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Our File No.	69459
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VIA EMAIL to Amanda.Town@cma.gsi.gov.uk

Amanda Town
Competition and Markets Authority
Victoria House
37 Southampton Row
London, United Kingdom
WC1B 4AD

Dear Ms. Town:

Re: Consultation — Draft Guidance on Requests for Internal Documents in Merger Investigations

We write on behalf of the Merger Streamlining Group ("MSG" or the "Group"), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The cornerstone of the Group's activity has been to work with competition agencies and governments to help implement international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* of the International Competition Network ("ICN") of which, as you know, the Competition and Markets Authority ("CMA") is a longstanding member.[2]

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as more than 50 submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in more than twenty other jurisdictions (*e.g.*, Ireland, Canada, Russia, Brazil, India, China, Japan, Korea, France, Spain, Italy, Argentina, Chile, Philippines and Portugal) to promote reforms consistent with the *Recommended Practices*. The Group has previously provided comments to the CMA's predecessor (the Office of Fair Trading) and/or the UK Department for Business, Innovation & Skills in 2008, 2011 and 2016.

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[1] The current members of the Group include Accenture, BHP Billiton, Bosch, Chevron, Cisco, Danaher, General Electric, Novartis, Oracle, Procter & Gamble, Siemens, and United Technologies.

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/ uploads/library/doc588.pdf> ("*Recommended Practices*").

The Group writes in connection with the CMA's public consultation document entitled "Guidance on requests for internal documents in merger investigations" (the "*Guidelines*").[3] The Group commends the CMA for its ongoing interest in improving the merger control process in the United Kingdom, and for its willingness to consult with stakeholders on these important issues.

Generally speaking, the Group finds the *Guidelines* to be thoughtful, well-prepared, and relatively comprehensive. We have set out below a few specific suggestions, by which we believe the Guidelines could be further improved. We hope that this submission, which draws upon the MSG members' very substantial experience with multinational merger transactions, will prove useful to you. For your ease of reference, we have adopted below the subheadings used by the CMA in the *Guidelines*.

I. *Guidelines* Commentary: The Likely Scope of Internal Document Requests

The *Guidelines* note, at paragraph 17, that the CMA intends to "*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*."[4] The Group supports this focus on proportionality, which reflects international best practices established through the ICN *Recommended Practices*, which advise that "*competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties and third parties in connection with merger investigations*."[5]

The proportionality of information requests issued to merger parties — as distinct to third parties — should also reflect the significant volume of information and documents provided by merger parties *ex ante* as required by the CMA's merger notice form. Such material includes press releases, transaction documents, offer documents (for transactions subject to the City Code), annual reports, accounts, business plans, analytical/planning documents prepared for the board of directors or senior management relating to the proposed transaction, and analytical/planning documents prepared for the same audience relating to any market in which the merger parties' operations have a horizontal overlap.[6] In this respect, the Group appreciates the statement from the CMA, at paragraph 10 of the *Guidelines*, that "*in most cases, merger parties are unlikely to be asked to provide material volumes of additional internal documents*" beyond what has been provided with the merger notice.[7] The Group encourages the CMA to adhere to this approach in the day-to-day review of merger transactions.

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[3] Competition & Markets Authority, *Guidance on requests for internal documents in merger investigations* (28 March 2018), available online at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695203/draft-guidance-on-internal-docs-merger_investigations.pdf>.

[4] *Ibid.*, at paragraph 17.

[5] *Recommended Practice* VI.E.

[6] Competition & Markets Authority, *Merger Notice Template*, sections 8-10, available online at <https://www.gov.uk/government/publications/mergers-forms-and-fee-information>.

[7] *Supra* note 3, at paragraph 10.

One specific type of record discussed in the *Guidelines* which the Group believes merits reconsideration is the reference, at paragraph 18, to instant messaging records. The CMA states that it "*may require the production of chats on instant messaging systems*"[8] in connection with its review of a proposed transaction. With respect, in the Group's view the brevity, highly informal, and often personal, nature of instant messaging means that such messages are very unlikely to contain any material analysis of a proposed transaction, or of the competitive factors that are relevant to merger review, let alone content that has any probative value. Requiring parties to search for and produce such materials (which may be very time-consuming and costly, in particular given that archiving arrangements may involve third party solutions), when relevant analytical documents have already been produced in connection with the merger notice, would appear to impose the very sort of "*unnecessary or unreasonable costs and burdens*" that the ICN *Recommended Practices* caution against. Such materials are also unlikely to generate any meaningful enforcement benefits for the CMA (and may consume significant agency time to review).

Paragraph 20 of the *Guidelines* addresses the periods for which internal documents are likely to be requested by the CMA. It notes that "*in most cases*", the CMA will request documents covering a three-year period preceding the information request.[9] The Group respectfully suggests that the CMA consider whether a two-year period for documents requests would sufficiently address its needs, as per its approach to those documents required under Question 10 of the Merger Notice. This would be consistent with the approaches taken by the U.S. and Canadian competition agencies, which generally apply a two-year period for document production requests.[10] It would also accord with the ICN *Recommended Practices* guidance that "*competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties*."[11] In the Group's experience, business documents dating back more than two years are often not indicative of current business conditions, particularly in dynamic markets or industries subject to rapid technological changes.

II. ***Guidelines*** **Commentary: Engagement on Complex Document Requests in Draft Form**

Paragraph 26 of the *Guidelines* states that the CMA "*may, where it is practicable and appropriate, share document requests in draft with parties before issuing a notice under section 109.*"[12] In the Group's view, such dialogue is an essential aspect of effective and

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[8] *Ibid*., at paragraph 18.

[9] *Ibid.*, at paragraph 20.

[10] *See*, *e.g.*, United States Federal Trade Commission, *Model Second Request* (Revised August 2015), at paragraph 11, available online at <https://www.ftc.gov/system/files/attachments/merger-review/guide3.pdf>, and Canadian Competition Bureau, *Merger Review Process Guidelines* (September 8, 2015), at paragraph 3.3.1, available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03423.html#s3_3_1>.

[11] *Supra* note 5.

[12] *Supra* note 3, at paragraph 26 (emphasis added).

efficient merger review for both merger parties and competition enforcers. The Group therefore strongly encourages the CMA to engage in such dialogue with merger parties in all instances where an informal request or a section 109 notice is to be issued. Such dialogue typically generates efficiencies and benefits for both sides, including the elimination of irrelevant or duplicative information, exploring whether the parties generate or maintain the types of data or documents sought by the enforcer, the narrowing of requests to more closely target the issues that the enforcer wishes to analyze, and the avoidance of large productions of documents or data that are unlikely to assist the enforcer (but would consume resources in order to be reviewed).

Engaging in such dialogue with the merger parties is expressly supported by the ICN *Recommended Practices*, which state that "*applicable laws and rules should permit the case team (i.e., agency staff responsible for conducting the investigation) to modify information requests in an effort to avoid unnecessary or unreasonable costs and burdens*" and that a case team "*should be willing to consider possible modifications proposed by the parties*."[13] It is also consistent with, for example, the practice of the U.S. and Canadian antitrust agencies, which as a general policy engage in such consultation in all instances.[14] Any departure from this approach should be exceptional. The Group does not believe that the "*where it is practicable and appropriate*" language in paragraph 26 of the *Guidelines* is necessary or desirable.

III. *Guidelines* Commentary: Approach to IT issues

Paragraph 22(f) of the *Guidelines* states that "family" attachments should be included in response to a document request "*along with responsive documents*", and paragraph 22(g) states that documents should be provided in their entirety "*including the parts of the document that deal with matters that are not specified in the request*". Where an attachment is not responsive (which may be the case where, for example, an email deals with multiple issues), or sections of a document are not responsive, the Group suggests that the parties ought not to be required to provide such materials. Requiring the production of clearly irrelevant materials imposes a burden on merger parties with no corresponding enforcement benefit to the CMA.

IV. Additional Issues Not Addressed In The *Guidelines*

One additional topic not addressed in the *Guidelines*, but which the Group respectfully suggests is worthy of inclusion, is the adoption of a procedure by which merger parties can seek review of information requests that are considered to be unduly broad or burdensome. The ICN *Recommended Practices* indicate that such a review/appeal mechanism is

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[13] *Recommended Practice* VI.E, Comment 2.

[14] *See, e.g.*, Federal Trade Commission, *Model Second Request*, *supra* note 10 (which states at page 2 that the FTC will "*invite recipients to discuss possible modifications with staff*" when issuing a Second Request; *see also* the Canadian *Merger Review Process Guidelines*, *supra* note 10 (which deal at paragraph 3.2 in some detail with the "*pre-issuance dialogue*" process).

an important part of any merger control regime, and counsel that "*disagreements between the case team and a merging party relating to whether a request is reasonable or unduly burdensome or whether the merging party has adequately complied with the request should be subject to timely review mechanisms.*"[15] Such a mechanism could include an internal review procedure within the CMA (for example by the Procedural Officer), which may offer greater speed and efficiency in considering such requests, or review by an independent outside agency or tribunal, which may offer greater perceived independence (and therefore effectiveness).

Such review mechanisms are a feature of the U.S. and Canadian merger control regimes.[16] The Group is not aware of any concerns among those agencies concerning the existence and application of such review mechanisms.

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Thank you very much for considering the Group's views. We would welcome the opportunity to respond to any questions or discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,

A. Neil Campbell

Casey W. Halladay

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Members of the Merger Streamlining Group

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[15] *Recommended Practice* VI.E, Comment 5.

[16] *See* Federal Trade Commission, *Model Second Request*, *supra* note 10, at page 2, and U.S. Department of Justice, Antitrust Division, Second Request Internal Appeal Procedure, available online at <https://www.justice.gov/atr/second-request-internal-appeal-procedure>; *see also* the Canadian *Merger Review Process Guidelines*, *supra* note 10, at paragraph 3.7 ("*Internal appeal procedure*").