parties except in limited circumstances.

[1] 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.

In deciding whether to issue a section 109 notice to a third party, the CMA should "*seek to avoid imposing unnecessary burdens*"[2] on the receiving business. Certain of our larger clients receive a high volume of informal information requests, both from the CMA and other competition authorities, in relation to third party transactions and antitrust proceedings. In some cases, responding to such requests would require substantial input from the business and making the request under a section 109 notice, with the consequences that entails, would be disproportionate.

One instance in which it may be justified to request internal documents from third parties pursuant to a section 109 notice, however, is where they have made unsubstantiated claims about the merger in question which may be material to the CMA's investigation.

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

We consider that the Draft Guidance generally provides sufficient information in relation to the likely scope of internal document requests. However, given that the CMA's definition of 'internal documents' potentially includes draft documents, we would welcome guidance on how the CMA will treat draft documents, particularly where a final or later version of the same document is provided by the merger parties. It would be helpful, for example, for the CMA to make clear that it will take into account the fact that such documents may not have been checked for accuracy or may, particularly in the case of documents prepared by third parties, have been prepared with little or no input from the business.

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

We consider that the Draft Guidance clearly sets out the CMA's approach to IT issues. In respect of the CMA's approach to requesting legally privileged materials, we would welcome a clarificatory statement in the Draft Guidance noting that the CMA cannot compel the production of privileged material.[3] We would also urge the CMA to explain how it intends to resolve disputes regarding privileged materials which have been withheld.

(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)?

We would welcome further guidance on the CMA's use of compliance statements. It is unclear from the Draft Guidance whether the CMA intends that a compliance statement would affect its decision whether to impose administrative penalties for non-compliance with a section 109 notice. We remind the CMA that it may only impose administrative penalties where there is no "*reasonable excuse*" for the failure to comply[4]. Compliance statements from senior officials within the business should not be used, by the CMA, to circumvent this statutory requirement.

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[2] Paragraph 2.6 of 'Transparency and disclosure: Statement of the CMA's policy and approach' CMA6

[3] Section 109(7) of the Enterprise Act 2002

[4] Section 110(1) of the Enterprise Act 2002

3. RESPONSE TO QUESTION 2.3

The CMA would also welcome the views of stakeholders on any other aspects of the draft guidance.

As recognised at paragraph 6 of the Draft Guidance, the existing guidance document "Mergers: Guidance on CMA's Jurisdiction and Procedure" (CMA2) contains information which is replicated in the Draft Guidance. To avoid the unnecessary costs and potential uncertainty for businesses and their advisers associated with reading the Draft Guidance in conjunction with other CMA guidance, we consider that it would be more beneficial for the Draft Guidance to be incorporated into CMA2.[5]

We also consider that there would be merit in the CMA explicitly stating in the Draft Guidance that, when carrying out both Phase 1 and Phase 2 merger control reviews, it reviews all evidence (including internal documents) in the round.

[5] The CMA has recent experience of updating, rather than supplementing its Guidance – see for example the CMA's Guidance as to the appropriate amount of a penalty (CMA73) which was updated in April 2018.