RESPONSE OF CLIFFORD CHANCE LLP TO THE COMPETITION AND MARKETS AUTHORITY CONSULTATION ON DRAFT GUIDANCE ON EXCEPTIONS TO THE DUTY TO REFER IN MERGER INVESTIGATIONS

Clifford Chance LLP welcomes the opportunity to respond to the consultation on the draft CMA guidance on exceptions to the duty to refer in merger investigations. Our comments below are based on the substantial experience of lawyers in our Antitrust Practice of advising on merger control procedures for a diverse range of clients, and across a large number of jurisdictions. However, the comments below do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

Our comments below relate primarily to the limited substantive changes that have been introduced to the draft guidance, in comparison with the content of CMA64 and Chapters 1, 3 and 4 of OFT1122.

Is the content, format and presentation of the draft guidance sufficiently clear? In particular, does the draft guidance clearly explain the relationship between RCBs and remedies? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.

1. Subject to our comments below, the draft guidance is sufficiently clear in content, format and presentation.

2. It would be helpful to include in the final guidance a description of efficiencies which may be considered as RCBs, as currently set out in paragraphs 5.7.6 - 5.7.18 of the CMA Merger Assessment Guidelines, rather than simply cross referring to those sections. The guidance might also usefully explain which of the efficiencies described in the Merger Assessment Guidelines could be considered as RCBs.

Is the draft guidance sufficiently comprehensive? In particular, does the it provide enough examples of the type of evidence that the CMA requires in its assessment of RCBs? Does it have any significant omissions? Do you have any suggestions for additional or revised content that you would find helpful?

3. In cases in which the merging parties present evidence of RCBs, the CMA usually concludes that the evidence is not sufficiently compelling. We therefore consider that the comprehensiveness of the guidance would be best served by some illustrative examples of specific RCBs (such as those listed in paragraph 7.13 of *CMA29: guidance on the review of NHS mergers*), with detailed explanations of the evidence and data that the CMA would accept as sufficiently compelling to support the existence of those RCBs. While useful, the illustrations of RCBs set out in paragraph 72 of the draft guidance are too high level.

Do you have any other comments on the draft guidance?

4. While the draft guidance does not make substantive changes to the content relating to the *de minimis* exception, we continue to believe that the relevant thresholds should be higher, in particular because of the additional volume of mergers that the CMA will be required to review following Brexit. While the consideration of *de miminis*

issues at an earlier stage in the investigation (and in particular as part of the decision on whether to call in a merger for review) has had a positive impact, it remains the case that the UK merger regime catches too many inconsequential mergers and that this results in an inefficient use of the CMA's resources.

5. Indeed, the current thresholds are already anomalous, given the CMA's target of delivering direct financial benefits to consumers of at least ten times its relevant costs to the taxpayer. In cases where the CMA can be confident that clearance would not set a precedent for other related mergers (e.g. in respect of local retail markets), such that "spill over" harm will not arise, the application of the current *de minimis* thresholds in many cases serves only to deliver direct financial benefits to consumers in the form of lower prices that are broadly equal in value to, or only marginally more than, the cost to taxpayers of a phase 2 reference, taking into account the probability that a reference would be cleared unconditionally.[1] Applying the CMA's target of taxpayer value more rigorously would imply a threshold (at least for mergers involving national markets) of closer to £50 million, rather than £5 million.

Clifford Chance LLP
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[1] A calculation of this nature formed the basis of the Office of Fair Trading's decision to set the level of the original thresholds – see footnote 5 of OFT1122con, "Mergers - Exceptions to the duty to refer and undertakings in lieu, Draft guidance consultation document" October 2009.