Response to the CMA's consultation document regarding requests for internal documents in UK merger investigations

Linklaters welcomes the opportunity to comment on the CMA's draft guidance on requests for internal documents in merger investigations (the "**Draft Guidance**").

1 Executive summary

We consider that the practices detailed in the Draft Guidance may be unduly burdensome and disproportionate in certain circumstances. Accordingly, we have included some observations below indicating points where the CMA might clarify its standard approach and expectations for the production of internal documents in a range of potential cases.

In our view, the Draft Guidance lacks clarity on the approach the CMA is likely to take in practice. We consider that the CMA's principles as set out in the Draft Guidance, while potentially well-suited to large, complex cases requiring Phase II review, are likely to be problematic when considering Phase I cases. As detailed further below, we would welcome the articulation of clear presumptions that many of the more burdensome topics addressed in the Draft Guidance are geared for Phase II and presumptively inapplicable at Phase I.

We are available to discuss this submission further should it be useful to the CMA.

2 Specific points

2.1 Definition of internal documents

We very much agree with the thrust of the CMA position that it does "*not typically expect to receive documents such as emails*"[1] as this would be disproportionate generally and especially across Phase I cases. We also agree this cannot be an absolute exclusion: it is the CMA's intention that "*other types of document*" (including emails) be requested "*in some circumstances*"[2] and we agree that this is reasonable, most obviously at Phase II.

That said, we also note that the CMA's definition of internal documents in its Draft Guidance includes "*all types of documents … sent or received*" by the merging parties' officers or employees.[3] It would be helpful to merging parties for the CMA positively to exclude emails from the default definition of "*internal documents*" altogether, which would be without prejudice to the CMA specifying that it seeks internal documents (.doc, .ppt, pdf etc.) <u>and</u> emails in certain specified circumstances as necessary on a case-by-case basis.

As a relevant comparison, in our experience the inclusion of review of emails as a default position in Phase I would be a differentiating factor from most other peer jurisdictions (e.g. the European Commission, the German FCO, the Canadian Competition Bureau etc.) and would

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1 Draft Guidance, paragraph 8.

2 Draft Guidance, paragraph 2.

3 *Ibid*. In addition, we are of the view that it would be beneficial to make clear in the Draft Guidance that the definition of internal documents should not automatically include documents received from third parties, as such documents may not be reflective of a merging party's views. In our view, the extent to which final versions of third party documents may be relevant should first be discussed between the CMA and the merging parties.

thereby increase the already-large cost differential between UK Phase I review and those in peer jurisdictions.

In addition, in our view it would be best practice for a specific justification / rationale to be given to the merging parties for the request of "*other*" types of documents (e.g. purchasing pattern information is requested to establish/investigate [x], etc.).

2.2 Additional document requests

We welcome the CMA's position that "*merging parties are unlikely to be asked to provide material volumes of additional internal documents*"[4] beyond the requirements of the Merger Notice. Nonetheless, as regards the circumstances where additional internal documents may be requested by the CMA, our observations are:

a) As an overarching point, we would suggest that in cases where it is the CMA's intention to request additional documents, the specific rationale behind such a request is explained and discussed with the merging parties and their advisors in advance of any such request being issued. The vast majority of merging parties and their advisers wish to engage in good faith with the CMA and such discussions can help frame requests to target what is readily available and proportionate.

b) With respect to the CMA's intention at Draft Guidance paragraph 10(a) to request additional internal documents such as emails "*where commercial decisions … or where internal reporting takes place*" over such a medium, we are concerned that such a blanket approach is flatly disproportionate and could be particularly burdensome on the merging parties. In our experience material commercial and strategic decisions relevant to the CMA's substantive analysis are made (and often required to be made under merging parties' corporate governance) at board and management meetings. If there emerged a material issue in respect of which the CMA were told, in full cognisance of the criminal penalties that may arise in providing false or misleading information to the CMA, that there were no non-email internal documents (.doc, .ppt, .pdf) on a given topic (for example in certain, often smaller or leanly-run private companies, perhaps) then it could conceivably be proportionate to request email evidence in lieu of other internal documents.

c) We consider that it would also be helpful to clarify the type of documents which the CMA envisages as necessary to substantiate a failing firm defence; as currently drafted it seems possible that an evidence gap would automatically arise unless documents such as emails are produced.[5] The UK antitrust adviser community is well aware that the CMA imposes a high evidentiary burden on failing firm claims and applies it to the merging parties, so the parties have every incentive to be comprehensive in terms of submission of evidence to support such claims. In this respect, we are aware of past cases where there was compelling evidence to support a failing firm defence at UK Phase I absent email collection, so it should not be suggested that their provision is an inevitable requirement.

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[4] Draft Guidance, paragraph 10.

[5] Draft Guidance, paragraph 10(c).

d) As regards the CMA's statement at Draft Guidance paragraph 10(d) that it may be difficult for the CMA in Phase I to undertake the necessary information-gathering where a material volume of further evidence would be needed to dismiss competition concerns in relation to a broad range of substantive issues, that is understood. We would welcome clarification from the CMA that Phase II review would not be initiated simply because there is a large volume of documents to review, particularly if this were driven by incremental CMA document requests beyond the requirements of the Merger Notice.

2.3 Section 109 notices

We appreciate that there may be a minority of cases where the CMA has felt that merging parties were not respecting their obligations, but the use of section 109 notices as standard in future Phase I merger reviews[6] is a strict approach that increases the process burden. Formal compulsory process is entirely appropriate for litigation and criminal and quasi-penal civil investigations under the Competition Act, but applying these processes in a blanket fashion – rather than judiciously – to the civil process of merger control is heavy-handed. Unlike other CMA investigations in which merging parties are usually unwilling and involuntary participants, merging parties knowingly participate in and are incentivised to cooperate with the CMA in order to maximise the chances of securing a positive decision in their favour.

We would question this particularly in relation to Phase I review, where use of section 109 would be burdensome on merging parties. As most merging parties will have engaged with the CMA in (often lengthy) pre-notification discussions, where the CMA has opportunity to discuss the extent to which internal documents will be required as part of the merger notification, the provision of the required additional documents could more straightforwardly be achieved by refusing to start the clock without full documents being submitted in the relevant instances.

Given the severity of the consequences of non-compliance with a section 109 notice as detailed by the CMA at paragraph 13 of the Draft Guidance and the requirement of a compliance statement as detailed at paragraph 34 of the Draft Guidance, it is in our view imperative that if used by the CMA in a Phase I investigation such notices are strictly proportionate to the circumstances of the case. For instance, a section 109 notice that requires merging parties to provide documents such as emails during Phase I (and the necessary instruction of a forensic IT provider and other such steps that this requires) would impose a significant burden on the merging parties and seem particularly disproportionate.

In addition, given the consequences of non-compliance, we would suggest that when using a section 109 notice, the CMA should always endeavour to provide merging parties with a draft notice unless there are exceptional timing or other constraints making it impractical and inappropriate to do so, as opposed to this mainly being required in complex cases.[7] This will help to ensure that the CMA receives the right documents from the merging parties and are not requesting documents which (i) do not exist; or (ii) have no relevance to the contemplated transaction; creating efficiencies for the CMA and the merging parties.

We are in favour of the CMA's use of section 109 notices in relation to third parties in order to properly evaluate claims made by competitors because - unlike the merging parties who are in

[6] Draft Guidance, paragraph 15.

[7] Draft Guidance, paragraph 26.

the midst of the CMA process - third parties have no particular incentive to be cooperative with the CMA and devote resources to furthering the CMA's fact-finding, whether or not such facts support or undermine the merging parties' submissions.[8]

2.4 Identification of custodians

We note the CMA's commentary that the identity of custodians is likely to be "*driven by involvement in or influence over commercial decision-making in relation to the matters under investigation*".[9]

We submit this should be rephrased as "custodians that comprise the key commercial decision-makers" in relation to relevant matters. It is a truism of corporate life that many individuals can be involved or arguably have some influence on decisions, but organisations are hierarchies where key or senior staff are entrusted to make decisions which may and often do contradict the views of juniors, or are required to reconcile multiple viewpoints with one "house view". By analogy, a CRM case does not have twelve decisions from different participants, but one decision made by the decision-maker – and that decision necessarily becomes the "house view" as to what the CMA thinks, whether or not it reflects unanimity of internal opinion. It would not be helpful if for sake of argument in judicial review the CMA were compelled to produce the draft economic advice and every iteration of comments on the draft decision. In the same way, what is relevant is the "house view" of a merging party as reflected by the decision of a key commercial decision-maker. Requiring documents from such a custodian will still capture all the inputs into their decision from colleagues and juniors, but avoids an exponential increase in scope.

In particular, in our experience, it is important that individuals who have simply had responsibilities for reviewing or making proposals for a particular project or category are not classified as custodians. It is no coincidence that perhaps the original inspiration for merger control document requests, the US HSR Item 4 (c) requirements, has the limiting principle of officers and directors as custodians.

2.5 Approach to IT issues

Whilst we appreciate the useful advice the CMA provides on the principles it expects merging parties to apply when preparing their response, we would caution that some aspects of them may not be proportionate. In our view, the CMA's advice as set out in the Draft Guidance is likely to be well-suited to large, complex cases requiring Phase II review and therefore the likely engagement of an external document platform provider, but become problematic when considering Phase I cases. In particular:

a) Including instant messaging systems as part of the custodian's IT environment[10] would be particularly cumbersome and likely to constitute largely irrelevant material for most organisations. While this is proportionate for an investigation such as LKBOR or FX we recommend that the CMA positively excludes instant messaging systems from the definition of the custodian's IT environment, taking the alternative approach of

[8] Draft Guidance, paragraph 16.

[9] Draft Guidance, paragraph 19.

[10] Draft Guidance, paragraph 22(a)

proactively asking for instant messages in businesses where the CMA considers them particularly likely to have probative value.

b) We are concerned that Draft Guidance paragraph 22(b) as drafted could be interpreted as putting merging parties under a proactive requirement to adjust their standard document retention policies; which we would regard as particularly onerous and suggest that such steps should be actively requested by the CMA only when deemed necessary for exceptional reasons.

c) Requiring a manual review of documents that are not text-searchable[11] is likely to be unduly burdensome and time-consuming for merging parties and their advisors during a Phase I investigation.

d) The metadata of digital material may include drafts that are subject to legal professional privilege, which would force merging parties' legal advisors to perform a lengthy review of metadata if it is requested by the CMA[12]. This also conflicts with paragraph 22(i) of the Draft Guidance as it provides that requests for documents will not cover draft documents unless otherwise stated. As the CMA's template already provides in-depth detail about each document, in our view it is not clear what additional value would be gained from including metadata.

e) Similarly, requiring merging parties to ensure all "*family*" attachments are included along with responsive documents[13] and to include entire documents "*including the parts of a document that deal with matters that are not specified in the request*"[14] would, in our view, likely lead to (i) an unnecessary proliferation of documents for both the CMA and merging parties' advisors to review which would not be proportionate, particularly in a Phase I review; and (ii) the submission of information which goes beyond the scope of the CMA's review of the merger and therefore arguably beyond the statutory powers conferred upon the CMA as discussed at 2.3 above. In relation to the latter point, we are of the view that it would be appropriate for the CMA to allow for manifestly irrelevant materials to be appropriately redacted. Bearing in mind the ability of the CMA to criminally pursue merging parties for knowingly providing false and misleading information[15] we submit that this should be sufficient comfort for the CMA to ensure that any redactions have been appropriately applied. Finally, we are of the view that the CMA should include an explicit caveat that all relevant documents (and draft documents where requested) are provided in entirety subject to privilege.

f) We consider that the requirement for merging parties to ensure that document submissions do not contain duplicate files[16] would mean that merging parties would likely have to engage an external document platform provider to perform automatic de-

[11] Draft Guidance, paragraph 22(d).

[12] Draft Guidance, paragraph 22(e).

[13] Draft Guidance, paragraph 22(f).

[14] Draft Guidance, paragraph 22(g).

[15] Section 117 Enterprise Act 2002.

[16] Draft Guidance, paragraph 22(h).

duplication, which again would increase costs, delays and be disproportionate in many cases. This is particularly onerous if applied in Phase I.

g) As regards the CMA's intention to request production of draft files "*in some circumstances*"[17] we find this troubling unless applied only in extreme circumstances. We would advise that such request must only be made where essential for the CMA's substantive review (with adequate and substantial reasons for such a decision being explained to the merging parties), and that only "*significant*" drafts are requested; to avoid a proliferation of documents for the CMA and the merging parties' advisors to review, as documents are likely to have gone through many insignificant edits prior to the final version. In addition, until drafts have been reviewed and approved via the official channels within an enterprise it is, in our view, unreasonable to consider any draft documents as representative of views of the relevant company. In our experience, draft documents regularly need to be reviewed and validated by a number of stakeholders before they can be deemed to reflect a company's views.[18] The costs of verifying that all drafts of a document have been recovered and produced will also be disproportionate to the perceived benefit of allowing the CMA to consider every iteration of a draft document.

2.6 Approach to legally privileged materials

We recommend that the requirement to produce a privilege log[19] should be reserved for the more forensic analysis that is performed during Phase II investigation. At most, we take the view that in Phase I, explanations relating to privilege should only be necessary where large sets of documents have been requested in a short timeframe and an automated privilege check has been conducted.

2.7 Format of internal document requests

The CMA welcomes the certainty of approach to be gained from the setting out of the full version of the CMA's standard methodology question as at paragraph 28 of the Draft Guidance. However, given the acknowledgment by the CMA that the full version of the standard methodology question will not be used "*in all cases*"[20] we consider that it would be more helpful to clarify that the full version is not "*standard*" and may be better regarded as the most onerous form a methodology question may take. We recommend that it may be more helpful for the CMA to indicate versions of the methodology question which may be used in different cases (e.g. 'no issues' vs. 'cases likely to require a Phase II review').[21]

We recognise that merging parties should be held responsible for providing all the content that falls within the scope agreed with the CMA, such as search terms, the identity of custodians and

[17] Draft Guidance, paragraph 22(i).

[18] In addition, following on from footnote 3 above, this is particularly true of documents created by third parties where the company does not have control of the contents until it has provided significant feedback, but is also true of drafts created by employees which have not undergone any review or validation procedure.

[19] Draft Guidance, paragraph 23.

[20] Draft Guidance, paragraph 31.

[21] Additionally, we recommend that the inclusion of email as a part of the custodian's IT environment in paragraph 28(c) of the Draft Guidance should be explicitly limited to work emails.

the timeframe.[22] However, we consider that merging parties should not be liable for incomplete results produced by search terms that were approved by the CMA.

3 Conclusion

The CMA's practice in relation to internal document requests is already distinct from other merger control authorities, requiring expenditure on legal assistance several times higher than in other jurisdictions. In our view, the CMA's practices as set out in the Draft Guidance are likely to be well-suited to large, complex cases requiring Phase II review, but become problematic when considering Phase I cases.

We recognise and welcome the CMA's intention to ensure proportionality by considering the circumstances of each case, but are concerned by the current lack of clarity in the Draft Guidance on the approach the CMA would take in practice. Many of the potential requirements detailed in the Draft Guidance may be highly disproportionate in a Phase I review, leading to a proliferation of documents to be reviewed by both the CMA and merging parties' advisors and driving up expenses and delays for the merging parties. Consequently, we would welcome the articulation of clear presumptions that many issues are geared for Phase II and presumptively inapplicable at Phase I, including most obviously:

- Emails;
- Draft versions of documents;
- Privilege logs; and
- Addressing technical forensic issues.

We note that a policy position of presumptive inapplicability does not fetter the CMA's powers and ability to investigate with respect to any evidence as an exception to the rule, but a clear statement would provide an important element of quality control and proportionality that will become even more acute as the CMA's caseload and profile will change post-Brexit.

We are available to discuss this submission further should it be useful to the CMA.

[22] Draft Guidance, paragraph 30.