RESPONSE TO COMPETITION AND MARKETS AUTHORITY

Consultation document: Guidance on requests for internal documents in merger investigations

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This response represents the views of the law firm Allen & Overy LLP on the Competition and Markets Authority (**CMA**) draft for consultation *Guidance on requests for internal documents merger investigations*, dated 28 March 2018 (the **Draft Guidance**).

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

Response

1. The Draft Guidance provides welcome additional insight into the CMA's future intentions with regard to internal document requests in the Phase 1 and Phase 2 merger process, and is a useful addition to the current guidance set out in *Mergers: Guidance on the CMA's Jurisdiction and Procedure* (**CMA2**).

2. Whilst additional guidance is welcome, we have a number of practical and substantive points concerning internal document requests that we believe could be usefully addressed or clarified in the Draft Guidance. For ease of reference, paragraph references throughout this response are to the Draft Guidance unless indicated otherwise.

3. As a general comment, the Draft Guidance suggests to us that the CMA will adopt a more stringent and burdensome approach to internal document requests in the merger process in the future. We note that paragraph 10 helpfully indicates that "*in most cases, merging parties are unlikely to be asked to provide material volumes of additional internal documents (i.e. beyond those responsive to questions 9 and 10 of the merger notice or the equivalent questions in an enquiry letter in a Phase 1 investigation)*". However, given that where such requests are issued they are now likely to be issued under s.109 Enterprise Act 2002 (**EA02**) and so have clear civil and criminal sanctions associated with failure to provide comprehensive responses in the time period required (which, given the nature of the process, we recognise will often be short), we think that such requests could have a significant impact on the burden that is placed on the merging parties responding, in particular in Phase 1 processes. This effect is likely to be compounded by the possibility of a compliance statement being required. Given the nature of the businesses we advise (i.e. usually large corporates or financial institutions), this is likely to lead to clients adopting an overly cautious approach to responding to s.109 requests in all instances (e.g. by engaging in full scale document review exercises to ensure thorough compliance with the request, which are inevitably costly and time consuming for the business and the CMA). Whilst a thorough document disclosure exercise may be merited in certain cases, it would be overly burdensome for every s.109 request, particularly at Phase 1.

4. We also note that issuing s.109 requests as standard would be in contrast to the working practice of the European Commission, which currently usually only issues an Article 11(3) Decision after a simple request for information has been issued. We are concerned that issuing requests with clear sanction implications at the outset may lead to delays in a process that is already significantly longer than other regimes (e.g. by encouraging much broader document disclosure in pre-notification, or by increasing the likelihood of the CMA 'stopping the clock' during the formal review period to accommodate much wider document disclosure).

5. To avoid overly burdening the merging parties and creating a Phase 1 process that is inefficient, we would strongly encourage the CMA to take a targeted approach to s.109 requests and discuss in an open manner the methodology that the CMA expects the merging parties to adopt at the outset (as discussed further below).

6. Whilst recognising that as per paragraph 27 of the Draft Guidance, the CMA will not be in a position, even after engagement with merging parties on the document request in draft form, to be

able to "*pre-emptively give assurances that no breach of the section 109 notice would occur*", it is our view that the CMA should make it its practice to give soft but relatively certain assurances that if complex document review requests are conducted according to an agreed methodology, the risk of enforcement action for breaching a s.109 notice will be materially lowered.

Specific comments

7. **Paragraph 10(a)**: it would be useful for the CMA to clarify whether it expects only to issue s.109 notices requiring the disclosure of emails where the organisational structure is such as that described in this paragraph (e.g. where commercial decisions and internal reporting is done by way of email rather than formal meetings or presentations), or whether it is likely that the CMA will issue s.109 notices to request email correspondence to gather evidence of individuals' views on the merger outside of company decision making and reporting processes. If the latter, we would caution the CMA against a move towards placing increasing weight on bilateral communications between employees (or even officers) of the company that are outside of the organisational decision making and reporting structures, as these may not represent the view or strategic intentions of the company (the same applies to evidence gathered in internal messaging chat logs, as per paragraph 18).

8. **Paragraph 13(b)**: as noted, the increasing use of s.109 notices could have the impact of extending statutory time periods. This would be unfortunate, particularly in a Phase 1 regime that is already significantly longer than the equivalent at the European Commission. It would be helpful for the CMA to clarify that it only intends to use its power to 'stop the clock' in exceptional circumstances where there has been a clear breach of the s.109 notice and that in most instances, subject to reasonable excuse and providing the time period allows, the CMA would be willing to be flexible on allowing parties to provide documents that are proving more difficult to obtain (e.g. by allowing staggered responses if necessary).

9. **Paragraph 13(c)**: we would be grateful for further guidance from the CMA on when failure to comply with a s.109 notice would lead to the CMA rejecting an entire merger notice. Would this only be the case where a s.109 notice has been issued in the pre-notification period and the merging parties attempt to submit a complete notification without first fully complying with the s.109 notice?

10. **Paragraph 15**: the CMA clarifies that the s.109 notice is likely to become standard practice when requesting internal documents in future Phase 1 and Phase 2 processes. It would be helpful for the CMA to clarify whether s.109 notices will also be used at the pre-notification discussion stage. Similarly, we would encourage the CMA to discuss with the merging parties and issue all foreseeable internal document requests during pre-notification discussions, rather than during the Phase 1 statutory period (recognising that this may not be possible where issues come to light late in the process or during the Phase 2 process where requests may need to be expanded in scope). In this respect we welcome the CMA's guidance that all internal document requests will be carefully considered as to scope and nature to ensure that requests are proportionate (paragraph 17).

11. **Paragraph 19**: we welcome the CMA's proposed approach to requesting information on organisation and decision making structure. We have had positive experience of targeted information requests being issued on the basis of discussions with the CMA about the role and scope of decision making bodies within an organisation.

<u>Approach to IT issues</u>

12. This section of the Draft Guidance implies that the use of third-party document review platforms and document analysts will be required in order to compile and submit comprehensive responses. We would suggest that the CMA includes in this section explicit acknowledgement that this is likely to

be the case, as timely engagement will be required (ideally in pre-notification) so that merging parties are able to put in place the procedures and engagements necessary to respond to requests.

13. **Paragraph 22(a)**: we would suggest that the CMA clarifies that all of a "*custodian's IT environment*" would not normally extend to personal devices, even if used in the work-context. This could otherwise have significant data protection issues, particularly if there is relevant material stored outside of the UK or there are custodians in other jurisdictions that are relevant to the CMA's process.

14. **Paragraph 22(c)**: we would welcome the CMA's clarification as to whether it will be standard practice for the CMA to identify, at least in draft for discussion, the search terms that the CMA would wish to be used in relation to specific requests.

15. **Paragraph 22(g)**: we would welcome explicit acknowledgement in this sub-item that the CMA would not object to legally privileged material being redacted from documents where appropriate (we recognise that this point is dealt with in paragraph 23).

16. **Paragraph 22(h)**: past experience shows that de-duplication (whether performed manually or with the aid of document review technology) is time consuming and technically very difficult. This applies in particular to emails, where problems occur around: (i) the significant divergence in how certain email servers record metadata meaning that de-duplication is not always accurate or possible on a large scale; and (ii) email threading, where branches of email that are perhaps materially duplicative contain a limited degree of information that is not duplicative. We would welcome acknowledgement of the technical issues involved in this process, and that where de-duplication is insisted upon by the CMA (and the methodology of de-duplicating discussed) the CMA would be willing to issue soft guidance that the de-duplication of materials that may otherwise have been responsive to the s.109 request would be of low risk of opening the merging parties to enforcement action.

17. **Paragraph 22(i)**: we welcome the CMA's acknowledgement that in the ordinary course only the most recent or final versions of documents will be requested. To request all draft versions of documents as standard would be burdensome for merging parties, in particular with regard to ensuring a comprehensive response. Requests for draft documents would also significantly increase the volume of responsive documents in most cases.

Format of internal document requests

18. **Paragraph 26**: the CMA notes that it "*may*" share draft document requests with the merging parties before issuing a s.109 notice. We agree that sharing draft requests is likely to be of significant benefit to both the merging parties and the CMA. We would encourage the CMA to strengthen this guidance to indicate that it will be standard practice for the CMA to share draft s.109 requests with the parties before issuing the final notice.

19. **Paragraph 30**: the methodology adopted in relation to document collation will be very important both in relation to the types of documents that are eventually submitted and the scope of the collation / review exercise that the merging parties are required to engage in. The CMA indicates that it "*may*" request the merging parties' proposed response to the methodology question to be submitted in draft before the internal documents are submitted. We believe that it would be best practice in all cases for the CMA and the merging parties to discuss the response to the methodology question at the outset of the process, and ideally in conjunction with a discussion of the content of the s.109 notice as envisaged in paragraph 26, in all cases. This would allow a more efficient and worthwhile discussion

to take place about the content of the internal document submission and the practicability of proposed deadlines.

20. As noted above, whilst recognising the CMA is not able to fetter its discretion with regard to enforcement action, it is our view that the CMA should make it its practice to give soft but relatively certain assurances that if complex document review requests are conducted according to an agreed methodology and s.109 notice as per the discussions on drafts of both documents, the risk of enforcement action for breaching a s.109 notice will be materially lowered.

21. **Paragraph 33**: subject to our concerns in relation to the impact of the compliance statement (see below), we welcome the CMA's acknowledgement that "*in some cases … it might be appropriate, for example, for a party simply to state that certain business people 'self-selected' potentially responsive documents…*" and would encourage the CMA to make it standard practice (reflected in the Draft Guidance) to discuss whether this approach is appropriate at an early stage.

Compliance Statements

22. **Paragraphs 34–35**: we would encourage early engagement between the CMA and the merging parties on whether a compliance statement from the business will be required, and would encourage the CMA to indicate in its Draft Guidance that a discussion with the merging parties as to whether or not a compliance statement will be required (and the form that it will take) will take place at the same time as the draft s.109 notice and draft response to the methodology question. Given the nature of the clients that we represent, a compliance statement will be treated very seriously and potentially lead to an overly comprehensive response to document requests in order to eliminate the risk of any enforcement action. For example, though the CMA may consider (as per paragraph 33) that senior individuals "*self-selecting*" in response to document requests is appropriate in the circumstances, the requirement for a formal compliance statement to be signed has the potential to encourage a merging party to perform a comprehensive document review process (with all of the costs and delay to the process that that may entail). Accordingly, guidance indicating that it will be standard practice for the CMA to discuss the requirement for a compliance statement early in the process would be useful.

Allen & Overy LLP

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