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RESPONSE OF CLEARY GOTTLIEB STEEN & HAMILTON LLP TO THE COMPETITION AND MARKETS AUTHORITY'S CONSULTATION ON ITS MERGERS JURISDICTION AND PROCEDURE GUIDANCE.

This paper sets out the response of Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb") to the Competition and Markets Authority ("CMA") consultation on the Guidance to the CMA's Mergers jurisdiction and procedure, published on July 2013 (the "Draft Guidance").

QUESTIONS & ANSWERS

1. QUESTION 1

Do you agree with the list in Annexe D of the Draft Guidance of existing OFT and CC merger control-related guidance documents and publications proposed to be put to the CMA Board for adoption?

We agree with the list of merger control-related guidance documents to be put to the CMA Board for adoption, with one exception. Maintaining these guidance documents will ensure a degree of continuity and stability in the initial stages of the CMA's formation, and they will provide merging parties and their advisers with increased legal certainty.

In our view, the CMA should not adopt the OFT1122 Guidance in its current form.[1] Although this guidance contains a great deal of very valuable material, it does not provide a clear threshold for when the *de minimis* exception will apply. Under the existing Guidance, the test can be applied only after a transaction has already been subject to review, it is subject to discretion, and it relies on factors unrelated to the size of the transaction and/or market. As a result, mergers are reviewed at Phase I even where a Phase II reference is not a realistic possibility, wasting valuable public resources.

We believe that the creation of the CMA represents an opportunity for the UK competition authorities to produce clear and unambiguous guidance on the circumstances in which the *de minimis* rule will apply in merger control, applying fixed *ex ante* thresholds.

2. QUESTION 2

What, if any, further guidance do you think that the CMA should produce in the future in relation to its operation of the UK merger regime?

Please see the response to Question 1.

[1] OFT 1122 *Exceptions to the duty to refer and undertakings in lieu of reference guidance.*

3. QUESTION 3

Is the draft Remedies Form clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested from parties in that form?

The OFT's current approach works well. It provides flexibility that allows the parties and the authorities to focus on the most relevant issues, without unnecessary form-filling. We agree that the adoption of a Remedies Form may give greater clarity to parties about the information that will be required to constitute a clear offer of UILs. We also agree that the draft Remedies Form is clear and comprehensible. However, it is important that parties be given sufficient flexibility in completing the Remedies Form. The type and amount of information available to the parties will vary from case to case, and there will inevitably be instances where certain categories of information (such as financial information) may not exist. Given the short time-frame in which the parties are required to propose UILs, and the equally short time-frame in which the CMA has to decide whether to accept those UILs, it is important that the technical information requirements in the Remedies Form do not slow down the process.

We are also concerned about the new requirement on notifying parties to:

> "*Provide any reasons as to why the CMA should not require divestment to an upfront buyer."*[2]

This appears to introduce a presumption that the CMA will require upfront buyers. This is contrary to current practice both in UK and EU merger control. The current CC Merger Remedies Guidelines state that

> "*Where the CC is in doubt as to the viability or attractiveness to purchasers of a proposed divestiture package (ie composition risk) or believes there may be only a limited pool of suitable purchasers (ie purchaser risk), it may require the merger parties to obtain a suitable purchaser that is contractually committed to the transaction before permitting a proposed merger to proceed or a completed merger to progress with integration. Where the CC considers that the competitive capability of the divestiture package may deteriorate pending the divestiture (ie asset risk) or completion of the divestiture may be prolonged, it may also require that the up-front buyer completes the acquisition before the merger may proceed or, in the case of a completed merger, before the merger parties may progress with integration.*"[3]

It is clear, therefore, that the CC currently only requires upfront buyers where it has identified clear and specific risks associated with the attractiveness of the proposed divestiture package, the pool of suitable purchasers, or the time it takes to complete the divestiture. Upfront will not be required in other cases, and certainly not as a matter of course.

Likewise, the EU Commission may require upfront buyers where there are "*considerable obstacles for a divestiture*," such as third party rights or uncertainties as to

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2 *Ibid*., at paragraph 20.

3 CC8, Merger Remedies: Competition Commission Guidelines, November 2008, at paragraph 3.19

finding a suitable purchaser.[4] An upfront buyer may also be required in cases where there are "*considerable risks of preserving the competitiveness and saleability of the divestment business in the interim period until divestiture*."[5] This comprises cases where the EU Commission considers there to be a "high" risk that the divestment business will be degraded, in particular due to a risk of losing key employees, or where the parties are not able to carve-out a business to be divested until a sale and purchase agreement with a purchaser has been entered into.

Competition authorities should not require upfront buyer remedies other than in exceptional circumstances. Identifying upfront buyers can be a costly and time consuming exercise. It requires, among other things, identifying a business that is willing to enter into preliminary commercial discussions, having access to decision makers (whose availability is usually limited), ensuring that no confidential market information is shared between competitors, and reaching a sale agreement that is conditional only on the acceptance of UILs by the competition authority. It will undoubtedly be difficult to do achieve this in the relatively short time period in which the CMA must accept the proposed UILs. This requirement should, therefore, be reserved for exceptional cases.

In order to avoid creating a presumption that upfront buyers must be identified in every case, we suggest removing paragraph 20 from the Remedies Form or replacing it with a more neutral question. For example the European Commission's Form RM says: "*Explain the reasons why, in your view, the business will be acquired by a suitable purchaser in the time-frame proposed in the commitments offered.*"

4. QUESTION 4

Do you consider the guidance on the circumstances in which the CMA may extend the period for acceptance of UILs to be clear and understandable?

Yes. In particular, we welcome the provision at paragraph 8.24 for extending the timeframe for accepting UILs in cases involving upfront buyers which, as mentioned in response to Question 5, can be highly time-consuming.

5. QUESTION 5

Do you have any further comments on the explanation in the Draft Guidance of the time limits and processes described above?

We have three comments in this regard.

First, it is unclear what the requirements will be for triggering the five working day period during which the Parties can offer UILs after the CMA's Phase 1 reasoned decision. The Draft Guidance explains that parties will have up to five working days after receiving the CMA's reasons for its SLC decision to formally offer UILs.[6] The CMA then has a further five working days to decide whether the UILs, or a modified version of them, are in principle acceptable to address any competition issues.[7] However, it is unclear if, when, or how the

4 Remedies Notice, paragraph 54

5 Remedies Notice, paragraph 55

6 Draft Guidance, at paragraph 8.13.

7 Note that this second five working-day period is not clearly set out in the Draft Guidance.

Parties must inform the CMA that they intend to make use of this time period or, alternatively, if the Parties can request that the CMA skip this stage proceed directly to making a reference.

Second, the Draft Guidance explains that, following the Notice of provisional findings (the "Provisional Findings"), the Parties will have a period of at least 21 days to comment on the Provisional Findings.[8] It also explains that, where the CMA has provisionally found that a merger gives rise to an SLC, or may be expected to give rise to an SLC, response hearings will take place with the main parties and potentially with key third parties likely to provide relevant evidence.[9] However, it is unclear from the Draft Guidance whether the CMA will allow sufficient time to receive and consider the Parties' responses to the Provisional Findings before the response hearings. The Draft Guidance does state that "*views on provisional findings and on remedies will be explored at a single hearing,*"[10] but it does not guarantee that the CMA will have considered the Parties' written responses at this stage (or that the response hearing will take place after the deadline for providing written submissions on the Provisional Findings). By way of illustration in one recent case, the Competition Commission held a Response Hearing before the deadline for written submissions and, even though the party in question provided written submissions in advance of the Response Hearing, the Inquiry Group admitted it had not read those submissions prior to the Hearing. Given the importance of upholding the Parties' right of defence, we believe it should be made clear in the Draft Guidance that the CMA will allow sufficient time to receive and consider any written submissions made by the Parties in response to the Provisional Findings before holding a response hearing.

Finally, the Draft Guidance contains limited information on the compatibility between the CMA's timetable and the timetable set out in the City Code on Takeovers and Mergers. Guidance Note 5 to the draft Mergers Notice states that:

> "*For mergers governed by the Takevoer Code, the CMA does not envisage that the pre-notification timetable will raise significant difficulties in relation to the timing of public offers. Merger parties should however bear in mind the need to reconcile submission of the Notice with the requirements of the Takeover Code. If merger parties are seeking a decision by the first closing date of an offer, the CMA will need to receive the Notice (following pre-notification) before the posting of the Offer Document. This will increase the likelihood of obtaining a Phase 1 decision by the first closing date. The CMA cannot be bound by the first closing date however, and where it is not in a position to reach a decision by the first closing date, the consideration period will need to be extended.*"[11]

Given that there is a clear possibility of conflict between the CMA's timetable and the timing of public offers, it is unclear why the CMA "*does not envisage that the pre-notification timetable will raise significant difficulties in relation to the timing of public offers.*" Under the CMA's extended timetable, it is possible for a public offer to lapse before the end of Phase 1. In that case, the bidder may not make a further offer for a period of 12

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8 Draft Guidance, at paragraph 13.1.

9 *Ibid.* at paragraph 13.4

10 *Ibid.* at paragraph 13.3.

11 Draft Guidance, Annexe E, Guidance Note 5.

months from the date on which the offer lapses. Even if the proposed merger is ultimately cleared by the CMA, it will possible to argue that there will have been a material change in circumstances in the market by the time the bidder makes a further offer (triggering a new investigation).[12] In order to minimize the costs and delay associated with this possibility, we believe the Draft Guidance should indicate the way in which the CMA proposes to deal with these situations. In particular, we would invite the CMA to show flexibility in the way it applies its statutory timetable in cases of genuine urgency imposed by the City Code timetable.

6. QUESTION 6

Is the template Merger Notice clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested in that Notice?

In our experience, the OFT's current use of Informal Submissions works well. It provides flexibility that allows the parties and the authorities to focus on the most relevant issues, without unnecessary form-filling. While we agree that the Merger Notice is clear and comprehensible, it will be important for the CMA to retain this flexibility and to recognise where information requested by the Notice is unnecessary on the facts of a particular case. In particular, where the notifying parties inform the CMA that information is unavailable, or where providing it constitutes a disproportionate regulatory burden, the CMA should show flexibility and, where appropriate necessary, grant waivers.

It also appears that the Merger Notice anticipates that information will be provided by all merging parties. However, in cases of hostile takeover bids, the acquirer will not have access to the target's internal information or documents, and will therefore not be in a position to provide the information required under the Merger Notice (although the CMA will of course have the power to obtain that information itself). This should be addressed in the Preamble or the Guidance Notes to the Merger Notice.

7. QUESTION 7

Do you agree with the proposed harmonisation for all merger cases of the point of time at which the merger fee is payable?

We consider that, given the reforms in notification procedures, it is sensible to harmonise the time at which a merger fee becomes payable. We agree that the fee should be paid upon publication by the CMA of the decision whether or not to refer the case to Phase 2.

8. QUESTION 8

Do you have any further comments on the explanation in the Draft Guidance of the updated process for notifying mergers?

We have a few observations on specific paragraphs of the Draft Guidance.

- **Paragraph 1.7**. This paragraph states:

  > *"…Where this guidance is expressed to apply to the CMA's policy when making decisions whether to refer a merger for an in-depth*

[12] It is particularly likely that this argument would be put forward by the target of a hostile takeover.

Phase 2 investigation, this does not bind the independent Phase 2 Inquiry Group."

The wording of this paragraph is unclear. [It appears to be stating that Phase 2 Inquiry Groups will not be bound by any guidance that does not apply to the second phase of the CMA's investigation. If so, this could be expressed in simpler terms.]

- **Paragraph 6.10.** Under the current system, if parties approach the OFT to inform it about a transaction that does not merit investigation (or which does not meet the jurisdictional thresholds), the OFT's usual practice is to send an enquiry letter nonetheless. Parties are therefore left with the options of not approaching the OFT at all (with the risk of a subsequent investigation), or filing a notification. There is no apparent justification for this approach.

  Under the new system, the Draft Guidance recognizes that the CMA has a responsibility to keep merger activity under review and is under a duty to refer certain mergers for a Phase 2 investigation. However, it also recognizes that the OFT is not obliged to open a full investigation just because it becomes aware that transaction has taken place. It states that:

  > "*it does not follow that the CMA must, or will, follow-up and investigate every complaint related to a non-notified merger (even where it is clear that the CMA would have jurisdiction), as this would undermine the benefits of the voluntary regime. The CMA will not investigate a merger simply because a complaint has been made to it.*"[13]

  It is clear that the CMA will not necessarily follow-up or investigate every complaint by *third parties* about non-notified mergers. We would invite the CMA to adopt the same approach with respect to main parties. We consider that the Draft Guidance should specifically state that the CMA will not necessarily investigate every (completed or anticipated) merger, regardless of the manner in which it is informed about the merger. This will encourage parties to have an open an frank dialogue with the CMA, ultimately improving the efficiency of the voluntary regime.

- **Paragraph 8.11.** This paragraph states that:

  > "*Whether or not parties have raised the possible offer of UILs with the case team during the course of the Phase 1 investigation, they will have a further opportunity to do so at the end of the issues meeting, when the CMA official chairing the meeting will ask them whether they wish to discuss any such UILs. The parties may wish to make use of this opportunity to discuss UILs in person.*"

  We consider that the Draft Guidance should also make it clear that no adverse inferences will be drawn from the parties' decision to discuss (or not to discuss) UILs at Issues Meetings.

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13 Draft Guidance, at paragraph 6.10.

- **Paragraph 13.5**. This paragraph states that:

> "*Response hearings may take place where the provisional finding is that no SLC arises as a result of the merger, although main parties often choose not to take advantage of this."*

The procedure for holding these response hearings is unclear. First, the Draft Guidance does not specify whether the Parties will always be offered a response hearing in these circumstances, or whether they will have to request them from the CMA. Second, it is unclear whether third parties will be able to request these response hearings and, if so, whether the merging parties will be informed.

- **Paragraph 13.7**. This paragraph states that:

> "*Following the main party response hearing, the main party or parties may submit further, or amended, proposals for remedies. Non-confidential versions of these proposals will be published on the CMA's website. There may also be further meetings with the main parties at case team level. These meetings will be working meetings led by CMA staff at which the details of specific remedies proposals can be explored. A transcript or note of such meetings will be taken, depending on the circumstances*."

We believe the Draft Guidance should state that the transcript or note of such meetings to be provided to the Inquiry Group.

- **Paragraph 13.11.** This paragraph states that:

> "*The report must normally be published within 24 weeks of the date of the reference. The inquiry can be extended, once only, by up to eight weeks if the CMA considers there are special reasons why a report cannot be prepared and published within the statutory deadline. In addition to an extension for special reasons, the inquiry period can be extended if one of the main parties fails to provide information in response to a formal section 109 notice within the time stated in the notice (see paragraph 11.18 to 11.20 on section 109 notices). In this case the inquiry timetable is extended until the information is provided to the satisfaction of the CMA or the CMA decides to cancel the extension. If the inquiry timetable is extended for any reason a notice of extension will be published and the administrative timetable will be revised and republished*."

We believe the Draft Guidance should identify who will decide whether the timetable is extended (*e.g.*, the Inquiry Group).

9. QUESTION 9

Do you have any comments on the draft template order, or on the guidance on the CMA's use of interim measures included in the Draft Guidance?

There appears to be an inconsistency between the Draft Guidance and the Draft Template Interim Order. Paragraph 7.38 of the Draft Guidance states that:

> "*…a distinction should be drawn between parties' rights to make unconditional bids to acquire share capital or assets, especially common in auction settings, on the one hand, with, for example, actual integration after closing, on the other. The making of interim orders will bite on the latter, whilst leaving parties free to complete mergers if they are prepared to assume regulatory risk.*"

However, the Draft Template Interim Order, at paragraph 5(b), states that:

> "*Except with the prior written consent of the CMA, X shall not during the specified period take any action which might prejudice a reference of the transaction under section 22 of the Act or impede the taking of any action under the Act by the CMA which may be justified by the CMA's decisions on such a reference, including any action which might:*
>
> *…(b) transfer the ownership or control of Y or any of its subsidiaries*."

The wording of the Draft Guidance, therefore, appears to be inconsistent with the wording of the Draft Template Interim Order. If parties have a right to make unconditional bids to acquire share capital or assets so long as no actual integration takes place after closing, they should not require the written consent of the CMA to transfer the ownership or control of the target company

10. QUESTION 10

Do you agree with the proposed transitional arrangements for merger cases ongoing as at 1 April 2014, as set out in Annexe E of the Draft Guidance?

Yes. In particular, we agree that CMA's powers and procedures should apply prospectively.

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CLEARY GOTTLIEB STEEN & HAMILTON LLP