



## Pinsent Masons

### **RESPONSE TO THE CMA CONSULTATION:**

#### **DRAFT GUIDANCE ON REQUESTS FOR INTERNAL DOCUMENTS IN MERGER INVESTIGATIONS**

##### **1. INTRODUCTION**

- 1.1 Pinsent Masons LLP welcomes the opportunity to comment on the Competition and Markets Authority's (CMA) consultation on its draft guidance on requests for internal documents in merger investigations.
- 1.2 As a law firm, Pinsent Masons LLP has substantial experience of advising on the UK merger control rules and assisting clients in submitting merger notices.
- 1.3 The comments made in this response paper are those of Pinsent Masons LLP and do not necessarily represent the views of any of our individual clients or of individual partners of Pinsent Masons LLP.
- 1.4 This response does not contain any confidential or sensitive information and we are content for it to be published on the CMA's website.

##### **2. QUESTIONS FOR CONSIDERATION**

**(a) Does the draft guidance generally provide sufficient information in relation to the CMA's practice in relation to internal document requests?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

See answer to (b).

**(b) Does the draft guidance provide sufficient information in relation to the circumstances in which merging parties may be asked to provide material volumes of internal documents?**

We are concerned that the draft guidance is not sufficiently clear on either point (a) or (b). In particular, the circumstances in which "documents provided in response to questions 9 and 10 of the merger notice (or the equivalent questions in an enquiry letter) do not appear to fully capture the merging parties' analysis of the merger or their assessments of competitive conditions within the markets at issue" and where there is an "evidence gap in relation to an issue (or relatively narrow set of issues) that is material to the CMA's Phase 1 investigation" seem particularly vague. We would like to propose that the CMA establishes clearer guidelines (see additional comments below).

**(c) Does the draft guidance provide sufficient information in relation to the circumstances in which the CMA will use its statutory powers to request internal documents?**

Pinsent Masons has no response to this question.

**(d) Does the draft guidance provide sufficient information in relation to the likely scope of internal document requests?**

Pinsent Masons has no response to this question.

**PINSENT MASONS LLP**

Response to the CMA's consultation: "Draft guidance on requests for internal documents in merger investigations" (CMA77 CON)

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

Pinsent Masons has no response to this question.

**(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)?**

Pinsent Masons has no response to this question.

**3. ADDITIONAL COMMENTS**

We are concerned that following the search methodology outlined in the guidance note for the discovery of internal documents, particularly during Phase 1, will impose a disproportionate burden, especially on small and medium-sized merging parties. It could also lead to a significant increase in the cost of filing a merger notice and have a chilling effect on mergers, especially between SME parties.

Furthermore, we are concerned that the practical implications of this will be that parties will need to conduct a comprehensive search of internal documents to capture any potentially responsive documents prior to filing a merger notice, in order to avoid the risk of having to conduct such a search and produce such documents within a very short time frame after notification and to avoid any extension of the statutory timetable. In the case of listed company takeovers we consider that the potential adverse consequences of a suspension in the merger review timetable would put the merging parties under considerable pressure to undertake a full review for internal documents upfront, rather than waiting to see if the CMA sends a section 109 notice.

In light of the above, we would propose that the CMA puts forward a narrower set of circumstances in which material volumes of internal documents may be requested, particularly in Phase 1. For instance, it may be more proportionate for the CMA only to request material volumes of internal documents in Phase 1 where there is a realistic prospect of the merger being referred for a Phase 2 investigation.

We hope that the CMA finds this contribution helpful. Please feel free to contact us if you would like to discuss any aspect of our response.

**Pinsent Masons LLP**

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Submitted by

Pinsent Masons LLP - 30, Crown Place, Earl Street, London EC2A 4ES