



## MERGERS & ACQUISITIONS

# The role of contemporaneous documents in EC Competition Law

INGRID VANDENBORRE AND ROMAIN PERROIS

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Recent cases have underscored the European Commission's (EC) increasing reliance on company internal documents. Both in merger control review and in investigations, a greater emphasis is placed on the conclusions that can be derived from contemporaneous documents to support competition law analysis and enforcement. This increased focus on companies' contemporaneous documents raises a number of questions as to the appropriate scope and legal framework in the EC surrounding document review and analysis.

From 28 March to 24 April 2018, the Competition and Markets Authority (CMA) ran a consultation on draft guidance in relation to requests for internal documents in UK merger investigations and issued draft guidance as part of this process.

The EC is similarly preparing guidelines on document requests in merger cases in an effort to ensure transparency and predictability. Hopefully these will provide further insights into the framework these agencies intend to apply in their review of contemporaneous documents.

### EC current practice

The EU Merger Regulation (EUMR) provides that merging parties must provide

**Skadden**

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& Affiliates

Ingrid Vandendorre is a partner and Romain Perrois is an associate at Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates. Ms Vandendorre can be contacted on +32 (2) 639 0336 or by email: [ingrid.vandendorre@skadden.com](mailto:ingrid.vandendorre@skadden.com). Mr Perrois can be contacted on +32 (2) 639 0328 or by email: [romain.perrois@skadden.com](mailto:romain.perrois@skadden.com).



copies of documents prepared by or for any member of a company's board or shareholders meeting. Following the implementation of the modified EUMR in 2004, the EC expanded the scope of documents that parties should provide to include documents relating to market shares, the rationale of the concentration and potential for sales growth or expansion into other product or geographic markets. The scope of these documents was further expanded in 2013.

This requirement is often supplemented with additional requests for at times voluminous sets of contemporaneous documents. For example, in *Olympic/Aegean Airlines*, "the Commission reportedly analysed a substantial amount of internal documents belonging to the Parties, including more than 90 000 internal emails". In *Hutchison 3G UK/Telefonica UK*, the EC's document request was reported to have covered more than 300,000 that the EC reviewed during its investigation. In *ArcelorMittal/Ilva*, *Qualcomm/NXP Semiconductors*, and *Bayer/Monsanto*, the EC indicated it reviewed respectively over 800,000, 1 million and 2.7 million internal documents as part of its in-depth investigation.

In *Dow/DuPont*, the EC also relied on large numbers of internal documents,

several of which were cited to substantiate the EC's findings in relation to innovation in the agro-chemical sector. In addition, the EC underlined that "internal documents ... often allow the Commission to verify factual claims made by the parties and verify data they submit. Internal documents are frequently crucial to understand the factors which affect the incentives of the parties before and after the proposed merger".

Similarly, in the context of alleged violations of articles 101 and 102 TFEU, contemporaneous documents are increasingly important. For example, commissioner Margrethe Vestager recently commented that documents the EC obtained from Apple in its Qualcomm investigation "gave us an understanding that we could never have achieved just by looking at prices and costs". She also said internal documents played a vital role in the Google search investigation, commenting that Google's documents "made it clear that Google knew its own search service wasn't doing well and it decided to show that service more prominently in search results, whilst demoting those of its rivals".

### **The anticipated guidance on internal document requests**

Both the EC and the CMA are working on draft guidance material in relation to the use of contemporaneous documents in merger investigations.

Johannes Laitenberger, director-general of DG Competition, recently confirmed that the EC is "preparing a set of best practices", to be published in the coming months, to "clarify the Commission's approach and give practical guidance to companies on how to reply to [its] requests for internal documents in merger cases". The 'well-defined scope' of the guidelines will seek to make requests more transparent and predictable, while also allowing for early cooperation with companies, making requests simpler and better targeted. The guidelines will specify the scope of requests for internal corporate documents. This includes which individuals or positions in companies can be subject to requests, what categories of documents can be requested – e.g., board papers, investment plans and business decisions – and practical issues, such as the type of file format acceptable for submission.

The CMA's draft guidance on requests for internal documents in merger investigations sets out how the parties to a merger are expected to respond to an internal document request from the CMA. The scope of future CMA internal



document requests is potentially wide-ranging as they are likely to relate to specific categories of emails, including the files attached to those emails, and internal analyses, such as studies, presentations, spreadsheets and surveys, but also to “the production of written materials” – such as handwritten notes or notebooks, or even, where appropriate, chats on instant messaging systems.

### Legal and practical implications

In US antitrust law, internal documents have historically played a central role in merger control review procedures, whereas the EC’s merger control procedure has been focused on the very detailed data and information to be provided in an elaborate notification form, identified as the Form CO.

This greater focus on contemporaneous documents raises a number of questions.

First, it is unclear what rules or criteria of evidence apply to the EC’s analysis of contemporaneous documents. For example, in merger analyses, the EC carries out a prospective assessment where it bears the burden of proof that must be discharged in accordance with a “balance of probabilities” standard. Although the EUMR does not provide information on the evidentiary

principles applicable to merger reviews, the General Court specified that internal documents are “particularly important in that they corroborate the findings made at the stage of the analysis of the market shares and precede the analysis of the econometric information”.

The increased emphasis placed on contemporaneous documents also raises questions as to the appropriate approach, e.g., when the documents are incomplete, older or are contradicted by factual data. Often documents may have been prepared in a different context, for a different purpose, or otherwise not reflective of all realities that are relevant to a proper antitrust assessment. Second, increased reliance on contemporaneous documents also calls for further clarity of the rules on legal privilege. This is particularly relevant as proceedings before the EC are largely written in nature, involving the preparation of extensive notification forms and other information prepared by counsel and shared among counsel, pursuant to joint defence agreements. In addition, given the exchange of documents between different competition enforcement agencies, it will be important to understand the implications of potential privilege waiver, for example as a result of documents being shared with

competition enforcement agencies outside the EU. It is unclear whether the draft guidance will elaborate on the EC’s practices in these areas.

There are also practical implications of the increased focus on contemporaneous documents. Extensive documents requests are likely to slow down merger reviews, where currently merger review proceedings are increasingly longer. The EC suspended its review period for approximately two months in *Dow/DuPont* and four and a half months in *Qualcomm/NXP Semiconductors*.

### Conclusion

There are important legal and practical consequences to the EC’s approach that extend both to merger proceedings and competition law enforcement proceedings. The changing role for contemporaneous documents comes at a time when the EC is taking a more rigorous approach to the enforcement of procedural errors. It will therefore be imperative to have a clear and consistent legal framework for the review and relevance of documentary evidence in EC proceedings that takes into account rights of defence and other existing principles of EU law. ■