Client Alert | Antitrust/Competition

The CMA issues guidance on requests for internal documents in merger investigations

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Overview

Competition authorities around the world typically place considerable weight on parties' internal documents when assessing the potential effects of a merger. Such documents, many of which can pre-date the companies' decision to enter into a transaction, are often regarded as conveying the merging parties' 'real' views about the market(s) concerned and the competitive dynamics within them. That is why it is always important for companies to be mindful of how they draft documents, not only when a potential transaction is contemplated but also when preparing market-related documents such as business plans and strategy papers.

On 15 January 2019, the Competition and Markets Authority (**CMA**) issued '**Guidance on requests for internal documents in merger investigations**' (**Guidance**). The purpose of the Guidance is to provide further clarification on the CMA's use of requests for internal documents, in both Phase I and Phase II UK merger investigations.

Use of internal documents in UK merger investigations

The UK merger filing regime is voluntary in that no notification or clearance decision is required for the parties to close a transaction, even if the jurisdictional thresholds are met. However, where the relevant thresholds are met and the merging parties opt to notify the transaction in the UK (or the CMA subsequently decides to investigate, e.g. as a result of a complaint), they will be required to provide copies of internal documents. The documents typically requested will be those relating to the rationale and impact of the merger (such as synergies, alternative commercial options absent the merger, etc.), and details of any characteristics of the market (such as competitor analysis, pricing, expansion plans, marketing, bidding strategies, barriers to entry, etc.).

A request for documents can be issued either 'informally', or 'formally' under section 109 of the Enterprise Act 2002 (**Section 109 Notice**). A Section 109 Notice can be issued by the CMA to request information for 'permitted purposes', including any aspect of its merger-related functions. Failure to comply with such formal notice can result in a number of potential penalties, including administrative fines, 'stop the clock' provisions and rejection of the entire 'merger notice' (i.e. the formal notification)[1].

[1] In November 2017, the CMA imposed a penalty of £20,000 on Hungryhouse for failing to provide documents responsive to Section 109 Notices which later came to the CMA's attention. This was the first time such a penalty had been imposed, and indicates the CMA's strict approach to such matters. It can be expected that the CMA will investigate and impose fines if it believes responsive documents are not provided in response to formal information requests. Penalties for failing to provide accurate information is a current trend in merger enforcement, both at national and European Commission level. For example, the Commission has threatened to fine General Electric, and Merck and Sigma-Aldrich for providing incorrect or misleading information in EU merger investigations.

The Guidance

In addition to general information on the use of internal documents in merger investigations and the CMA's statutory powers to request documents, the Guidance also includes information on the scope of such requests, and issues relating to IT, legally privileged materials, complex document requests, methodology and the use of compliance statements.

The Guidance states that 'internal documents' includes all types of documents in the merging parties' possession that have been prepared, sent or received by their officers or employees. These can include handwritten notes and instant messages. Although the CMA has a wide discretion to determine what types of documents to request, it notes that handwritten notes and instant messages are "*rarely likely*" to be requested. The Guidance notes that although the CMA has the authority to request "*any potentially relevant document*" the CMA will consider the scope and nature of any document request and will ensure any request is proportionate. It also states that all documents are viewed in their proper context. Against that background, the Guidance specifically states that parties may not be expected to produce **draft documents**, unless the CMA considers there are specific reasons for asking for them. As such, general requests will only cover the final, or most recent, draft of a responsive document. However, it is very important to note that e-mails that are responsive to a document request will have to be produced in their entirety, including with drafts of any documents that are subsequently amended and superseded by a final version. This may therefore require the production of early drafts of documents, prepared by junior personnel which do not reflect the considered view of the company concerned.

In cases where the CMA decides to issue a Section 109 Notice and the request is particularly complex or extensive, the Guidance also specifies that the CMA may share a draft request with the merging parties where 'practicable and appropriate'. This reflects current practice but confirmation in the Guidance is to be welcomed.

Comment

Notwithstanding the helpful clarification in the Guidance to the CMA's approach to document requests, there are some stings in the tail. First, as noted above, draft documents may need to be produced. If the final versions are materially different this may prompt questions from the CMA but there may well be good reasons to explain the development of the document and any change in views (if indeed there are any). Secondly, **responsive documents must be produced in their entirety** "*including the parts of a document that deal with matters that are not specified in the request*". This may therefore cover sensitive material about other projects wholly unrelated to the case in question (e.g. in different markets and/or jurisdictions). The Guidance does not discuss the ability to produce redacted documents but, in some circumstances, it may be possible to agree a position with the CMA, perhaps by having a third-party lawyer appointed by the CMA to review the documents to confirm whether or not those parts of a document are relevant to the case. However, such an approach is likely to be very much the exception.

Given the CMA's wide discretion to determine what documents to request or what may be material to the assessment of the merger, there are some points all companies should bear in mind. Companies should be **mindful when drafting transaction related documents**, both in draft and final form, such as presentations and emails, as any such document could be responsive to a request from the CMA and consequently used in their assessment of the merger. In addition, it would be good practice for separate documents to be created for each transaction opportunity. In particular, as documents must be produced in their entirety, transaction-specific documents should not refer to other potential projects (which are not relevant to the CMA's assessment of the case in hand) if a company wants to ensure details of such other projects do not need to be disclosed to the CMA until such time as the company wishes to bring those projects to the CMA's attention.

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