

**RESPONSE OF CLIFFORD CHANCE LLP TO THE BIS CONSULTATION ON
THE PROPOSED SUPPLEMENTAL GUIDANCE OF THE CMA
ON MARKET STUDIES AND MARKET INVESTIGATIONS**

1. INTRODUCTION

- 1.1 Clifford Chance LLP ("**Clifford Chance**") welcomes the opportunity to comment on the proposed supplemental guidance of the Competition and Markets Authority ("**CMA**") on the CMA's approach relating to market studies and market investigations (the "**Draft Guidance**").
- 1.2 Our observations below are based on the substantial experience of lawyers in our Antitrust Practice of advising on competition law investigations 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.

2. GENERAL COMMENTS

- 2.1 We have provided comments below in response to the specific consultation questions set out in the BIS consultation document, however we also have some initial overarching observations relating to the Draft Guidance.

Preparatory work prior to market studies

- 2.2 The Draft Guidance (paragraphs 1.10 to 1.12) refers to preparatory work that may be undertaken by the CMA in advance of the launch of a market study, including consultation with parties on the appropriate scope of a study, and other steps. According to the Draft Guidance, such preparatory work does not fall within the scope of the statutory time limits following publication of a market study notice and commencement of a formal market study.
- 2.3 While we recognise that some preliminary work is necessary in advance of a market study, we are concerned that the Draft Guidance could potentially allow for an undefined and open-ended period of time prior to the commencement of a formal market study. Any such extended period of time would effectively create an additional phase prior to the formal market study phase which, in our view, would create uncertainty for businesses, and run contrary to the spirit of the Enterprise and Regulatory Reform Act 2013 ("**ERRA**") and the time limits introduced for the conduct and completion of market studies by the CMA.
- 2.4 The Draft Guidance should at least contain an indication of the likely period of time during which preparatory work may be carried out. In view of the time limits for formal market studies, we consider that a preparatory phase (including calls for evidence) of no longer than around 3-4 months would be reasonable in most cases.
- 2.5 Steps undertaken prior to the launch of a market study should also be limited to consultation with parties, and any necessary scoping and planning work. We note that one of the steps suggested in the Draft Guidance (in paragraph 1.11) is "developing"

possible theories of harm and the potential for remedies. We would suggest that this is changed to "identifying" possible theories of harm and the potential for remedies, as any more detailed consideration or "developing" of possible theories of harm and remedies should be reserved, in our view, for the CMA's formal market study phase.

Format of guidance

2.6 We note that the intention is for the Draft Guidance to supplement the three main existing guidance documents on the markets regime, i.e. the two OFT guidance documents on market studies (OFT519 and OFT 511), and the Competition Commission guidance document on market investigations (CC3). However, in effect, this would result in the need for businesses and their advisers to consult four main guidance documents when dealing with only one authority from April 2014 under the new CMA markets regime.

2.7 We consider that it would be more helpful and user-friendly for businesses and their advisers to have one consolidated guidance document (which would replace the three main existing guidance documents). Such an approach would be consistent with that taken in respect of the single guidance proposed by BIS for mergers (jurisdiction and procedure) and would, as is the intention with the proposed mergers guidance, remove duplication between the existing guidance documents and provide a single point of reference for those seeking guidance on the new regime. As with the proposed mergers guidance, a single guidance document would also help to reduce any uncertainty and transition costs for parties.

3. **CONSULTATION QUESTIONS**

Do you consider that the Draft Guidance covers the main changes that are introduced by the ERA13 to the CMA's conduct of market studies and market investigations? If not, what aspects do you think are missing?

3.1 Subject to our comments above and below, we consider that the Draft Guidance provides a useful overview of the main changes to the markets regime introduced by ERA.

Do you consider that the Draft Guidance will facilitate your understanding of the markets regime when read in conjunction with the existing guidance documents?

3.2 We consider that the Draft Guidance provides a useful overview of the new procedures under the future CMA markets regime. However, as set out above, we believe it would be more helpful to have one consolidated guidance document rather than having the Draft Guidance in conjunction with the existing guidance documents.

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

3.3 While we agree with most of the existing guidance documents (as specified in the list in Annexe B) being put to the CMA Board for adoption, as set out above, we consider that the two OFT guidance documents on market studies (OFT519 and OFT 511), and

the Competition Commission guidance document on market investigations (CC3) should be replaced by a single consolidated document.

Do you consider that the Draft Guidance is user friendly in terms of its content and language?

- 3.4 While the Draft Guidance provides a clear and structured overview of the new procedures under the new markets regime, as set out above, we consider that it would be more user friendly for businesses and their advisers to have one consolidated guidance document replacing the three main existing guidance documents.

Do you have any other comments on the Draft Guidance?

Application of guidance

- 3.5 We note the statement in the preface to the Draft Guidance that the CMA would apply the guidance "*flexibly*" and that "*when the facts of a case reasonably justify it, the CMA may adopt a different approach*". It would be helpful if examples could be provided in the guidance of cases where the CMA may potentially adopt a different approach. In any event, it should be made clear that the CMA would adopt a different approach to that set out in the guidance only in exceptional circumstances.

CMA case teams

- 3.6 The Draft Guidance (at paragraphs 1.21 and 1.22) notes that key decisions in market studies and subsequent market investigations will be made by separate groups within the CMA, but that at operational staff level, the CMA would expect to retain at least some of the market study case team to work on the market investigation case team when a matter is referred.
- 3.7 While we recognise that it is necessary to have a certain degree of case team continuity, we are concerned that retaining senior or key market study case team members to work on a market investigation could lead to confirmation bias by those members, contrary to the purpose of ERRa of separating decision-making processes in market studies and market investigations. We believe that only a limited number of market study case team members should continue to work on a market investigation in the event of a referral, to the extent necessary to avoid any duplication in work already undertaken, and that senior or key market study case team members that may be capable of influencing the decision-making in market investigations should not continue to work on a market investigation. The Draft Guidance should, in our view, provide further details on this point, and emphasise the need for mainly separate market study and market investigation case teams, in order to avoid potential confirmation bias by case team members.

Consultation prior to decision-making by CMA

- 3.8 While the Draft Guidance provides an overview of the decision-making process by the CMA Board for market studies and references, and by the market reference group for market investigations, we consider that the guidance should also include further details on consultation with parties prior to decision-making by the CMA Board or

market reference group, so as to ensure sufficient transparency and effective stakeholder engagement.

Cases raising public interest issues

- 3.9 The Draft Guidance (at paragraphs 2.17 to 2.20) notes the Secretary of State's ability under ERRA to make full public interest references, but that this is expected only on extremely rare occasions. The Draft Guidance also notes that national security is to be the only specified public interest consideration in relation to the markets regime at 1 April 2014.
- 3.10 Although the specific changes to the markets regime under ERRA are not within the scope of the current consultation, we consider that full public interest references should be made, if at all, only in extremely limited circumstances and strictly limited to national security considerations. As such, we welcome the emphasis in the guidance on full public interest reference being expected only on extremely rare occasions.

Further guidance on timing of market studies and market investigations

- 3.11 The Draft Guidance states that the CMA will continue the existing practice of publishing a timetable and high level milestones for market studies, and will include the timetable in market study notices (paragraph 2.8 and footnote 32), which is welcomed.
- 3.12 Although the Draft Guidance provides an overview of the new deadlines under ERRA for completion of market studies, and publication of proposed market investigation reference decisions, it would be helpful if the guidance contained an example (in an annex) of a more detailed timetable including key steps along with these new deadlines. It would also be helpful to specify the general time periods for consultation, for example following notice of a proposed decision on a possible market investigation reference.
- 3.13 In relation to market investigations, the Draft Guidance notes the new time limits under ERRA of 18 months for completion of market investigations, and the possibility of one extension of a further 6 months, and states (at paragraph 3.7) that the power to extend is most likely to be used in complex cases "for example, where there are multiple parties, issues and/or markets". The Draft Guidance also refers (at paragraph 4.7) to the six-month period for the implementation of remedies, and the possibility of extending this period by four months which is most likely to be used in "more complex cases".
- 3.14 In our experience, the majority of market investigation cases have involved multiple parties, issues and/or markets, and it would be useful if the guidance provided further details and examples of what it considers to be "complex cases", for example by reference to previous Competition Commission inquiries and remedies cases.
- 3.15 We also consider that the guidance should also contain an example of a detailed timetable for market investigations, incorporating the new time limits under ERRA

for completion of market investigations and implementation of remedies. A separate illustrative timetable for cases raising public interest issues would also be helpful.

Clifford Chance LLP
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