CMA
Competition & Markets Authority

Guidance on requests for internal documents in merger investigations

Summary of responses to the consultation

15 January 2019
CMA99

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1. Introduction

Background and summary

1.1 The Competition and Markets Authority (CMA) is a non-ministerial department formed on 1 April 2014. The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy.

1.2 The CMA has responsibility for review of mergers under the Enterprise Act 2002 (the Act). Section 109 of the Act provides the CMA with a mandatory information-gathering tool for 'permitted purposes' (including any aspect of its merger-related functions).

1.3 The guidance should be read in conjunction with paragraphs 7.2 to 7.20 and 11.11 to 11.40 of Mergers: Guidance on CMA's Jurisdiction and Procedure (CMA2). Together with the guidance provided in CMA2, this guidance is intended to set out how the CMA will use requests for internal documents, including those requests made pursuant to section 109 of the Act. The penalties for failure to comply with a section 109 request are set out in Administrative penalties: Statement of Policy on the CMA's approach (CMA4).

1.4 Following a consultation from 28 March 2018 to 25 April 2018, the CMA is introducing additional guidance (*Guidance on requests for internal documents in merger investigations*) to supplement and clarify the guidance in CMA2, reflecting experience gained since the current system was introduced in April 2014.

1.5 This guidance is particularly intended to help merging parties and legal advisors advising on a transaction that may be subject to merger investigation by the CMA, and to help third parties that have been requested to provide information in merger investigations. In broad terms, the guidance covers:

(a) The use of internal documents in CMA merger investigations;

(b) The use of statutory powers to request internal documents;

(c) The likely scope of internal document requests;

(d) The CMA's approach to IT issues;

(e) The CMA's approach to legally privileged materials;

(f) The CMA's approach to engagement on complex document requests in draft form;

(g) The CMA's standard question for explanation of methodology; and

(h) The use of compliance statements.

1.6 Where there is any difference in emphasis or detail between this guidance and other CMA guidance, the most recently published guidance should take precedence.

Purpose of this document

1.7 The consultation document that accompanied the draft guidance set out a series of specific questions on which respondents' views were sought. This document is intended to summarise the key issues raised by the responses and the CMA's views on these responses. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available on the consultation page.

1.8 This document should be read in conjunction with the consultation document, which contains further background and explanation on the new guidance.

2. Issues raised in the responses to the consultation

2.1 The CMA received nineteen responses to the consultation, all of which were from legal advisers or associations of legal advisers. A full list of respondents can be found in Appendix A.

2.2 Overall, the majority of respondents welcomed the introduction of the guidance and agreed that it would provide greater clarity about the circumstances in which internal documents will be requested, the scope of such requests, and the CMA's approach to using its section 109 powers to request internal documents. Some respondents identified additional issues upon which it would be useful to clarify the CMA's likely approach.

2.3 Several respondents underlined the importance of proportionality and facilitating engagement between the CMA and merging parties to ensure that internal document requests are appropriately targeted. To this end, a number of respondents suggested very specific guidelines that could be put in place (*e.g.*, in relation to the circumstances in which documents would be requested, the types of documents that would be requested, the number of documents that would be requested, the circumstances in which forensic IT tools should be used, and the time provided for response). However, as the appropriate approach to a request for internal documents is likely to vary significantly in practice, based on the facts and circumstances of each case, the CMA therefore considers such overly-specific rules would not be appropriate for guidance of this type. Moreover, as the guidance makes clear, the CMA will carefully consider the appropriate scope and nature of a document request to ensure that such requests are proportionate.

2.4 Further detail on the issues raised in the responses to the consultation and the CMA's views in relation to these issues is set out below.

General practice in relation to internal document requests

Respondent views

2.5 Some respondents queried why the CMA appears to be changing its approach to internal document requests. In particular, respondents queried whether the CMA's use of its powers under section 109 of the Act by default is necessary or proportionate, given that:

(a) Merging parties are generally incentivised to comply with informal document requests;

(b) The request arises within the context of merger control proceedings, rather than within the context of a proceedings where an allegation of illegal behaviour is being made; and

(c) Section 117 of the Act sets out the criminal offence of knowingly or recklessly providing false or misleading information, meaning that the CMA has an enforcement route in any event.

2.6 Some respondents were also concerned that the CMA could, as a result of an enhanced approach to internal document requests, place too much weight on internal documents. Particular concerns were raised around the probative value of internal documents where:

(a) These documents contradict the wider body of evidence before the CMA (such as economic analysis and third-party testing); or

(b) these are not "formal" documents (such as documents prepared by or for the board), meaning that they may not represent the company's considered view.

2.7 Some respondents suggested that increasing internal document requests would take the CMA out of line with other merger control regimes where internal document requests are the "*exception rather than the rule*." Some respondents flagged that this could have a chilling effect on parties' willingness to notify transactions in the UK.

CMA views

2.8 As noted in the consultation document that accompanied the draft guidance, the CMA's ability to carry out its statutory functions is dependent, in large part, on being able to rely on the accuracy and comprehensiveness of merging parties' submissions, and on receiving these submissions in a timely fashion. The CMA considers that the use of a mandatory information-gathering power with binding timelines to request internal documents is entirely consistent with this position.

2.9 The guidance notes than internal documents *"can be an important source of evidence in a merger investigation*." It is, of course, the case that internal documents are only one source of evidence and the CMA will continue to assess a wide range of evidence in its investigations (and assess the weight that should be given to all individual pieces of evidence in the round). The CMA will also continue to take into account factors that have some bearing on the weight that should be attached to a given internal document (*e.g*., because of when it was produced or who it was produced by) where those factors are appropriately explained and evidenced.

2.10 The CMA notes that internal documents are an important source of evidence in a significant number of jurisdictions. The CMA is not aware of any basis to suggest that the introduction of the guidance, which sets out the principles to be used where internal documents are requested, is somehow inconsistent with international best practice.

The circumstances in which internal documents will be requested

Respondent views

Differences in approach between Phase 1 and Phase 2 investigations

2.11 Respondents generally welcomed the confirmation that 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). Some respondents suggested that more information could be provided in relation to when additional internal documents are likely to be requested and, in particular, in relation to the likely differences in approach between Phase 1 and Phase 2 investigations (and, in one case, that the guidance should be regarded as "*presumptively inapplicable*" at Phase 1).

2.12 As concerns the circumstances in which additional internal documents are likely to be requested in a Phase 1 investigation, some respondents expressed concern about paragraph 10(c) of the draft guidance, which notes that internal document requests might be used to substantiate an exiting firm counterfactual. These respondents were concerned that this paragraph might be understood to mean that an exiting firm counterfactual could only be substantiated where internal documents are produced.

2.13 Similarly, some respondents raised concerns about paragraph 10(d) of the draft guidance, which notes that it may be difficult for the CMA to undertake a material volume of further evidence-gathering (including evidence from internal documents) to dismiss competition concerns in relation to a broad range of substantive issues within the context of a Phase 1 investigation. Respondents were concerned that this would either mean it would take longer to identify concerns at Phase 1, or that merging parties may need to conduct extensive internal document searches prior to filing, in order to ensure they have enough time to respond to the CMA's requests.

Third party document requests

2.14 Respondents had mixed views on whether third party document requests should be made under section 109. Some respondents considered that third

party internal document requests should be made under section 109 – particularly where a third party has made unsubstantiated complaints about the merger – as third parties have no particular incentive to cooperate with the CMA. On the other hand, other respondents noted the burden on third parties in responding to high volumes on informal information requests, and that this burden should be minimised wherever possible.

CMA views

Differences in approach between Phase 1 and Phase 2 investigations

2.15 The principles set out in the guidance apply to requests for internal documents in both Phase 1 and Phase 2 merger investigations. There is, however, likely to be some difference, in practice, in the extent and type of information requested by the CMA in Phase 1 and Phase 2 proceedings (given the different nature of those proceedings). The final guidance has been amended in several places to ensure that these differences are as clear as possible.

2.16 Paragraph 10(c) of the draft guidance (now paragraph 11(c) of the final guidance) has been amended, and a new footnote to that paragraph has been added, to make clear, for the avoidance of doubt, that internal documents are not necessarily the only source of “*compelling evidence*” within the meaning of the Merger Assessment Guidelines to support an exiting firm counterfactual.

2.17 The CMA notes that paragraph 10(d) of the draft guidance (now paragraph 11(d) of the final guidance) should not be considered to imply any change to its existing practice in Phase 1 investigations. The CMA is therefore not aware of any basis to suggest that the introduction of the guidance will mean that it could take longer to identify concerns at Phase 1, or that merging parties may need to conduct extensive internal document searches prior to filing in order to ensure they have enough time to respond to the CMA’s requests.

Third party document requests

2.18 The CMA has considerable experience in assessing third-party submissions (and is aware that some third parties may have an incentive to suggest that a merger raises concerns that might not be borne out in practice). In general, consistent with the CMA’s established practice, more weight will be placed on third party submissions where these are appropriately articulated and evidenced. Consistent with the mixed views submitted by respondents, the CMA considers that it is likely to be appropriate to request information from third parties informally in the first instance but that section 109 notices will be

used where the CMA has doubts about whether it will receive full or timely responses to informal requests and the evidence requested is material to the CMA's investigation.

Likely scope of internal document requests

Respondent views

General scope of document requests

2.19 Respondents noted that the CMA should bear in mind proportionality when determining the scope of any internal document requests. Respondents suggested that factors relevant to assessing proportionality should include:

(a) The complexity of the case;

(b) Whether the case is at Phase 1 or Phase 2;

(c) The timeline of the case;

(d) The theories of harm identified;

(e) The size of the transaction; and

(f) The size of the parties (considering, for example, the resources available to a SME compared to a large multinational firm).

2.20 Some respondents raised concerns about paragraph 17 of the draft guidance, which notes that the CMA could request "*any potentially relevant document*," suggesting that requests compiled on this basis could be unduly wide.

2.21 In identifying relevant custodians for internal document requests, one respondent submitted that custodians should be limited to key commercial decision-makers (who are more likely to reflect the views of the businesses involved) rather than staff who are not key commercial decision-makers.

2.22 In terms of the types of documents that should be requested, some respondents raised concerns about requests for handwritten notes, instant messages and emails, and suggested that these should only be requested in exceptional circumstances.

2.23 Paragraph 20 of the draft guidance notes that requests for internal documents would run, in most cases, from no earlier than three years before the date of the case. Respondents queried whether this period should be aligned with question 10 of the Merger Notice and therefore should be limited, as a general rule, to two years before the date of the case, to ensure the CMA's resources

are focused on the most relevant and valuable evidence. Respondents highlighted that in dynamic markets or markets subject to rapid technological changes, older documents will become even less relevant.

2.24 In general respondents welcomed the envisaged steps for engagement with merging parties on draft document requests, which they considered should help to mitigate the risk of unduly wide requests being issued.

Approach to draft documents

2.25 Respondents welcomed the CMA's general exclusion of draft internal documents from its document requests (although some suggested that this general exclusion could go further with the production of drafts being limited to "*exceptional circumstances where such drafts may be essential for the CMA's substantive review*").

2.26 Some respondents raised concerns that the draft guidance indicated that a draft document would be responsive where attached to a responsive email (even where a final or most recent version of the attached document is also available). These respondents submitted that successive drafts of documents are often circulated over email, resulting in a large number of irrelevant and unnecessary documents being produced to the CMA, and that earlier drafts may not represent the company's considered view of a given issue. Respondents therefore suggested that only "*significant*" drafts should be produced (if any drafts are produced at all) and that parties should have the opportunity to remove draft documents that are attached to otherwise-responsive emails. If drafts are to be produced, respondents cautioned against placing probative weight on these documents.

CMA views

General scope of document requests

2.27 As the draft guidance makes clear, the CMA will carefully consider the appropriate scope and nature of a document request in light of the circumstances of the case in order to ensure that such requests are proportionate. This is case-by-case assessment that is likely to take into account factors including those identified by respondents to the consultation (as described in paragraph 2.19 above).

2.28 The reference to "*any potentially relevant document*" in paragraph 17 of the draft guidance (now paragraph 18 of the final guidance) relates to the scope of the CMA's mandatory information-gathering powers, and therefore should not be taken to mean that the CMA will request all potentially relevant

documents as a matter of course. Instead, as the draft guidance makes clear, the CMA will carefully consider the scope and nature of a document request on a case-by-case basis.

2.29 As concerns identifying relevant custodians for internal document requests, the CMA considers that a general rule that limits the scope of these requests to key commercial decision-makers would be unduly narrow (in particular because there may be circumstances in which other staff play an important role in shaping or implementing commercial policy). Relevant custodians should instead be considered on a case-by-case basis. As the guidance makes clear (at paragraph 19 of the draft guidance and paragraph 20 of the final guidance), the CMA may request information relating to the decision-making processes of the merging parties, or certain of their business activities (such as organisation charts and details of reporting lines and decision-making bodies and processes), in order to understand which business people are likely to hold potentially responsive documents.

2.30 As concerns the types of documents that should fall within the scope of internal document requests, the CMA agrees with the views submitted that handwritten notes and instant messages are rarely likely to be requested (but might be requested, for example, where engagement with the merging parties indicates that business decisions are made or considered through these media). The CMA strongly disagrees, however, that this is also the case for emails, in particular because the CMA's experience in practice indicates that almost all businesses communicate extensively by email.

2.31 As concerns the period covered by an internal document request, the guidance (at paragraph 20 of the draft guidance and paragraph 21 of the final guidance) makes clear that this will vary depending on the circumstances of the case (including the history of the markets at issue including, for example, whether the markets at issue are characterised by rapid technological change). As the guidance relates to circumstances where documents beyond the scope of those required by the Merger Notice are requested, there is, in principle, no reason why the same time-period need be used for both sets of documents (and a period of three years is consistent with documents requests that have been issued in several recent Phase 2 investigations). In any case, the CMA will, as with all other aspects of the document request, seek to ensure that the time-period used in each case is proportionate.

Approach to draft documents

2.32 In the CMA's experience, it is important to be able to assess internal documents within their proper context (a point that was highlighted by several respondents to the consultation). It is for this reason that all "family" items are

typically considered as being responsive to a document request. Accordingly, while successive drafts produced by a single custodian but not shared within a business are unlikely to be responsive, the CMA considers that drafts circulated by email (or otherwise associated with a responsive document) may be potentially relevant and should not be excluded from production as a matter of course.

2.33 As noted in paragraph 2.9 above, the CMA will take into account factors that have some bearing on the weight that should be attached to a given internal document. This may include whether a document is in draft form (and whether elements of that draft have been superseded by a subsequent draft). This is, however, likely to be a case-by-case assessment based on all of the facts and circumstances of a given case.

IT issues and legally privileged materials

Respondent views

Approach to IT issues

2.34 Several respondents suggested that the CMA's approach seems suited to Phase 2 investigations but may be challenging within the context of a Phase 1 timeline. Several respondents suggested that it may be difficult to comply with the guidance without engaging third-party forensic specialists (noting also that forensic searches can result in parties incurring significant costs).

2.35 Respondents raised a number of queries about the provision of metadata (*e.g.*, in relation to what metadata may be required and whether metadata must be provided separately to native documents). Some respondents submitted that a template load file format would be helpful in order for parties to provide data in a form that is likely to be helpful to the CMA.

2.36 Some respondents suggested that the general principle set out in paragraph 22(g) of the draft guidance that "family" attachments to responsive documents should be provided in their entirety could result in the provision of large numbers of irrelevant documents.

Approach to legally privileged materials

2.37 While respondents generally welcomed the approach envisaged in the guidance in relation to legally privileged materials, some respondents suggested that more information in relation to the circumstances in which a privilege log would typically be required would be useful.

CMA views

Approach to IT issues

2.38 The guidance makes clear (at paragraph 33 of the draft guidance and paragraph 34 of the final guidance) that it is not envisaged that an extensive document review supported by forensic IT tools is envisaged in all cases where the CMA requests internal documents. Instead, the guidance is primarily intended to ensure that a proportionate and transparent approach can be adopted for the identification of potentially relevant materials. The CMA considers that this approach should be applied equally in both Phase 1 and Phase 2 investigations.

2.39 As concerns metadata, the guidance notes that all documents should typically be submitted in their native format. The CMA would typically expect documents submitted in their native format to include the relevant metadata and therefore the CMA is unlikely to require the metadata for those documents to be provided separately. Paragraph 23(e) of the final guidance (previously paragraph 22(e) of the draft guidance) has been amended to reflect this position.

2.40 Where native files are not available, the CMA agrees that a template load file may be helpful in order for parties to provide data in a form that is likely to be helpful to the CMA. The metadata fields required may vary on a case-by-case basis and therefore should be discussed with the CMA. The CMA's preferred load file format is available on the CMA website. The final guidance (at footnote 14) reflects this point.

2.41 As concerns "family" documents, the CMA notes that these are, in principle, like any other type of document and therefore that their potential relevance, and the bearing that they have on the overall proportionality of a document request, falls best to be considered on a case-by-case basis.

Approach to legally privileged materials

2.42 In practice, whether a privilege log is required will be driven by the facts and circumstances of a given case. The CMA will discuss with the merging parties at an early stage if a privilege log is likely to be required, so that the parties can plan this alongside their collection of documents. The final guidance has been amended (at paragraph 24) to make clear that merging parties are encouraged to engage with the CMA on the appropriate approach to privileged materials (including a privilege log) at an early stage of the evidence-gathering process.

Likely format of document requests

Respondent views

Engagement on draft document requests

2.43 Respondents welcomed the CMA's commitment to share, where practical and appropriate, draft requests for internal documents. Some respondents suggested that this commitment could be strengthened (*e.g.*, by committing to share draft requests absent "exceptional" circumstances or by using voluntary information requests where the request could not be shared in advance).

Standard question for explanation of methodology

2.44 Some respondents raised concerns that the full methodology question in the guidance would be disproportionate in the majority of internal document requests (noting that this burden could disproportionately impact on SMEs).

The use of compliance statements

2.45 Respondents were concerned that the use of compliance statements may not achieve the CMA's objective, suggesting that the general counsel or CEO is unlikely to be close enough to the document collection exercise to be able to attest to the company's compliance with the request.

CMA views

Engagement on draft document requests

2.46 The CMA agrees that it is typically likely to be mutually beneficial to engage on a document in draft with parties before issuing a notice under section 109. The CMA notes, however, that it is unable to provide a blanket commitment to engaging in draft on all internal document requests as the circumstances of certain cases may mean that it is not practical or appropriate to do so.

Standard question for explanation of methodology

2.47 As paragraph 33 of the draft guidance (now paragraph 34 of the final guidance) makes clear, the full version of the methodology question set out in the guidance is not intended to be applied in every case. The guidance also makes clear (at paragraph 30 of the draft guidance, now paragraph 31 of the final guidance) that the CMA may engage with the merging parties on their proposed approach to the methodology question. The final version of the

guidance has been amended (at paragraphs 29 and 24) to highlight both of these points.

The use of compliance statements

2.48 As the guidance explains, compliance statements are generally intended to ensure that the merging parties are appropriately aware of the nature of the request and the approach that has been adopted in responding to it. It is therefore envisaged that the compliance statement should be signed by a member of senior management who is generally accountable for the conduct of some or all of the affairs of a company, rather than a lower-level member of staff who has been more directly involved in the document production exercise.

2.49 The CMA notes that such senior staff typically attest to compliance with an initial enforcement order in merger cases. Similarly, it is common practice for such senior staff to sign off other reports that are required to be produced (such as annual reports and accounts), without necessarily having been involved in all aspects of their preparation.

Appendix A: Respondents

- ABA's Antitrust Section International Task Force
- Addleshaw Goddard LLP
- Allen & Overy LLP
- Baker McKenzie LLP
- Bryan Cave Leighton Paisner LLP
- City of London Law Society Competition Law Committee
- Clifford Chance LLP
- Freshfields Bruckhaus Deringer LLP
- Herbert Smith Freehills LLP
- International Bar Association's Mergers Working Group
- Law Society of Scotland
- Linklaters LLP
- Matheson
- Mayer Brown LLP
- Merger Streamlining Group
- Norton Rose Fulbright LLP
- Pinsent Masons LLP
- Slaughter and May
- White & Case LLP