IBA ANTITRUST COMMITTEE COMMENTS ON THE COMPETITION AND MARKETS AUTHORITY'S DRAFT GUIDANCE IN RELATION TO REQUESTS FOR INTERNAL DOCUMENTS IN MERGER INVESTIGATIONS

1 May 2018

1. INTRODUCTION

1.1 This submission is made to the Competition and Markets Authority (***CMA***) by the Mergers Working Group (***Working Group***) of the Antitrust Committee of the International Bar Association (***IBA***) on the CMA's public consultation on its draft guidance in relation to requests for internal documents in merger investigations launched on 28 March 2018 (***Draft Guidance***).

1.2 The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help shape the future of the legal profession throughout the world. Bringing together antitrust practitioners and experts among the IBA's 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at: http://www.ibanet.org.

1.3 The Working Group's comments draw on the vast experience of the IBA Antitrust Committee's members in merger control law and practice in jurisdictions worldwide. Further information on the Antitrust Committee and its Mergers Working Group is available at: https://www.ibanet.org/LPD/Antitrust_Trade_Section/Antitrust/Default.aspx.

2. EXECUTIVE SUMMARY

2.1 As a general observation, the Working Group notes that the Draft Guidance appears to signal a shift in the CMA's policy with respect to requests for internal documents, and in particular a move towards using the CMA's formal information gathering powers as standard in future investigations. As a matter of good administrative practice, and given the likely material cost impact for businesses undergoing merger review in the UK, as well as for the CMA's own resources, the Working Group respectfully submits that the CMA should provide clear reasons (using a cost benefit approach) before proceeding with such a change.

2.2 Further, the Working Group cautions against a blanket adoption of certain practices from other jurisdictions where significant legal differences in the relevant legal framework may justify a difference in practice. For example, the merger review process in the United States involves very comprehensive (and usually very burdensome) document request procedures, but there are specific institutional design elements which have led to this process. In the US, the antitrust agencies cannot directly prohibit transactions, but rather must seek an injunction before an independent court that has very specific evidentiary rules and procedures, which is quite different from the UK's administration-based system of merger review. Therefore, the US merger review

process is heavily weighted toward collecting evidence in forensically specified ways that will enable the antitrust agencies to meet the procedural and substantive requirements of the US litigation system. These differences must be borne in mind when the CMA is designing a policy approach to the use of internal documents and the potential burdens that such an approach imposes.

2.3 Adoption of a proportionate approach to making requests for internal documents should be CMA's guiding principle. The CMA is a long-standing member of the International Competition Network (***ICN***), whose Recommended Practices for Merger Notification and Review Procedures state: "*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]

2.4 The Working Group therefore welcomes the CMA's recognition that requests for internal documents can be onerous and its commitment to proportionality through the careful consideration of the appropriate scope and nature of a request for internal documents in light of the circumstances of the case.[2]

2.5 Nevertheless, the Working Group has concerns that the approach set out in the Draft Guidance will not achieve the stated aim of proportionality and in fact will add additional and unnecessary burdens on merging parties, third parties and the CMA itself. In particular, there are concerns regarding:

(a) the use of section 109 notices as a standard procedure, which would be disproportionate and unnecessary;

(b) the potential for duplication between document requests at Phase 1 and Phase 2 of a review, and the use of formal requests at Phase 1 (other than in exceptional circumstances);

(c) the potential for document requests to be scoped unnecessarily broadly, in particular catching handwritten notes or chats on instant messaging systems which are unlikely to offer meaningful and reliable evidence;

(d) three years as the default time period for documents requests, which is too long and risks diverting the CMA's scarce resources from documents that are likely to have most relevance and value;

(e) the need to produce documents in their "entirety", without the ability to make appropriate redactions;

(f) the use of compliance statements, in particular in the case of extensive document requests, which may raise practical difficulties and create unnecessary burdens; and

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[1] ICN Recommended Practice VI.E. The OECD Recommendations similarly advise that OECD member countries should "ensure that their merger laws avoid imposing unnecessary costs and burdens on merging parties and third parties"; see supra note 3, at paragraph A.1.2.

[2] Draft Guidance, paragraph 17.

(g) the treatment of documents and the CMA's approach to confidentiality.

2.6 The Working Group welcomes the CMA's intention to engage with parties on complex document requests and suggests that this should occur in all cases (and not just complex cases or at the discretion of CMA personnel handling a particular case). Not only will this ensure that requests are scoped more appropriately, but it will help to avoid the CMA receiving disproportionately large volumes of documents which would impose unnecessary burdens on the authority as well as the parties producing them.

2.7 The remainder of this response is structured as follows: (i) use and scope of internal document requests; (ii) approach to document issues; (iii) the use of compliance statements; and (iv) the treatment of confidential information. The Working Group has not commented on every aspect of the Draft Guidance, but has focused on those key aspects where its international experience may be most relevant for the CMA.

3. USE AND SCOPE OF INTERNAL DOCUMENT REQUESTS

3.1 The Draft Guidance is helpful in acknowledging 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 (relating to rationale for and impact of the merger) and 10 (providing competitive analysis of potential segments where parties' activities overlap) of the merger notice).[3]

3.2 In addition, the Draft Guidance provides a helpful explanation of circumstances where internal documents may nevertheless be requested in addition to those provided as part of the merger notice, for example: where commercial decisions or internal reporting takes places by email and those emails are not provided as part of the merger notice;[4] the documents provided as part of the merger notice refer to other documents that may be material to the CMA's investigation; the merging parties are submitting an exiting firm defence; and there is an evidence 'gap' in relation to an issue that is material to the CMA's Phase 1 investigation.

3.3 In light of this explanation, The Working Group offers the following suggestions:

(a) The CMA should ask the merging parties about the extent to which decision-making or internal reporting is undertaken by email before determining whether to issue a request for this type of additional internal documents.

(b) Where documents provided in response to questions 9/10 of the merger notice refer to other documents, the CMA should specify the documents in question rather than making a generic request to provide any documents referred to in those documents already provided as part of the merger notice.

[3] Draft Guidance, paragraph 10.

[4] As the CMA guidance to the merger notice notes, the CMA would not typically expect to receive emails in response to questions 9/10 of the merger notice.

Use of section 109 notices as standard would be disproportionate and unnecessary

3.4 The Working Group considers that the use of section 109 notices as a standard practice would be disproportionate and unnecessary. Such a step should not automatically be warranted bearing in mind the existence of, and the potentially very serious consequences of infringing, section 117 (which states that it is a criminal offence to provide misleading information to the CMA) which applies to informal requests for information and incentivises parties to submit complete and accurate information.

3.5 As regards third parties, the Working Group welcomes the confirmation that the CMA normally would use its informal information gathering powers, as a starting point with third parties. However, the Working Group suggests that the Draft Guidance should go further and indicate that section 109 notices will not be used for third parties other than in exceptional circumstances (e.g. non-cooperation accompanied by reasons to believe that important evidence is likely to be unavailable as a result). The Working Group believes that burdens imposed on innocent bystanders should be minimized. However, if the third party is a complainant, it may be appropriate in certain situations to review its relevant documents to evaluate the veracity of the complaint.

Scope of requests for internal documents at Phases 1 and 2

3.6 The Working Group would welcome further guidance on the approach to internal document requests at Phase 1 versus Phase 2 of a review. In particular:

(a) The Draft Guidance notes that requests will be more extensive at Phase 2 than Phase 1, but no other guidance on approach is provided (other than that documents provided at Phase 1 will be used by the Inquiry Group at Phase 2 - which is a welcome clarification).

(b) The Working Group has concerns that the use of internal documents requests at Phase 1 (and then again at Phase 2), in addition to documents provided in the merger notice and in response to questionnaires at start of Phase 2, will result in a disproportionately burdensome and potentially duplicative process for merging parties. The Working Group urges the CMA to consider limiting formal requests for additional merger documents to Phase 2 unless there are specific exceptional circumstances that warrant such a request during Phase 1.

Scope of requests should be proportionate and reasonable

3.7 The Working Group would welcome further guidance on how the CMA will scope its requests. There is a concern that the scope could in many cases be unduly wide (see, for example, the reference to "any potentially relevant document"[5]).

3.8 In this regard, the Draft Guidance is helpful in explaining that the CMA may engage with parties to discuss scope and the approach to responding to the request. The Draft Guidance envisages three types of engagement with merging parties:

[5] Draft Guidance, paragraph 17.

(i) to understand their decision-making procedures and how they gather and assess competitive analysis, and to obtain information on decision-making processes and reporting lines to assist in identifying relevant custodians;[6]

(ii) to provide document requests in draft to the merging parties and discuss them before issuance under section 109. As part of this process, CMA may request a party's proposed response to the methodology question to be submitted in draft before responsive documents are produced;[7] and

(iii) to engage with the parties on whether the proposed approach is sensible and practical, and in particular that the envisaged approach would not result in a disproportionate number of documents being produced.[8]

3.9 These steps are welcome and should go some lengths to ensuring that the request for documents is efficient and proportionate. Accordingly, the Working Group recommends that the CMA ensure that these steps are followed in all cases, rather than being left to the discretion of case team personnel as to when and how they should or should not be followed. [9]

3.10 The Draft Guidance is also helpful in noting that most requests will relate to specific categories of emails and internal analyses rather than a broad general "document" category.[10] Nevertheless, the Working Group has a concern about the potential for unnecessary requests for handwritten notes or chats on instant messaging systems. The Working Group suggests that the CMA weigh the likely probative value of such materials against the associated burden on parties of finding and producing such materials, as well as the resource implications for the CMA to review them. It is respectfully submitted that meaningful and reliable details regarding the company's strategy or the impact of the proposed merger are unlikely to be found in these types of documents and that comments expressed in such documents are more likely to be personal views than those of the company. In addition, the Working Group notes that companies often do not treat chats on instant messaging systems as a type of corporate record.

3.11 The Draft Guidance is helpful in recognising that self-selection might be appropriate in certain circumstances.[11] While the Working Group appreciates that the complexity and breadth of requests will be determined, to a significant extent, by the facts of the case, it would welcome more clarity on the circumstances where CMA would be prepared to use more limited requests, in particular not requiring wide-reaching IT searches. An "all documents" formulation of a request has significantly greater burdens than a request to produce the core documents related to a specific topic area.

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6 Draft Guidance, paragraphs 18 and 19.
7 Draft Guidance, paragraphs 26 and 30.
8 Draft Guidance, paragraph 27.
9 See Draft Guidance, paragraph 26, which refers to consultations "where it is practicable and appropriate".
10 Draft Guidance, paragraph 18.
11 Draft Guidance, paragraph 33.

Time period for requests

3.12 Finally, in respect of time periods, the Draft Guidance suggests that three years is likely to be the normal approach. In light of the potentially onerous nature of document requests (especially those relating to all documents responsive to a particular specification) and the focus of the CMA's review being on an anticipated or completed merger where either current or recent documents will be of most probative value (and the fact that ordinary course documents are prone to go 'out of date' quickly), the Working Group respectfully suggests that two years should be CMA's default time period. This will also allow the CMA to focus its scarce resources on the documents that are likely to have most relevance and value.

3.13 Further, the Draft Guidance notes that there may be instances where the time period is "materially shorter or longer". While the reference to shorter periods is helpful (and indeed the Working Group would hope that shorter periods would often be considered to be adequate), the reference to longer periods is concerning. The Working Group would only expect such a longer duration to be warranted in exceptional circumstances. Further guidance in this regard would be welcome.

4. APPROACH TO DOCUMENT ISSUES

4.1 The Draft Guidance notes that responsive documents should be produced in "entirety", including "parts of a document that deal with matters that are not specified in the request".[12] However, the Working Group suggests that redactions should not be objectionable to the CMA so long as they are done in a way that allows the CMA to confirm their legitimacy (for example, this can be achieved by parties providing the title/heading to a redacted section).

4.2 The Draft Guidance also helpfully notes that parties may not be expected to produce draft documents. However, it goes on to state that the CMA may request a draft version of a document where it may be material to its investigation.[13] In the Working Group's experience, drafts of documents rarely provide probative evidence. It would therefore be helpful if the CMA could provide guidance on when this type of exceptional situation might arise.

4.3 The Working Group appreciates the confirmation that privileged materials may be withheld or redacted.[14] While a privilege log may be an appropriate further check on such claims, the Working Group considers that it likely is only warranted in limited circumstances.

5. COMPLIANCE STATEMENTS

5.1 The Working Group has concerns that the requirement to sign a compliance statement may raise practical difficulties and create unnecessary burdens on parties. This is particularly the case in extensive document requests (one of the scenarios envisaged by the Draft Guidance where compliance statements are particularly likely) where it may be unrealistic to expect a CFO, General Counsel or other senior officer to be able to certify absolutely full compliance.

[12] Draft Guidance, paragraph 22(g).
[13] Draft Guidance, paragraph 22(i).
[14] Draft Guidance, paragraph 23.

Accordingly, the Working Group suggests that the CMA only require compliance statements where it has encountered difficulties in its information gathering.

5.2 Further, the Working Group notes that in the United States, the standard is one of "substantial compliance" rather than "full" or "complete" compliance. The Working Group encourages the CMA to adopt this standard (or a comparable one) to the extent it decides to require compliance statements going forward.

6. TREATMENT OF CONFIDENTIAL INFORMATION

6.1 Finally, the Working Group believes that the Draft Guidance would benefit from explaining the CMA's treatment of documents and its approach to confidentiality. For example, are there circumstances in which the CMA would consider disclosing some or all of a document to another party and, if so, what steps would the CMA take to preserve confidentiality? This is particularly relevant to third parties who may be required to provide internal documents for the purposes of the CMA's review and have concerns about how those documents will be treated by the authority because such documents may contain competitively sensitive information and/or may contain information that could place a customer or supplier in a commercially disadvantageous position in future dealings with the merging parties. Confidentiality is also an important and legitimate concern of merging parties. The Working Group believes that parties who are being required to produce their most highly confidential internal documents are entitled to clear and strong assurances from the CMA regarding the manner in which confidentiality will be maintained.