CMA Consultation on its Draft Guidance in relation to Requests for Internal Documents in Merger Investigations

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Response by Freshfields Bruckhaus Deringer LLP

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RESPONSE TO THE CMA CONSULTATION ON ITS DRAFT GUIDANCE IN RELATION TO REQUESTS FOR INTERNAL DOCUMENTS IN MERGER INVESTIGATIONS

of 28 March 2018

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP (***Freshfields***) welcomes the opportunity to comment on the Competition and Markets Authority's (***CMA***) public consultation on its draft guidance in relation to requests for internal documents in merger investigations launched on 28 March 2018 (the ***Draft Guidance***).

1.2 Our comments are based on our extensive practical experience of merger investigations in the UK and across many other jurisdictions all over the world. In particular, Freshfields has represented many clients on a large number of Phase 1 and Phase 2 merger investigations carried out by the CMA.

1.3 We have confined our comments to those areas which we feel are most significant in terms of providing clarity and certainty for merging parties going through a CMA merger investigation. The comments in this response are those of Freshfields and do not necessarily represent the views of any of our clients.

1.4 This response is structured as follows: (i) initial remarks; (ii) scope, nature and format of internal document requests; (iii) approach to IT issues; (iv) approach to legally privileged materials; (v) use of compliance statements; and (vi) concluding remarks.

1.5 We would be very happy to discuss further any points made in this response if the CMA would find it helpful to do so.

2. Initial remarks

2.1 We welcome the CMA's commitment in principle to proportionality through the careful consideration of the appropriate scope and nature of the document request in light of the circumstances of the case.[1] However, we are concerned that the approach proposed in the Draft Guidance risks failing to achieve the aim of proportionality in a large number of cases.

2.2 It would clearly be disproportionate to apply a standardised approach for all cases regardless of their complexity, especially given the material cost and timing implications for merging parties. Despite the general statement that most cases will not require the gathering of material volumes of additional internal documents (in addition to those responsive to questions 9 and 10 of the merger notice), we are concerned there is a real risk that this approach will apply to a larger number of cases than would be proportionate or desirable. In particular, the fact that the CMA does not make a clear distinction between the approach it will take in Phase 1 and in Phase 2 investigations is cause for concern in relation to proportionality. However, even if the Draft Guidance is not meant to put forward a 'one size fits all' approach, we consider that, as currently drafted, it provides too much discretion for the CMA to decide when

[1] Draft Guidance, paragraph 3.

to apply this proposed approach and provides merging parties too little by way of guidance as to the factors which will determine that decision.

2.3 As a result of this shift in approach, the UK regime risks becoming more out of line with other national merger control regimes with a comparable degree of sophistication, most notably Germany.

2.4 We also have concerns with respect to proportionality in relation to a number of specific positions taken in the Draft Guidance, for example the use of draft requests at the CMA's discretion, the use of section 109 requests as the standard for requests for internal documents, the requirement for compliance statements from the merging parties' CEOs or General Counsel, among other examples mentioned in this response.

2.5 We also believe that firms would welcome more clarity on the use the CMA intends to make of the documents gathered pursuant to these requests for internal documents and how it intends to review that information.

3. Scope, nature and format of internal document requests

Scope of requests at Phase 1 and at Phase 2

3.1 We welcome the confirmation that documentary evidence gathered in Phase 1 will also be used by the Inquiry Group in Phase 2.[2] This is in line with our recent experience in Phase 2 cases, such as in [***Confidential – Redacted***]. We believe this approach makes the transition easier and adds efficiency to the Phase 2 process, without compromising the independence of the Inquiry Group as the Phase 2 decision-maker.

3.2 We also welcome the statement that "*in most cases, merging parties are unlikely to be asked to provide material volumes of additional internal documents*" beyond the documents responsive to Questions 9 and 10 of the merger notice.[3] This policy position is very important, especially since those merger notice questions are very comprehensive and significantly wider than, for example, the equivalent provision in the European Commission's Form CO when it comes to market analysis documents.[4] We believe this wording needs to be strengthened, as there is a serious risk that this message is getting lost in the remainder of the document. The Draft Guidance should emphasise that this is the cornerstone of the CMA's approach and that the remainder of the guidance refers to the unusual circumstances where the CMA requires more internal documents. It would also be useful if the document clarified whether this statement applies to Phase 1 and Phase 2 cases or only the former.

3.3 Furthermore, we are concerned that the Draft Guidance does not make a distinction between the approach the CMA will take at Phase 1 and at Phase 2, which we believe it should (or, at least, that the distinction is not sufficiently clear). The scope and depth of the internal document requests as envisaged in the Draft Guidance do not appear compatible with the timelines of Phase 1 or commensurate with the level of detail of the scrutiny expected at Phase 1, given the difference between the legal test for a reference to Phase 2 and the questions the CMA must answer at Phase 2. There

[2] Draft Guidance, paragraph 11.
[3] Draft Guidance, paragraph 10.
[4] Section 5.4 of the Form CO.

is also a risk that the Merger Notice form becomes less relevant with regard to internal documents (i.e., Questions 9 and 10).

3.4 From a practical point of view, in our experience, very extensive document requests at Phase 1 are unnecessary in a very large number of cases, since approximately half of all Phase 1 cases do not merit a case review meeting, which indicates that they raise limited or no competition concerns. Such wide reaching requests at Phase 1 are unlikely to be useful in complex cases either, since, if requests are not sufficiently targeted, the case team would spend precious time at Phase 1 reviewing documents with little or no bearing to the issues raised by the case. Those wide document searches would be appropriate only at Phase 2 when the CMA has a deeper understanding of the case and, in particular, of the areas where further documentary evidence is required.

3.5 Another unintended consequence of the Draft Guidance could be to create a very binary system, whereby merging parties decide either (i) not to notify the transaction to the CMA (or opt for the briefing paper route) when they are confident the case would be cleared at Phase 1, trading off the certainty of a clearance decision for avoiding the considerable burden of the process (when otherwise they would have preferred to obtain clearance); or (ii) submit a notification only when there is a significant risk that the case could be referred to Phase 2, because in those cases the incredibly burdensome process cannot be avoided. However, these two categories do not reflect the makeup of the CMA's case load and, given that the new approach creates a perverse incentive not to notify in the UK (to avoid the increased burden), cases of some complexity may slip through the net.

3.6 In this connection, we are concerned about the final statement made under point (d) of paragraph 10 of the Draft Guidance:

"*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*."

3.7 There is a risk that this outcome could become too frequent under the CMA's proposed new approach to internal documents requests, in light of the same wide scope of requests being proposed for Phase 1 and Phase 2 cases. Excessively extensive requests at Phase 1 could very well lead to a situation where the CMA finds it challenging to process all the information it has received during the Phase 1 timeframes and takes longer to identify the areas of concern, even in cases that could fairly be cleared at Phase 1. Assuming this Draft Guidance becomes final, in order to avoid this outcome, the CMA would have to make a much greater effort to identify the areas of concern and what supplementary documentary evidence is required early on in Phase 1 or during pre-notification, to give the parties the opportunity to try to address all concerns at Phase 1.

Use of statutory powers to request internal documents

3.8 According to the Draft Guidance the CMA will use section 109 notices as standard practice in future cases.[5] We believe this proposed change in approach to be unnecessary and disproportionate.

3.9 It is unnecessary since, in virtually all cases we have been involved in, the merging parties responded to an 'informal' request with the same level of rigour, seriousness and exhaustiveness as they would have deployed for a formal section 109 notice. It is in the parties' best interest to cooperate with the CMA throughout the process, so informal requests are taken to be formal requests.

3.10 It is also disproportionate because, in our experience, the number of cases where the CMA faces difficulties in document gathering is low. Furthermore, we believe that using section 109 notices will create an incentive for merging parties to focus more in complying with the precise terms of the notice (including by adding obviously irrelevant material), rather than drawing to the CMA's attention material that is most relevant for the review, even if it is not necessarily responsive to the notice. This was our experience in [***Confidential – Redacted***], where the parties were focused on gathering large volumes of [***Confidential – Redacted***] to comply with section 109 notices (which had very tight deadlines), but these documents were often of limited use and relevance to the investigation.

3.11 Our suggestion would be to maintain the CMA's current policy and use section 109 notices only when the CMA has faced difficulties with document gathering in the case in question.

3.12 As a related point, we believe the Draft Guidance should include a commitment (or at least an aspiration) to ensure that deadlines are reasonable, in particular when the CMA issues section 109 notices. It would be regrettable if, as an unintended consequence of the CMA's new approach to use section 109 notices and the setting of excessively short deadlines, the UK merger control timetable became routinely further extended, falling further out of line with other merger control regimes.

3.13 When the document production is likely to lead to a considerable volume of responsive documents, the ability to submit responsive documents in batches on a rolling basis (with a deadline for the final submission) would be very helpful for the merging parties from a practical perspective. It would also improve the efficiency of the merger investigation, by allowing the CMA to start reviewing documents sooner.

Engagement with merging parties

3.14 We welcome the CMA's intention to engage with the parties to define the scope of the request and discuss the approach to respond to it. The Draft Guidance envisages three avenues of engagement:

(a) 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*" and "*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 (...), in*

[5] Draft Guidance, paragraph 15.

order to understand which business people are likely to hold potentially responsive documents";[6]

(b) The CMA "*may, where it is practicable and appropriate, share document requests in draft with parties before issuing a notice under section 109. 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)*".[7] As part of this process, 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*";[8] and

(c) 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*".[9]

3.15 Our experience in [***Confidential – Redacted***] suggests that each of these three steps is very effective. In relation to internal documents, at the outset of Phase 2, the CMA case team requested that the parties submit a proposal as to how they would gather internal documents relevant to a number of areas the CMA had identified in advance. This proposal included an explanation of the decision-making process in each of those areas, the level of seniority of the decision-makers and the key documents generated (either routinely or as a matter of exception). Separately, the case team on [***Confidential – Redacted***] shared the draft of the initial request for information of Phase 2. Throughout this process, the CMA case team asked the parties to flag if any question would lead to a substantial volume of responsive documents.

3.16 We also note that, in that case, the CMA only explicitly asked for an email search exercise in relation to one specific aspect of the case. In this regard, the CMA together with the parties identified the main areas of focus, with a clear view to carrying out targeted searches that would not lead to an excessive volume of documents.

3.17 This level of engagement made the process more efficient: for example, the parties were able to identify (i) areas where the information had already been provided; (ii) challenges to documents gathering; and (iii) questions which would lead to a considerable volumes of documents being produced to the CMA. This, in turn, ensured that the responses to the requests were thorough, precise and provided in a timely fashion.

3.18 Given these clear benefits, we consider that this approach should be the rule and not the exception and, therefore, the Draft Guidance should include a presumption that the CMA will engage with the parties in this way, in particular before issuing the requests, unless there are good reasons not to do so. Our experience suggests that the CMA tends to issue quite broad requests for internal documents out of abundance of

6 Draft Guidance, paragraphs 18-19.
7 Draft Guidance, paragraph 26.
8 Draft Guidance, paragraph 30.
9 Draft Guidance, paragraph 27.

caution. This is another reason why we consider that there should be a genuine discussion about a draft request in all cases and not just at the CMA's discretion, in order to ensure proportionality. This approach would be particularly welcome given the requests' wide scope under the Draft Guidance.

3.19 This approach will, of course, have timing implications and can only work if the CMA focuses on internal document requests early in the process (particularly in Phase 1 investigations), in order to avoid further extending the pre-notification period. Otherwise, there is a risk that the UK review timetable will fall out of line even further with the vast majority of merger control timetables.

3.20 In any event, as mentioned above, we consider that wide document searches should only be carried out at Phase 2, once the case team has a better understanding of the case and what documents are necessary.

Scope of requests

3.21 The Draft Guidance suggests that the requests will have varying degrees of complexity or breadth and that, in some instances, the CMA will be willing to accept self-selection of documents (which is naturally much less burdensome for merging parties). Examples of the latter that are cited in the Draft Guidance include cases involving smaller parties or where the information sought is less material.

3.22 While we, of course, recognise that the complexity and breadth of the requests will be determined, to a significant extent, by the facts of the case, we would welcome more clarity on the circumstances where the CMA would envisage more limited requests, in particular requests not requiring wide-reaching IT searches. It is not clear from the Draft Guidance in which cases (if at all) the CMA would adopt a similar approach to the one taken in [***Confidential – Redacted***] in relation to email searches (i.e., only focused on one specific aspect of the case), which we thought was proportionate and quite effective.

4. Approach to IT issues

4.1 In relation to IT issues, we believe the CMA's position is not proportionate in three key areas:

(a) The extension of the notion of relevant document to cover a custodian's entire IT environment, in particular instant messaging systems, given the slim likelihood of information relevant for the assessment of the merger being found in instant messaging communications. Given the limitations and typical use of the medium, the company's strategy, the impact of the merger and competitive analysis are unlikely to be articulated through such communications. Furthermore, positions taken in that medium will probably reflect the individual's evolving thinking but not necessarily the company's considered position and strategy; the latter is normally communicated in a meeting or through a presentation, report or email;

(b) The indication that responsive documents will have to be provided in their entirety, including parts which are outside the scope of the request. A more balanced solution – which we have adopted with success in the past – would be to keep the titles/headings of the sections which are not responsive, to allow

the CMA to confirm that they are, in fact, not responsive to the request. This would reduce the volume of information the CMA has to review and make the response more targeted to the CMA's request. If the CMA then considers that the out of scope information could be relevant for the investigation, it could always send a follow up request for information; and

(c) In relation to the requirement to provide the metadata of digital material, to ensure consistency, it would be helpful if the CMA made available a template data exchange agreement providing details on the type of load files and the naming conventions for field headers. Other points where it would be good to have a consistent approach include: list of metadata fields to produce, name/subject, dates, custodian names and path where file originated from in the IT environment. Given our experience in large electronic document productions, we can certainly contribute to the design of this template if that would be helpful.

5. Approach to legally privileged materials

5.1 We welcome the CMA's stated approach of requesting the parties to describe the steps taken to identify privileged materials redacted or removed from the final production.

5.2 The Draft Guidance indicates that the CMA may require privilege logs to be produced. It would be useful to understand in which cases the CMA would consider necessary or unnecessary for the parties to prepare a privileged log. This would allow the parties to plan ahead for the eventuality of those logs being requested.

6. Use of compliance statements

6.1 We believe that, by proposing to require compliance statements from CEOs or General Counsel, the Draft Guidance does not strike the right balance between proportionality and fostering compliance and due care when responding to the request. Apart from the situation where senior management have self-selected relevant emails, it is difficult to envisage how CEOs or General Counsel will be able to attest compliance, especially if the information gathering has been complex.

6.2 CEOs and General Counsel would be put in a very delicate position if they had to confirm compliance in relation to a process over which they naturally will have had quite limited visibility due to their position and responsibilities within the company. Indeed, an all-encompassing statement is unlikely to be meaningful given the way such large and complex requests must be organised as a matter of practicality (with forensic IT searches). Therefore, it would be unrealistic and disproportionate to expect that CEOs and General Counsel will be able to monitor compliance every step of the way.

6.3 In these circumstances, CEOs or General Counsel will probably only be in a position to certify that they have instructed the business and its advisers to use due care to respond in full to the request and be mindful of the company's responsibilities in this regard.

6.4 This requirement will also likely have timing implications, causing delays in the responses.

7. Concluding Remarks

7.1 As we mentioned at the outset, we welcome the CMA's commitment in principle to proportionality, but we are concerned that, in reality, the approach proposed in the Draft Guidance will be disproportionate in a large number of cases. We also consider that the Draft Guidance gives excessive discretion to the CMA on a number of relevant issues, in particular the scope and breadth of the requests and the level of engagement with the merging parties when defining the scope of those requests. Moreover, as set out above, there are a few other features of the Draft Guidance which would benefit from further clarification or some adjustment. Viewed as a whole, there is a real risk that this approach will significantly increase costs for merging parties (as large document gathering exercises are very costly), have undesirable timing implications and, more generally, add more uncertainty to the process.

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