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Helpful Clarity on Responsiveness and Process for Internal Document Production under New UK CMA Merger Guidance

Last week, on 15 January 2019, the UK Competition and Markets Authority (the 'CMA') completed its consultation on its draft and published the final version of its Guidance on requests for internal documents in merger investigations (the 'Guidance').¹

While the Guidance does not change the substantive requirements for notifying parties, it helpfully sets out the CMA's expectations regarding merging parties' internal document production exercises. In this way, it is the first of its kind, explaining (1) what the CMA will consider as responsive documents, both up front and in the context of document requests, (2) its use of mandatory requests, and (3) the detailed procedure under which internal documents should be produced. While the Guidance supplements, but does not replace, previous CMA publications on the matter, it does shift the status quo by emphasising the CMA's desire to increase the use of mandatory document requests in Phase 1 cases. This has implications both on the rigour with which parties must comply with the requests, and the potential penalties for failing to do so (including delayed review and even fines). While the CMA does not expect that the introduction of the Guidance will mean longer reviews in Phase 1, the detailed expectations set out in the Guidance, and the CMA's response to the consultation², along with the increased use of mandatory requests, mean that merging parties will need to take more time preparing UK notification than in the past.

One cannot help but wonder whether this new preference for mandatory requests is informed by the CMA's recent decision in *Hungryhouse*³, where the CMA fined the takeaway food online platform £20,000

¹ Guidance on Requests for Internal Documents in Merger Investigations, CMA100, published in January 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/773103/guidance_on_internal_documents_in_merger_investigations.pdf.

² Guidance on requests for internal documents in merger investigations, Summary of responses to the consultation, CMA99, published in January 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770898/summary_of_responses.pdf.

³ Penalty notice under section 110 of the Enterprise Act 2002 – Addressed to Hungryhouse Holdings Limited, Anticipated acquisition by JUST EAT plc of Hungryhouse Holdings Limited, Case ME/6659-16, 24 November 2017, available at: <https://assets.publishing.service.gov.uk/media/5a21799940f0b659d1fca8a9/notice-under-s110-enterprise-act-2002-just-eat-hungryhouse.pdf>.

(approx. US\$ 29,000) for failing to comply with the first mandatory information request by not providing a material number of responsive documents later unearthed through subsequent mandatory requests. Merging parties are now put 'on notice', and we can expect higher fines for non-compliance in the future.

Responsive Documents Required for Notification

While US document production often entails massive data pulls of emails of custodians, European authorities typically provide for a narrower subset of documents, particularly for short-form or non-problematic transactions. In the UK, Question 9 and 10 of the CMA's Merger Notice Template⁴ require that notifying parties submit to the CMA board-level documents (1) analysing the proposed transaction or its rationale and (2) where the parties have a horizontal overlap, the competitive conditions of the relevant market over the last two years. These requirements largely mirror those of the EU (so called '5.4 documents')⁵, including the fact that such market studies are generally not required absent a substantive overlap.⁶

Despite criticism, the CMA does not rule out the possibility of requiring such documents where that overlap is small or unproblematic, which could be the case for transactions that satisfy the CMA's jurisdictional turnover thresholds, but not its share of supply test. But it does envisage discussion and potential waivers where the parties expect the requirements to result in a large number of responsive documents, or where such documents are not necessary.

Scope of Document Requests

After listening to consultation respondents, the CMA strikes a fair balance between the voluminous requests of the US and the more nuanced and selective set of documents required by the EU. Early on, the Guidance sets out that, "[i]n 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).⁷ Where the CMA does request additional documents, it points out that "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".⁸ This means that:

- The types of documents will depend on how the business is typically conducted (e.g. handwriting, email, other collaborative work solutions);
- The identity of the custodians will depend on their involvement in or influence over commercial decision-making;
- The time periods will depend on the history of the markets at issue, but generally will not be more than three years old.

⁴ Merger Notice under Section 96 of the Enterprise Act 2002: Template for Completion, available at: <https://www.gov.uk/government/publications/mergers-forms-and-fee-information>.

⁵ Section 5.4, Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, as amended, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02004R0802-20140101>.

⁶ Under the EU process, unproblematic transactions are notified under a simplified procedure, which does not require such internal documents where there is no horizontal or vertical overlap.

⁷ Guidance, para. 10.

⁸ Guidance, para. 18.

The CMA provides additional detail with regards to internal document requests related to (i) emails and (ii) draft documents.

i. *Emails*

While acknowledging that emails or handwritten notes typically would not be responsive to questions 9 and 10, the Guidance explains that emails are nevertheless considered internal documents, and that the CMA will request them where it deems it necessary, e.g. where commercial decisions are taken via email (rather than at set-piece events such as meetings of a board of directors) or where internal reporting takes place via email (rather than in reports or presentations). Despite criticism that this could cause overly broad or voluminous responses, the CMA notes that its “experience in practice indicates that almost all businesses communicate extensively by email”. Parties must therefore rely on pre-response discussions with the CMA in order to reduce the scope of such requests.

ii. *Draft documents*

The Guidance states that, while draft documents generally are not responsive, they would be responsive where they are attached to a responsive email (even where a final or more recent version of the attached document is also available). In response to the consultation, the CMA emphasised 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. Furthermore, the CMA points out that in certain circumstances, it may request the production of draft files (e.g. where the CMA has reason to believe that the content of certain draft documents may be material to its investigation).

Unsurprisingly, the scope of documentary evidence that could be requested will be more extensive in the second phase (“Phase 2”) of a merger review where the CMA has already identified potential competition concerns. The merging parties may be expected to provide up-front internal documents relating to the transaction, customers, suppliers, product characteristics, competitor analysis, pricing, marketing efforts, bidding strategy, and barriers to entry, expansion and exit.

The CMA also helpfully acknowledges 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 continue to take into account factors that have 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).

Use of Mandatory Document Requests

The CMA’s information gathering powers are broadly described in the CMA’s previous publication *Mergers: Guidance on CMA’s Jurisdiction and Procedure* (the ‘2014 Guidance’).⁹ The 2014 Guidance explains that the CMA will issue a request for internal documents either informally or using the powers provided by Section 109(2) of the Enterprise Act 2002 (the ‘Act’).¹⁰ Section 109 provides the CMA with an information-gathering tool that is mandatory and backed up by fining power. Where the CMA considers that a company has, without reasonable excuse, failed to comply with a Section 109 notice, it may impose

⁹ Paras. 7.2 to 7.20 and 11.11 to 11.40, *Mergers: Guidance on CMA’s Jurisdiction and Procedure*, CMA2, published January 2014, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2_Mergers_Guidance.pdf.

¹⁰ Enterprise Act 2002, available at: <https://www.legislation.gov.uk/ukpga/2002/40/contents>.

a fixed or daily penalty, and may 'stop the clock', extending the statutory timetables for reviewing the transaction.

Historically, the CMA has mixed its usage of both informal and Section 109 requests. While the CMA does not explicitly exclude the use of informal internal document requests going forward, it states that Section 109 notices will become the norm. Despite several respondents to the consultation criticising this approach, the CMA notes that its 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. In the CMA's view, this justifies an increased use of a mandatory information-gathering power with binding timelines. This modifies and supplants the CMA's previous approach under paragraph 7.3 of the CMA's 2014 Guidance, which provided that such Section 109 notices should be used where the CMA: (i) considers there to be a risk that it will not receive the information sufficiently in advance in order to be analysed and taken into account in its decision, (ii) has doubts that the recipient will comply with an informal request where there has been a precedent of non-compliance, or (iii) believes that there is a risk that the evidence may be destroyed.

Conversely, for documents requested from third parties, the CMA considers that it is likely to be appropriate to informally request information in the first instance. But, Section 109 notices could still be used where the CMA has doubts about whether it will receive full or timely responses, and where the evidence requested is material to the CMA's investigation.

In the Guidance, the CMA also reminds companies that (i) intentionally altering, suppressing, or destroying any information that the CMA has required to be produced and (ii) knowingly or recklessly supplying false or misleading information to the CMA are criminal offences under Sections 110(5) and 117 of the Act respectively. This offence is punishable by a fine of an unlimited amount¹¹ and/or a maximum of two years' imprisonment.

Detailed Procedure for Document Requests

While the 2014 Guidance provides a broad overview of the CMA's use of financial questionnaires, quantitative information, technical economic analysis, evidence based surveys, and even site visits, it does not go into detail on how responsive internal documents should be produced. The new Guidance helpfully clarifies the detailed procedure under which responsive documents should be identified and submitted to the CMA, including: (i) IT issues, (ii) legal privilege, (iii) pre-submission discussion, (iv) supplemental explanation of methodology, and (v) the use of compliance statements.

i. Approach to IT issues

Given the varying and evolving IT environments of businesses, instead of detailed specifics, the CMA sets out general principals on IT as follows:

- Responses should typically cover all of a custodian's IT 'environment' where relevant documents might be stored;
- Appropriate measures should be taken to ensure that potentially responsive documents remain available for production (e.g. the suspension of internal document deletion processes);

¹¹ The statutory cap on the maximum fine that can be imposed on summary conviction (of £5,000) has been removed for most common law and statutory criminal offences by a law that came into force in March 2015.

- A robust search methodology should be used to identify responsive documents;
- Documents should be text-searchable;
- Parties may also be required to provide the metadata of digital material;
- Responsive documents should be provided in their entirety, including all ‘family’ attachments;
- The CMA may request ‘case de-duplication’, ‘custodian de-duplication’, and ‘production de-duplication’;
- Parties may not be expected to produce draft documents, unless shared within the business;
- All documents should be submitted to the CMA in their native format without password protection; the CMA may require a load file to be produced in the form of the template available on the CMA’s website.

ii. *Approach to legally privileged materials*

Where parties wish to redact or remove privileged materials from the final production, the CMA will ask the parties to describe the process used to identify and withhold such materials, and/or provide a privilege log.

Note that while under UK rules, the communications of in-house counsel are privileged,¹² under EU rules, only correspondence with EEA external counsel are protected.¹³

iii. *Engagement on complex document requests in draft form*

Before issuing a notice under Section 109, the CMA will generally engage with the merging parties to narrow the document request for responsiveness, and to ensure that the resulting number of documents is not disproportionate or burdensome.

iv. *Standard question for explanation of methodology*

The CMA will include in its document request a question on methodology, describing the determination of responsiveness. The level of detail required will depend on the case and the scope of the request, allowing for the hand-picking of select documents where it is deemed appropriate. The CMA may also request a draft response to the methodology question before finalising the scope of its document request.

v. *The use of compliance statements*

The CMA may include a request for the Chief Executive Officer or General Counsel (or equivalent) to sign a ‘compliance statement’ confirming that the business has complied with the Section 109 notice when it providing its response to the document request.

¹² Competition Act 1998, s. 30, available at: <http://www.legislation.gov.uk/ukpga/1998/41/section/30>.

¹³ Judgement of the European Court of Justice, Case C-550/07, *Akzo Nobel Chemicals and Akros Chemicals v Commission*, 14 September 2010, available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=D87E05B7C8EDC14A4591CC1B2D591869?text=&docid=82839&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9670625>.

Concluding Remarks

As a result of this new Guidance and new policy from the CMA, businesses undergoing merger review in the UK can expect more rigorous and lengthy internal document production exercises, backed up by mandatory timelines and fining powers. Importantly, parties may be required to submit both emails and draft documents. It is therefore exceedingly important that business documents are not circulated internally until they have been reviewed by antitrust counsel. When analysing the proposed transaction, employees, particularly those not well versed in the merger review process, may tend towards artificial puffery, or may unknowingly use language that has a specific meaning within the antitrust context. The approach detailed in the Guidance increases the likelihood that such documents will be reviewed by case handlers who themselves might be unfamiliar with the way businesses market themselves. In order to avoid possible misunderstandings, make sure to involve your antitrust counsel early, and encourage strong and clear lines of communication.

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Authors:

Tobias Caspary

Kay Jebelli

Julie Flandrin

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Contacts:

London

Dr. Tobias Caspary	+44.20.7972.9618	tobias.caspary@friedfrank.com
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New York

Nathaniel L. Asker	+1.212.859.8566	nathaniel.asker@friedfrank.com
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FRIED FRANK

New York

One New York Plaza
New York, NY 10004-1980
Tel: +1.212.859.8000
Fax: +1.212.859.4000

Washington, DC

801 17th Street, NW
Washington, DC 20006
Tel: +1.202.639.7000
Fax: +1.202.639.7003

London

41 Lothbury
London, U.K. EC2R 7HF
Tel: +44.20.7972.9600
Fax: +44.20.7972.9602

Frankfurt

Taunusanlage 18
60325 Frankfurt am Main
Tel: +49.69.870.030.00
Fax: +49.69.870.030.555

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