RESPONSE OF CLIFFORD CHANCE LLP TO THE BIS CONSULTATION ON MERGERS: GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE

Clifford Chance LLP welcomes the opportunity to comment on the BIS Competition Regime: Consultation on CMA Mergers: Guidance on the CMA's Jurisdiction and Procedure (the Draft Guidance).

Our comments below are based on the substantial experience of lawyers in our Antitrust Practice of advising on merger control clearance procedures for a diverse range of clients, and across a large number of jurisdictions. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

Q1. Do you agree with the list in Annexe D of the Draft Guidance of existing OFT and CC merger control-related guidance documents and publications proposed to be put to the CMA Board for adoption?

1. We generally agree with the list in Annexe D, and welcome the effort to ensure that existing, useful guidance remains available notwithstanding the legislative and institutional changes. We also agree that the jurisdictional and procedural guidance should be the priority for a complete review and update. However, the lack of any update to the 11 guidance documents that have been adopted by the CMA will create difficulties as a result of the caveats set out in Section D2 of Annex D and, in particular, the fact that various statements in the adopted guidance are incorrect due to conflict with the Draft Guidance, or because they do not take into account recent developments in case law, legislation or practice. If these inconsistencies are allowed to persist, we consider there to be a substantial risk that they will cause confusion as to the law or the CMA's approach to applying it.

2. This is a particular problem for guidance which purports to set out the CMA's practice, but which is no longer accurate. Practitioners can identify developments in case law and legislation and will therefore be in a position to know if the guidance is incorrect in respect of such developments. If, however, the CMA changes its practice from that described in the guidance, there is no way for practitioners and their clients to know this, until it is sprung upon them in the context of an active merger. Furthermore, it may not be readily apparent whether a particular statement in the adopted guidance is in conflict with the Draft Guidance, and should therefore be ignored.

3. We therefore recommend that a review of these guidance documents should be a priority for the CMA, once this and the next wave of consultations has closed.

Q2. 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?

4. The sections of the Draft Guidance that deal with Phase 2 procedures do not envisage any possibility of departure from the relatively rigid process of information gathering, issues statements, working papers, hearings and provisional findings, even in cases in which there are few issues of contention by the time of referral. The introduction of binding Phase 1 timetables will increase the likelihood that referrals are made simply because the CMA runs out of time in Phase 1 to finalise its views on certain issues, or

to finalise remedies. Consequently, it seems to us that it would be sensible to provide for the possibility of early resolution in Phase 2, in appropriate cases. The European Commission, for example, issues unconditional Phase 2 clearance decisions, without issuing a statement of objections, in approximately 30% of its Phase 2 investigations. We recognise that the change in decision maker at Phase 2 may mean that candidates for early clearance may not be processed quite as quickly as they are by the European Commission, but consider that such a procedure would nevertheless be useful, and is made all the more possible by the fact that Phase 1 and Phase 2 decisions will be conducted by the same body, and with flow-through of at least some CMA officials from Phase 1 to Phase 2. In addition, we see nothing in the EA2002 that would prohibit such a procedure.

5. In addition, as set out in our response to Question 9 below, we consider that the CMA should produce further and more detailed guidance on its approach to the use of interim orders.

Q3. 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?

6. We consider that the draft Remedies Form requests information that is broadly appropriate and in line with that required by other agencies, such as the European Commission. We have the following minor comments:

   (a) point 6(viii) of the draft Remedies Form refers to "debt leases and other financial liabilities". We query whether this should instead read "debts", as leases are covered by point 6(v) and other liabilities are covered by point 6(ix); and

   (b) point 8 states that financial information and forecasts should be broken down by product type/market "if relevant". The form should explain when such a breakdown would be relevant. In our view, such a breakdown would be relevant only if, and to the extent that, the competition concerns identified by the CMA (which the undertakings seek to address) relate to multiple products or markets.

Q4. 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?

7. We consider that an extended timeframe for acceptance of undertakings-in-lieu ("**UILs**") should be necessary only in cases involving upfront buyers, or in cases where there is an unforeseen need to conduct a second consultation on proposed UILs. In all other cases, 40 working days ought to be more than enough to agree remedies and carry out the appropriate consultations. The CMA might, however, consider whether the introduction of binding deadlines for UIL procedures means that it is no longer advisable to give third parties a deadline for their responses that is longer than the statutory 15 calendar days (or 7 calendar days for modified UILs).

Q5. Do you have any further comments on the explanation in the Draft Guidance of the time limits and processes described above?

8. The introduction of binding Phase 1 timetables was a fundamental part of the reforms introduced by the Enterprise and Regulatory Reform Act 2013 ("**ERRA**"). We consider that the Draft Guidance does a good job of describing those changes in a clear way. However, we have some reservations that the implementation of those changes, as described in the Draft Guidance, may undermine the objective of swifter and more predictable filing procedures.

Commencement and suspension of the 40 working day timetable will be unpredictable, and almost entirely at the discretion of the CMA

9. The impact and purpose of the binding 40 working day timetable will be undermined if parties cannot influence, control or predict when that timetable will start. We recognise that it is the statutory duty of the CMA to determine when filings are complete, but are concerned that some of the procedures described in the Draft Guidance go too far in removing possibilities for notifying parties to obtain comfort that the timetable will begin, and when that will happen.

10. First, as explained in more detail in paragraphs 15 to 18 below, we consider the template Merger Notice to require an unjustifiably wide scope of information. This means that, in practice, every notified transaction will require waivers from at least some of the relevant information requirements. The Draft Guidance contains no indication of how long parties may expect the grant of a waiver to take. Moreover, possibilities to challenge unreasonable rejections of waiver requests will be extremely limited. Accordingly, the point at which even the parties might consider their filing to be complete will be largely at the discretion of the CMA. This unpredictability will give rise to particular problems in cases that are subject to urgent or binding transaction timetables, such as those falling within the scope of the Takeover Code. This concern would be addressed by a more proportionate information requirement (see paragraph 19 below).

11. Second, the Draft Guidance does not envisage any mechanism whereby notifying parties can obtain comfort as to when the 40 day timetable will start. Paragraph 6.58 of the guidance states only that the CMA will generally inform the parties within 5 to 10 working days if their filing is missing important information. In our view, if the parties to a merger have gone through the pre-notification process and have submitted drafts of the merger notice upon which the case team has commented, then there is no reason why the 40 working day period cannot start as soon as the parties submit the merger notice. A possibility for parties to obtain pre-notification comfort that their filing will be accepted as complete on the date of notification (as exists, for instance, for filings under the EU Merger Regulation) would be of particular benefit in situations such as transactions involving a public bid, where there is intense interest in the timing of the merger review process.

12. Third, the ability of the CMA to reject a merger notice on the basis of a failure to comply with a formal information request within the requested timeframe (where such a failure may in any case result in a suspension of the 40 working day period) adds another needless layer of uncertainty over the timetable. Again, we recognise that this

ability is a statutory power,[1] but given its draconian consequences it would be useful if the Draft Guidance contained a clarification that this power would be used only in highly exceptional circumstances, an indication of what those circumstances might be and confirmation that this would not happen if the parties gave the CMA the opportunity to comment on their draft submission in pre-notification discussions. The guidance could also clarify who would be considered a "relevant party" for these circumstances (the seller in a completed merger should not, for instance).

Pre-notification periods

13. Paragraph 6.40 of the guidance suggests that the parties should allow at least two weeks for the pre-notification process. As paragraph 6.49 of the CMA guidance suggests that it will generally take 5 to 10 working days for the case team to respond to pre-notification submissions, it is likely that in all but the most straightforward cases, pre-notification will last significantly longer than that. In addition, the introduction of a case allocation form and weekly case allocation meetings, similar to the system used by the European Commission, means that the parties to a merger will face up to a week's delay simply to have a case officer appointed.

Overview of the Phase 1 process

14. The table of key stages in a Phase 1 process is a useful addition to the guidance. It could however, be clearer and more specific in places. For instance, at present it states that for cases raising competition concerns, parties may expect to have an Issues Meeting "by day 40", which is not useful.

Q6. Is the template Merger Notice clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested in that Notice?

15. The scope of the information required by the draft Merger Notice is far wider than that required by the current Merger Notice and all other mature merger control regimes (see paragraph 18 below for examples of requirements that we consider to be particularly excessive). We recognise that the CMA wishes to retain flexibility, so that it is not denied the opportunity to require information that may be relevant, depending on the circumstances. However, requiring all information that might conceivably be relevant for any transaction, including the most complex of deals, and relying on waivers to ensure that information requirements are proportionate to the notified transaction risks a number of adverse consequences.

16. In particular, it would result in a Merger Notice that requires a disproportionate volume of information for almost every possible transaction, such that one or more waivers will always be required. Negotiating such waivers would be a burden on the time and resources of the CMA and the parties. Moreover, it would be a natural tendency of case officers to treat the Merger Notice as the "default" information requirement, such that compelling justifications are required for waivers, creating a risk that excessive information requirements become the norm. There may also be

[1] Section 99(5)(c) EA 2002, as amended.

(hopefully isolated) cases where case officers are either inexperienced or overstretched and yield to the temptation to use the completeness of submissions to manage their pipeline of cases. The uncertainty of the process of seeking waivers would mean that, as often happens under the EU Merger Regulation, parties opt to provide unnecessary and irrelevant information instead of seeking a waiver, so creating inefficiencies and delays in the pre-notification process.

17. Moreover, it would be very difficult for merging parties to prepare a submission which they can be confident will be sufficiently complete to be notified without first engaging with the CMA and agreeing waivers. As noted above, if parties cannot predict or influence when the 40 day timetable will start, this will undermine the effect and purpose of the introduction of such a timetable. In addition, there will be many transactions which – for reasons of confidentiality – the parties will not be able to approach the CMA to discuss until the transaction becomes public, at which point there is likely to be additional pressure to expedite the filing process.

18. Some examples of information requested which we consider are likely to be unwarranted in the great majority of cases include:

    (a) the list of required internal documents, which includes any documents or emails prepared by or for any person (not just senior managers or decision makers) in relation to a wide range of matters including the investment case or pricing. It also includes documents which are normally considered as extremely sensitive (investment case) and are only indirectly relevant to the question of the nature of competition between the merging parties;

    (b) other internal documents include all documents relevant to the markets under consideration prepared or published over the last three years and all marketing documents created in the past year. This is a potentially enormous volume of documents;

    (c) information on all markets in which the parties overlap or have a vertical relationship, even if they have insignificant market shares. There seems to us to be a compelling case for including a materiality threshold based on market shares, such as that used to define "affected markets" for the purpose of Form CO under the EU Merger Regulation;

    (d) variable profit margins by product; and.

    (e) contact details of up to 20 competitors and 50 customers.

19. We recognise that transactions that are notified under the UK's voluntary regime are more likely, in aggregate, to raise competition issues than those notified in most mandatory regimes, but consider that this alone cannot justify the excessive scope of the information requested. The Merger Notice is not just the means by which the CMA gathers information to review the transaction (nor is it the only means for gathering such information), it is also the legal instrument that determines when the Phase 1 timetable begins. In our view, it should therefore aim to capture information that is likely to be relevant for most transactions that are notified to the CMA, rather than a high watermark that is relevant to very few transactions, if any. Further

information that is required as a result of case-specific factors can then be requested using the CMA's new Phase 1 information gathering powers, without creating unnecessary inefficiencies and delays in pre-notification.

20. Finally, paragraphs 7 and 11 of the preamble to the Merger Notice seem to imply that parties may be required to provide additional information (i.e. additional to that described in the Notice) as a condition of completeness of the Notice.[2] We assume that is not the intention, as that would be inconsistent with the Section 96 requirement that the Merger Notice specifies the "prescribed information", in which case these statements should be clarified accordingly.

Q7. Do you agree with the proposed harmonisation for all merger cases of the point of time at which the merger fee is payable?

21. Yes.

Q8. Do you have any further comments on the explanation in the Draft Guidance of the updated process for notifying mergers?

22. We do not consider there to be a continuing justification for excluding the decision maker from issues meetings (paragraph 7.52 of the Draft Guidance). If the CMA continues the current OFT practice of multiple decision makers, there will be enough decision makers for this not to be an administrative burden, provided that such access is limited to the issues meeting. Moreover, the introduction of statutory separation between the SLC decision and the UIL decision removes any further justification for denying parties access to the Phase 1 decision maker, and the advantages for the CMA of allowing parties access to the decision maker at this stage would be considerable. In our experience, the current lack of access to the decision maker is the issue that businesses consider to be the most frustrating aspect of the Phase 1 UK merger control regime, and is therefore damaging to the OFT's reputation as a reasonable and transparent agency. Allowing such access would also strengthen the robustness of CMA decision-making, as it would ensure that parties are able to ensure that the decision maker is aware of the right evidence and arguments, and it would mitigate the confirmation bias that may arise on the part of case team members that have decided to call the issues meeting.

23. We recognise that the CMA may be concerned that attendance of the decision maker at issues meetings would lead to third parties, such as complainants, also demanding such access. However, the merger clearance process is between the merging parties and the CMA. Third parties are not invited to attend the issues meeting or given a copy of the issues letter and do not, therefore, need to be given the opportunity to respond to the issues raised. In those circumstances, it seems to us entirely justifiable that they will be (as they are at present) excluded from the issues meeting and that they would not, as a result, have access to the decision maker who attends the issues meeting. Moreover, the fact that access to the decision maker is a difficult issue for

[2] Paragraph 7 says "some cases will require more or less information under each category" (emphasis added) while paragraph 11 says that the CMA "may also, where appropriate, request additional information required for its review of the merger during pre-notification".

market investigation reference decisions (as these are required to be taken by the CMA board) is not a reason to refuse such access in merger cases.

24. We also consider that there would be advantages if parties were to have the option to ask the decision maker to participate in UIL discussions that take place before the SLC decision. We recognise the importance of the statutory safeguards for ensuring that SLC decisions are taken without being influences by knowledge of prior UIL discussions (paragraphs 8.15 and 8.16 of the Draft Guidance), but consider that, in appropriate cases - such as those involving multiple local markets in which it clear that at least some divestments will be required - parties ought to be able to waive those safeguards where they do not wish to contend any SLC finding and can achieve a substantially quicker remedies process as a result.

25. As regards the composition of Phase 2 inquiry groups, Paragraph 10.8 of the Draft Guidance states that "in order to avoid unnecessary duplication and facilitate an efficient end-to-end review process, the CMA would normally expect a degree of case team continuity by retaining at least some of the Phase 1 case team". As we have previously indicated in our response to the Government's proposals for reform of the UK competition regime, allowing such "flow-through" of case team members will eliminate one of the important safeguards against confirmation bias that exists under the current system. The Draft Guidance does not, however, appear to envisage any measures to compensate for the loss of this safeguard, or to mitigate the effects of this loss. One measure that the CMA might consider is to restrict or limit the flow through of the senior case team economist and the senior case officer, such that the they will change in the event if a referral.

26. Finally, we also have the following miscellaneous comments:

(a) The Draft Guidance could usefully clarify whether the CMA would use its new Phase 1 information gathering powers (including third party market testing) during pre-notification (or otherwise prior to commencement of the 40 day Phase 1 timetable). The EA2002 does not appear to prevent it doing so. If it would, the Guidance could usefully explain that it would only do so in exceptional circumstances, and with the consent of the parties.

(b) Section 8 of the Draft Guidance should refer somewhere to the 10 working day period within which the CMA is required to decide whether there are reasonable grounds for believing that an offered UIL might be accepted.[3]

(c) Paragraph 18.53 (regarding Article 22 references) cross-refers to paragraph 5.44, which does not exist. The intended reference may be paragraph 4.44, but that paragraph relates to the date on which a relevant merger situation is "made known" to the CMA, whereas paragraph 18.53 appears to require a "satisfactory submission under the Act" (repeating the unclear wording from the existing guidance).

(d) Paragraph 19.5 of the Draft Guidance states that the CMA may, in certain circumstances, seek permission to exchange confidential information with an

[3] Section 73A(2) EA 2002, as amended.

overseas competition authority "where national legislation prevents the exchange of confidential information". The Guidance could state more clearly that UK legislation prevents the exchange of confidential information (footnote 305 does this, but not in a way that is readily comprehensible).

(e) Footnote 127 states that in some cases, merging parties will be "expected" to publicise the CMA's invitation to comment, such as through signs or displays in the merger parties' stores or on their websites. We query the necessity of imposing such an obligation, given the absence of any evidence that lack of such publicity has caused problems in the past. More importantly, the CMA has no power to impose such an obligation under the EA2002, as amended.

(f) The section of the Guidance relating to fast track references (paragraphs 6.62 to 6.66) could usefully give an indication of the information that parties will be expected to provide to the CMA in order to satisfy it that a fast track reference should be made.

Q9. 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?

The use of interim orders on anticipated mergers at Phase 1

27. The reforms introduced by the ERRA include a new power which enables the imposition of interim orders on anticipated mergers at Phase 1. Paragraph 7.32 of the CMA's guidance states that *"the CMA would not expect generally to impose an interim order at Phase 1 preventing the parties to an anticipated merger from completing the transaction*". While it is quite clear that the transfer of shares following a Phase 1 reference decision is prohibited (except in narrowly defined circumstances), the ERRA contains no explicit provision which would suggest that the transfer of shares or assets prior to a reference decision is prohibited, nor that the CMA could prevent such a transfer through the use of an interim order. In our view, the intention of Parliament was to allow for the prevention, prior to closing, of pre-emptive action of the same type that can currently be prohibited, i.e. that which takes place post-completion. We see nothing in the Hansard debates concerning the ERRA, or the explanatory notes to the statute, to indicate that the legislator intended for "pre-emptive action" to be taken as extending to completion of a transaction.

28. The introduction of a prohibition on completion prior to Phase 2 would be a significant and unwelcome step, as the UK merger regime has never sought to prevent transactions from completing unless and until the Phase 1 authority has made a reference decision. This allows the seller to collect the purchase price and transfer the risk of the merger review process to the buyer. Consequently, the interim measures regime has always sought to prevent integration for completed transactions and not completion itself.

29. Given that the UK is a voluntary regime, it is possible that parties may be contractually obliged to complete before the Phase 1 decision. For instance, parties may consider that a voluntary filing to the CMA is not warranted, or that the CMA has no jurisdiction to review the merger. The proposed use of interim measures is of particular concern given that the CMA does not have to decide on whether it has

jurisdiction or whether there are any material issues in the case before issuing an interim order.

30. We consider that the CMA should clarify that it does not envisage any circumstances in which completion of an anticipated merger would amount to pre-emptive action (i.e. action that may prejudice or impede the subsequent imposition of any remedies deemed necessary).[4] Conversely, if the CMA considers that there are circumstances in which the mere transfer of legal title to the target would amount to pre-emptive action it should explain what those circumstances are, and give examples.

31. Efficient transaction planning will be impossible if parties are subject to an unpredictable risk that they may become subject to an open-ended prohibition on closing their transaction. If sellers consider that there is a material or unpredictable risk that the CMA will intervene in a transaction during Phase 1, then this may lead to a significant increase in transactions being notified, not because they raise any particularly difficult substantive competition concerns, but simply to manage the uncertainty in deal timing and the completion risk. Given the duration of the UK merger review process and the information burden imposed on the merging parties, this will add unnecessary costs to transactions which have no impact on competition, or which are pro-competitive. From the CMA's perspective, this will also be a needless burden on the CMA's resources and might challenge its ability to manage its Phase 1 caseload within the statutory timetable.

32. Finally, footnote 109 of the Consultation states that the CMA may consider imposing an interim order "in exceptional circumstances" where parties approach it for informal advice and the CMA considers that there is a risk of pre-emptive action before the transaction becomes public knowledge. It also notes that such orders are required to be published by section 107(1)(e) EA2002. The possibility of forced publicity of a transaction would deter parties from requesting informal advice and undermine the usefulness of this tool. A potential solution to this problem would be to provide the order only to the parties affected by it, and to delay wider publication of it until such a time as the transaction becomes public. Section 107 does not expressly forbid such an approach, and Section 129(4) EA2002 provides that "[a]ny duty to publish which is imposed on a person by this Part shall, unless the context otherwise requires, be construed as a duty on that person to publish in such manner as he considers appropriate for the purpose of bringing the matter concerned to the attention of those likely to be affected by it." Given the fact that interim orders affect only those on whom they are imposed, and that the circumstances of their imposition in an informal advice case would be exceptional, we consider that it would be justifiable to depart from the general principle of publication on the CMA's website on the same date as the order is made.

[4] This is of particular importance for concentrations with a Union dimension which are referred back to the UK pursuant to Articles 4(4) or 9(1) of the EU Merger Regulation. The ability to complete these transactions is often particularly important as the parties will already have had to account for a significant period (two months or more) for pre-notification consultations and review by the European Commission.

The use of interim orders on anticipated mergers at Phase 2

33. Paragraph C.13 of Annex C states that:

> "The statutory restriction on dealing for anticipated mergers prevents the transfer of shares, but not assets, pending final determination of the reference. Hence, there may also be a need for interim measures to be introduced at Phase 2 in relation both to asset acquisitions and to certain share acquisitions (in the latter instance, where there is a concern that assets may be transferred from the seller to the acquirer prior to final determination of the reference)."

34. This implies that interim orders or undertakings prohibiting completion will be imposed/sought as a matter of course in relation to asset acquisitions, notwithstanding that these are not covered by the statutory prohibition in Section 78 EA2002. This would not be consistent with Sections 80 and 81 which allow such orders and undertakings only for the purpose of preventing pre-emptive action. Paragraph C.13 should be amended to reflect that requirement.

The use of interim orders on completed mergers

35. Paragraph C.8 of Annex C states that, for completed mergers, "interim orders will usually be addressed to the acquiring party in order to prevent pre-emptive action". This suggests that interim orders might, in unusual circumstances, be imposed on the seller. Our particular concern is that sellers might be required to "unwind" transactions that have been lawfully completed, in circumstances in which the CMA considers that such completion might amount to pre-emptive action (see paragraph 30 above). Again, we consider that this would be inconsistent with the intentions of Parliament, and would fundamentally undermine one of the key efficiencies of the UK regime, i.e. the possibility for efficient allocation of merger control risk between seller and purchaser.

36. We therefore consider that the CMA should clarify that where a transaction has completed the seller can no longer be considered to be a "person concerned" for the purposes of Sections 72 and 81 EA2002.

Interim orders – procedural issues

37. We are concerned about the CMA's proposed approach to the way in which interim orders are put in place. Currently, nearly all interim measures are dealt with consensually, such that any derogations from the standard approach are typically agreed up front. Under the new regime proposed by the CMA, interim orders would be imposed with little or no notice and any derogation requests dealt with subsequently. In particular, paragraph 7.41 of the guidance states that the parties to a merger should not expect the CMA to agree the scope of the interim order up-front.

38. This will mean that any organisation entering into a transaction which may be subject to UK merger control faces the prospect that, without notice, they are made subject to obligations they may not be able to meet and which carry very significant financial penalties. This risk is likely to be manageable in relation to anticipated mergers (provided the terms of any interim orders do not conflict with the deal's conditionality

– see paragraph 29 above). However, it may cause significant difficulties where the parties to a transaction are looking to complete prior to CMA clearance.

39. It is clearly counter-productive to put companies in a position where they are unavoidably in breach of a legal requirement – even when that breach may be retrospectively "cured" by a subsequent derogation. This approach puts companies in the position of having to concede that they are in breach of the interim order in able to request a derogation from the terms of the interim order. Consequently, any company considering whether to complete a transaction prior to CMA clearance will either have to be prepared to disregard the requirements of an interim order (in the event that a subsequent derogation is not given) or will try and agree the scope of its derogation requests pre-completion.

40. We appreciate that the apparent justification for this approach could be that it was open for the parties to seek pre-merger clearance or at least not take any integration steps. However, the option of not taking any steps that might breach the terms of an interim order is simply not possible in many cases once completion has occurred. For example, the employees of the target may have been transferred to the Buyer under TUPE rules, or the Buyer may have financial or other reporting obligations that require it to take account of the acquired target business (which in turn requires access to information which may be prohibited by the interim order).

41. Unless the CMA seriously engages on the terms of an interim order prior to its issue, fewer buyers will wish to complete prior to CMA clearance than is currently the case. This is partly a result of the risk of fines, but also the difficulty deal principals may have in explaining internally why they have allowed their company to be in the position of being subject to and in breach of an interim order without first having agreed a suitable derogation.

42. Under the current system, the OFT generally reviews around 100 mergers per year (20-25% of which are typically found not to qualify). This is low compared to other European jurisdictions – last year for example, Germany reviewed over 1100 cases, France nearly 200 and Italy over 450. It is the voluntary nature of the UK regime which is believed to keep the UK numbers relatively low. The increased cost and risks associated with the procedures around interim orders may make many businesses treat the UK regime as if it were mandatory, even where the transaction does not present substantive competition concerns.

43. As a result, the number of UK merger filings is likely to increase closer to the levels seen in other jurisdictions. This implies that it would be critical for the CMA to have procedures which allow speedy and efficient disposal of cases. However, as we have also noted, the guidance suggests that the review process will become more demanding in terms of quantity and nature of the information required to be submitted (and reviewed); the statutory review period will still be much longer than most other jurisdictions for Phase 1, with the pre-notification requirements making it longer still.

44. Apart from presenting parties with an additional hurdle, the use of interim orders would potentially contribute to a significant increase in the CMA's caseload, with much of that increase coming from cases that do not raise any particular substantive competition concerns. In other cases, the prospect of a lengthy and expensive merger

review process may mean that potential mergers which would otherwise have gone ahead, are simply abandoned. Given that the UK merger control regime appears to be moving closer to a mandatory regime, this also underlines the importance of simplifying the merger review timetable and the information requirements in the draft merger notice.

Q10. 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?

45. We generally agree with the proposed transitional arrangements. However, we note that where a merger investigation into an anticipated merger is ongoing at 1 April 2014, the CMA would have the power to make initial enforcement orders prohibiting pre-emptive action. This would have the effect of subjecting merging parties to potentially onerous new requirements which they may not have been in a position to anticipate at the time when they entered into their transaction (the seller may, for example, have anticipated that the transaction would complete prior to 1 April 2014). We therefore consider that it would be more appropriate for such powers to become applicable only to transactions for which the legally binding (albeit conditional) obligations, such as the signing of a sale and purchase agreement, were entered into on or before 1 April 2014.

Clifford Chance LLP
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