RESPONSE OF CLIFFORD CHANCE LLP TO THE CONSULTATION ON CONCURRENT APPLICATION OF COMPETITION LAW TO REGULATED INDUSTRIES

Clifford Chance LLP welcomes the opportunity to comment on the draft Guidance on Concurrent Application of Competition Law to Regulated Industries (the "**Draft Guidance**"). Our comments below assume that the Draft Guidance will also apply to the Financial Conduct Authority ("**FCA**") and the Payments Systems Regulator, further to the Government's recent announcement that these bodies will have concurrent powers under the Competition Act 1998 ("**CA98**").

Our comments below are based on the substantial experience of lawyers in our Antitrust Practice of advising on competition law and sector-specific regulation 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: Do you consider that the Transition Team's proposed approach to dealing with the revised requirement that Regulators' exercise competition powers in favour of sectoral powers is clear and appropriate?

1.1 Paragraphs 4.3 to 4.8 of the Draft Guidance contain a useful description of the procedures that that will be followed in assessing whether it is more appropriate to use CA98 powers in a given case. However, they offer sparse guidance on how that assessment will be conducted and, in particular, the relevant factors. They state only that the use of CA98 powers may sometimes be "more effective or provide greater deterrent and precedent effect for the benefit of competition and consumers".

1.2 Given the vagueness of the "more appropriate" test, we consider that the CMA should take this opportunity to elaborate on relevant factors and, more importantly, factors which ought not to be taken into account. For instance, matters such as the standard of review to which the regulator will be held in the event of an appeal, or the due process rights that the regulator will be required to accord to an undertaking, should not, in our view, be taken into account.

Question 2: Do you consider that the Transition Team's proposed approach to allocation of cases between the CMA and Regulators, or between Regulators, is clear and appropriate?

2.1 We consider that the proposed approach is, broadly, clear and appropriate. However, we are concerned that the proposed arrangements 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 create inefficiency, but also an increased perception of inefficiency.

2.2 Accordingly, we have made a number of recommendations to the Department for Business, Innovation and Skills ("**BIS**") in our separate response to the consultation on the Draft Concurrency Regulations which, if accepted, should also be reflected in the Draft Guidance:

2.2.1 Paragraph 3.23 refers to an administrative 2 month target for agreements under Regulation 4, but states that this may differ from the "reasonable time" period that triggers the CMA's dispute resolution function under Regulation 5. We consider that 2 months will be a reasonable time in every case, and have therefore suggested to BIS that it be incorporated into Regulation 5.

2.2.2 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 the undertaking has not yet been told that the regulator is contemplating the exercise of its regulatory or CA98 functions.

2.2.3 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).

2.3 Separately, Regulation 8, as currently drafted, prevents the CMA from exercising its powers under Regulation 8 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 their use. 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 the progress of the case.

Question 3: Do you consider that the Transition Team's proposed approach to secondments and cooperative working between the CMA and Regulators is clear and appropriate?

3.1 Yes, and we encourage the increased use of such arrangements.

3.2 An important point not addressed by the Draft Guidance is the relative paucity of guidance by the sector regulators on procedural aspects of how they carry out investigations. Where such guidance does exist, it is far more limited than that published by the OFT, and that which is to be published by the CMA. This creates an unlevel regulatory playing field for complainants, who (unlike the regulated entities) will typically have no experience of investigations by the relevant regulator and,

therefore, no understanding of the degree to which they will be involved in the process and kept informed (e.g. through state of play meetings) or the procedural rights that they will be accorded. For example, we are aware of a regulator having expressed concerns that the interaction between a CA98 investigation and its regulatory functions might fetter its discretion in the event it decides to exercise regulatory functions.

3.3 While we recognise that these issues may fall outside the scope of the Draft Guidance, we recommend that they are addressed. The simplest way to do so would be for the regulators to agree that they will follow the CMA's procedural CA98 guidance.

Question 4: Do you consider that the Transition Team's proposed approach to information sharing between the CMA and Regulators, or between Regulators, is clear and appropriate?

4.1 The approach described seems to us to be broadly appropriate. We would, however, welcome greater emphasis of the principle that information will be shared only for the purpose of facilitating the exercise of CA98 functions (in accordance with the disclosure gateway set out in with Sections 241(1) and 241(3) EA2002). In particular, it is important to ensure that the restrictions contained in Part 9 EA02 are not circumvented by the use of information for regulatory functions (under the sector-specific legislation applicable to a given regulator), where that information was disclosed to a regulator for the purpose of facilitating the exercise of CA98 functions, and there has been no consideration of whether disclosure is necessary for the purpose of facilitating the exercise of regulatory functions. The absence of such a clarification may cause companies to be less forthcoming in providing information and, in particular, could affect incentives to apply for leniency in certain cases.

4.2 We recognise that, as a practical matter, it may prove cumbersome for the CMA to apply the Part 9 gateway regime systematically to every piece of information that it wishes to share with a regulator. We therefore suggest that the Draft Guidance sets out structural solutions for the ring-fencing of confidential information so that it is only made available to the employees engaged in the relevant CA98 procedure and is used solely for that purpose.

4.3 Moreover, we consider that the Draft Guidance should recognise that the degree of information exchange that is necessary for the purpose of facilitating the exercise of CA98 functions by the CMA and the regulators may vary, depending on the nature of the case. For instance, exercise of such functions by a regulator will often not be facilitated in any meaningful way by the disclosure of detailed information that is outside the scope of Regulation 9 (draft SO/decision/commitments etc) in hardcore cartel cases that, in practice, will never be investigated by that regulator. In such cases, the requirements of Part 9 EA2002 suggest that the information should be disclosed only in so far as necessary to facilitate the exercise by the CMA of its functions, e.g. by drawing on the sector specific knowledge of the regulator. At minimum, we consider that there should be a clear statement in paragraph 3.49 that, while the fact of a leniency application might be shared between the CMA and regulators, the leniency application itself would not be.

Question 5: Do you consider that the CMA and the Regulators should share additional categories of information, or share information of the type outlined in the Draft CMA Concurrency Guidance at different times?

5.1 No.

Question 6: Do you consider that the Transition Team's proposed approach to the annual concurrency report is clear and appropriate?

6.1 Yes.

Question 7: Do you consider that the annual concurrency report should contain categories of information that is not envisaged in the Draft CMA Concurrency Guidance?

7.1 We do not consider further categories of information to be necessary. Indeed, we caution that levels of readership of the report are unlikely to justify it consuming substantial amounts of time to prepare.

Question 8: Do you agree with the Transition Team's proposed approach to transitional arrangements to account for the changes to competition concurrency introduced by Chapter 5 of Part 4 of the ERRA13?

8.1 Yes.

Clifford Chance LLP
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