



Law Society
of Scotland

Consultation Response

Draft guidance on requests for internal documents in
merger investigations

April 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Competition Law Sub-committee welcomes the opportunity to consider and respond to the CMA's consultation *Draft guidance on requests for internal documents in merger investigations*.¹ The Sub-committee has the following comments to put forward for consideration.

Response

(a) Does the draft guidance generally provide sufficient information in relation to the CMA's practice in relation to internal document requests?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

We are aware that concerns have been raised in the past about competition authorities using internal documents that may have been created in a specific context for general competition analysis without taking the relevant context into account. It is very important to read internal documents in the context they were created and to balance that evidence against economic assessment. As the CMA is drafting guidance on this, it may be a good time to consider if there should be hierarchy between technical and non-technical evidence. For example, as a general rule we would not expect an email from a marketing team to be treated in the same way as a report from an economist.

¹ https://www.gov.uk/government/consultations/draft-guidance-on-requests-for-internal-documents-in-merger-investigations?utm_source=1203db86-c5d5-44cd-b1de-9e18aeed1ff0&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

(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 welcome a commitment to engage with the parties on complex document review cases in draft.

(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?

We note the possibility to include a request for a compliance statement to be signed by the GC or CEO set out in paragraph 34. The CMA specifies that the power will only be in limited cases where there was a degree of difficulty in collecting evidence. However, it could be recommended that the compliance statement is made by an appropriately informed person or person at a particular level. So for example, in cases where documents are collated by IT or forensic experts, it may be appropriate to have a statement from that team. Furthermore if the GC or CEO is not available, it would be helpful to clarify that the GC or CEO would be able to delegate responsibility for sign-off to an appropriate person.

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

In terms of assessing and anticipating the regulatory burden, it is not only the scope of internal document requests which must be assessed but also the timeframe for complying with that request.

It would be helpful if further guidance on this issue were given alongside paragraphs 26/27 insofar as when consulting the parties over scope of the document request, the CMA should also discuss timing. It would be beneficial if the CMA were to state explicitly that they will discuss this as part of scoping the request.

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

Where the CMA is asking for "metadata" it may be helpful to define what information is to be included as metadata or to state that this is something to be agreed on the scoping exercise on a case by case basis, depending on what is relevant in the particular circumstances of a given case.

In addition 22(g) states that responsive docs should be provided in their entirety, including parts of the document that deal with other matters. Whilst s.109 gives wide powers, it is limited to what is required to be produced in civil litigation. It would be helpful to have further clarity as to whether that carve-out also applies to relevance. For example, a Board Minute that might cover many different issues and matters, many of which may be highly confidential and commercially sensitive.

(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)?

A further point for consideration is that paragraph 16 talks about third parties getting a s.109 where they fail to comply with the initial formal request. We consider that the guidance should explain what happens from the merging parties' perspective if a third party does not comply with a request.

For further information, please contact:

Carolyn Thurston Smith
Policy Team
Law Society of Scotland
DD: 0131 476 8205

carolynthurstonsmith@lawscot.org.uk