RESPONSE OF CLIFFORD CHANCE LLP TO THE CONSULTATION ON DRAFT SECONDARY LEGISLATION FOR THE COMPETITION REGIME: PART TWO

Clifford Chance LLP welcomes the opportunity to comment on the following draft secondary legislation:

- Enterprise Act 2002 (Publishing of Relevant Information under Section 188A) Order 2014 (the "**Relevant Information Order**";
- Competition Act 1998 (Concurrency) Regulations 2014 (the "**Concurrency Regulations**"); and
- The Competition Appeal Tribunal (Warrants) (Amendments) Rules 2014 (the "**CAT Warrant Rules**").

Our comments below are based on the substantial experience of lawyers in our Antitrust Practice of advising on competition law 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.

Question 1: What is your view on the proposed manner of publication of relevant information?

1.1 We consider the London, Edinburgh and Belfast Gazettes to be acceptable media for publication of the relevant information. However, given the cost of such notices, it is possible that companies will prefer to rely instead on the defence in Section 188B(2) EA2002, by simply providing the relevant details to the CMA, as this will (presumably) be free, and not made public.

1.2 In addition, we query whether printed copies of these publications – as opposed to the online database - will ever be used by customers, the CMA or other regulators for the purpose of informing themselves of possible anticompetitive arrangements, and therefore whether the cost of subsidising such printing should be borne by those placing the relevant notices. It seems to us that the cost of publishing such notices online would be minimal, and might instead be borne more efficiently by the Government.

Question 2: Can you estimate the number of advertisements which might be placed in one of the Gazettes?

2.1 No. However, as we have noted in our response to the CMA's draft prosecutorial guidance, the wording of Section 188 EA2002 catches some very prevalent commercial arrangements, such as distribution agreements which allocate exclusive territories to distributors, or between the supplier and one or more exclusive distributors[1] and co-insurance and re-insurance agreements. Consequently, in the

[1] While we understand that it was not intended for Section 188 to catch vertical agreements, unfortunately the wording of Sections 188(1) and 188(2)(d) does not exclude this.

absence of any clarification in the Prosecutorial Guidance that such arrangements will not be subject to criminal proceedings, it is possible that very large numbers of notices relating to such arrangements will be published in the Gazettes every year.

Question 3: Do you have any other comments on the draft Relevant Information Order?

3.1 No.

Question 4: Do you have any comments on the draft Concurrency Regulations?

4.1 We consider that the draft Concurrency Regulations are, broadly, appropriate. However, we are concerned that some of the envisaged concurrency mechanisms risk adding quite a substantial amount of time to the average duration of a case that is deemed to be concurrent. Moreover, for parties that are, or are potentially, subject to regulatory or CA98 proceedings, much of this will be opaque, "behind the scenes" wrangling between regulators and, in some instances, they will not even have any right to be informed that their case is being held up in this way, or to have their views taken into account. The combination of these factors would not only risk creating inefficiency, but also an increased perception of inefficiency.

4.2 We therefore recommend the following amendments to the Draft Concurrency Regulations:

4.2.1 Instead of providing that the CMA's power to determine jurisdiction under Regulation 5 is triggered if there is no agreement within a "reasonable time", we recommend a specified period. The CMA's draft Concurrency Guidance refers (at paragraph 3.23) to an administrative 2 month target for agreements under Regulation 4, and we consider that this would also be an appropriate time limit for the purposes of Regulation 5.

4.2.2 Regulations 7 and 8 require that undertakings are consulted before any transfer of a case or assumption of a case by the CMA and that their representations are taken into account. There is, however, no similar provision in Regulation 4. We consider that there should be, for the reasons described above. While we recognise that in many instances actions under Regulation 4 will be taken before the relevant undertaking is aware that proceedings are likely to be commenced, this could be addressed by the use of a provision (similar to that in Regulation 7(5)) that consultation requirements will not apply to cases in which undertaking has not yet been told that regulator is contemplating the exercise of its regulatory or CA98 functions.

4.2.3 There is no limit on the period of consultations with the regulator from which the CMA is considering taking a case under Regulation 8(2). We suggest a 10 working day period would be appropriate, in line with the period for consultations with the undertaking under Regulation 8(3).

4.3 Separately, Regulation 8, as currently drafted, prevents the CMA from exercising its powers to assume responsibility for a case if a Statement of Objections ("SO") has been issued. A potential concern is that this might create incentives for a regulator,

once informed that the CMA is contemplating the exercise of such powers, to issue a hasty and undeveloped SO in order to pre-empt a loss of jurisdiction. The CMA might therefore consider including a statement in its guidance that regulators are expected to refrain from issuing an SO during the period of consultation. If it does so, a time limit on the consultation period (as suggested above) would become more necessary, to prevent delays to progress of the case.

4.4 Finally, we have the following minor observations:

4.4.1 Regulation 2(1)(iii) refers to Section 31D(8) CA98 - which requires the CMA to have regard to certain guidance when deciding whether to accept commitments - as a "prescribed function", the proposed exercise of which triggers obligations to give notice to other "competent persons" under Regulation 4 (i.e. the CMA and sector regulators). Given that such obligations are also triggered by a proposal to accept or review commitments under 31A to 31C CA98, the reference to Section 31D(8) seems to us to serve no purpose.

4.4.2 There is a typo in Regulation 7(5).

4.4.3 Section 9(1)(b) refers to notices under Section 31 CA98 and notices under Rule 5 of the CMA's rules. These appear to be the same thing, in which case the reference to Rule 5 could be omitted to avoid confusion.

Question 5: Do you have any comments on the draft CAT Warrant Rules?

5.1 No.

Clifford Chance LLP
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