Guidance on internal document requests

1. We welcome the opportunity to comment on the CMA's consultation, published on 28 March 2018, concerning proposed guidance on requests for internal documents in the context of merger investigations.

2. We set out in this submission some general observations, rather than seek to respond to the specific consultation questions – but the observations are relevant to a number of those questions. These comments represent the views of White & Case LLP, and nothing in this submission should be taken as representing the views of any of our clients.

3. We consider that it would be helpful for the guidance to state that it would not normally expect to request e-mails in Phase 1, unless there are compelling reasons for so doing and such requests are narrowly focussed. As the CMA will appreciate, providing categories of documents can be a very time-consuming and expensive exercise and raises issues of proportionality, especially in Phase1.

4. If the parties considered it might be helpful to provide a significant amount of e-mails and other internal documents in Phase 1 then they should be free to do so and, as a matter of good practice, discuss this with the CMA – but the guidance could make it clearer that CMA would not expect to use extensive document requests in Phase 1. In addition, we consider that the guidance should make clear that certain types of document (such as instant messages, handwritten notes) would only ever be expected to be required in Phase 2.

5. Whilst we welcome the CMA's desire to be consistent in its approach to information requests, if section 109 notices are to be used as standard in Phase 1 and Phase 2, it is important to engage with the parties about such requests before issuing them. We note and welcome the comments in the draft guidance about carefully considering the appropriate scope and nature of a request. However, if section 109 notices are to be used, given the potential penalties for failing to comply with the notice and the "stop the clock" provisions, we consider the CMA should as a general rule share the requests with the parties in draft. The default positon should be to do so unless there are compelling reasons not to – so we consider the statement that draft document requests may be shared "where it is practicable and appropriate" to do so should be clearer and state that that will be the general presumption where the request is not straightforward and/or may require an extensive amount of data.

6. Where search terms and an appropriate methodology has been agreed between the CMA and the parties there should be a rebuttable presumption that no breach of a section 109 notice had occurred if, in good faith, documents that would otherwise have been responsive come to light. The current guidance that this is not the case may mean that attempts – in conjunction with the CMA – to limit data requests to manageable proportions may not be achieved. If parties are concerned that a breach of a section 109 notice might occur, after having agreed in good faith search parameters, they may be dis-inclined to seek to focus a request on the most likely sources of potentially relevant documents. This would create inefficiencies and expense for both the parties and the CMA.

7. In this regard, it should also be noted that certain documents may be encrypted and the merging parties may not be able to provide passwords. This might be, for example, when the author has since left the company. We understand that there are a number of password protection and encryption programmes which can be downloaded from the internet, or even available within Office 365 which could be used. If these documents cannot be un-encrypted the merging parties should not be penalised if one such document later comes to light from another source and would have been responsive to an information request but the merging parties were not able to identify it themselves.

8. It is also important to appreciate that documents that may be responsive to requests for information may include some that do not reflect the views of the merging parties, and need

to be treated with an appropriate degree of caution. In particular, information memoranda are usually prepared by third parties such as financial advisers, and seek to paint a business for sale in the most attractive way. This may include, for example, exaggerated comments about brand strength, barriers to entry etc. which do not necessarily reflect the views of the merging parties and are in practice not necessarily a wholly actually picture of the relevant market. Such "sales documents" need to be seen in their proper context and against more empirical evidence to the extent available.

9. In fact, while transaction-related documents are clearly relevant and important, documents that are prepared in the ordinary course of business, rather than in connection with a transaction, may often provide a more accurate view of the competitive dynamic in a market. In any event, our experience is that robust economic analysis, together with third party input, is generally more relevant than internal documents, so extensive document requests should be limited and narrowly defined.

10. We note that the CMA proposes that it may ask for drafts in certain circumstances but such documents may not properly reflect the views of either merging party (especially if prepared by a third party, but also if prepared internally by someone without a detailed knowledge or understanding of the relevant markets).

11. The draft guidance states that responsive documents should be produced in their entirety. This would cover a situation in which parts of responsive documents that are not relevant to answer a section 109 request (e.g. because they relate to different products or markets) contain sensitive information unrelated to the merger in question. It should not be necessary for these documents to be produced in their entirety. In such situations we consider that parties should be able to produce redacted documents. The proposal for any response to a section 109 notice to be accompanied by a compliance statement should address any potential concerns as to completeness when certain documents are redacted. If necessary, an independent third party could be asked to opine on the appropriateness of the redactions if the CMA wishes to verify or challenge any of them.

12. We hope these comments will assist in making the guidance as useful as possible. If you have any queries about these comments or would like to discuss any matters arising please contact Marc Israel (marc.israel@whitecase.com; +44 20 7532 1137).

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