CMA CONSULTATION ON THE REVISED MERGER NOTICE: RESPONSE OF CLIFFORD CHANCE LLP

1. INTRODUCTION

1.1 Clifford Chance welcomes the opportunity to comment on the Consultation Document of the Competition and Markets Authority (**CMA**) regarding the proposed revision to the merger notice. This response is not confidential and may be published as is.

1.2 On the whole, the proposed amendments amount to sensible refinements and restructuring of the Merger Notice. However, it remains our view that the Notice could go further in identifying circumstances in which the requested information is not necessary.

2. GENERAL COMMENTS

2.1 The amendments to the preamble better reflect the fact that pre-notification discussions regarding the information that may be omitted from the filing tend to take place after the submission of a draft filing. Case teams are naturally reluctant to accept that information can be omitted before that stage, as they will not usually have a full understanding of the merger and the relevant markets affected by it until a draft filing has been provided. In our experience, this factor, along with the need to minimise delays in the filing process, often creates a bias towards "over-completeness" in draft merger notices: information will generally be provided in the draft notification if there is even the slightest doubt about whether it is relevant or useful. This requires merging parties to expend time and resources providing that information which could otherwise be spent developing higher quality information and better explanations in relation to the issues that are of real importance to the substantive assessment of the merger.

2.2 Consequently, it is important that the Merger Notice is appropriately designed to exclude information requirements that can easily be foreseen as unnecessary. In our view, neither the current notice nor the revised notice do that as well as they could. For example, if merging parties have horizontally or vertically related activities in 20 "Candidate Markets", but have a combined market share of only 1% in 19 of them, the revised Notice still requires large amounts of information for each of those 19 immaterial markets, including:

2.2.1 documents that analyse the merger only in relation to those markets with insignificant combined shares (question 9(b));

2.2.2 market shares of competitors (question 140 – subject to our comment below in 3.11.2;

2.2.3 descriptions of competitive constraints, drivers of customer choice and parameters of competition, as well as explanations of product differentiation and determination of pricing and the supply chain (question 15);

2.2.4 for bidding markets, detailed bidding data for the last 5 years (question 16);

2.2.5 a description of the vertical supply chain and the importance of relevant inputs and the merged entity;

2.2.6 a description of barriers to entry and exit (question 21 – subject to our comments below at 3.20); and

2.2.7 (for horizontal overlaps), extensive contact details for customers and competitors.

2.3 In contrast, Form CO filings under the EU Merger Regulation require only that parties provide sufficient information to establish that their combined market share is less that 20% for horizontal overlaps, or 30% for vertically related markets. It seems to us that this is a more proportionate approach, as if the relevant markets (or plausible candidate markets) have been correctly defined, then in practice none of the information summarised in 2.2 above will add any value to the assessment of a market in which the parties have *de minimis* market shares. In particular, the required information should not be necessary to "verify" the accuracy of information provided on the scope of plausible candidate markets and market shares: notifying parties have an interest in ensuring that such information is accurate, as a failure to do so risks penalties for the provision of false or misleading information, delays in the clearance process and an increased risk of a Phase 2 reference.

2.4 Accordingly, we have highlighted in our comments below the areas in which we consider the Merger Notice could go further in identifying information that is highly unlikely to be relevant or useful.

3. COMMENTS ON THE TEXT OF THE REVISED NOTICE

Preamble

3.1 Paragraph 17: This states that "[i]t is particularly important to discuss with the CMA any evidence supporting their notification (for example, econometric analysis or customer surveys)" and that doing so "will help to minimise risks of the parties undertaking wasted or unnecessary work". In our experience, the CMA is excessively dismissive of surveys and econometric analysis that have been carried out without prior consultation with the CMA, even when conducted using methodologies accepted by the CMA in previous recent cases. There are various reasons why it may not be possible to discuss the methodology for surveys or economic analysis in advance with the CMA, e.g. where carried out at a preliminary stage for the purpose of assessing the merger control implications of multiple potential acquisition targets, or where there are other reasons for carrying out the survey (e.g. to assist with commercial decision making) that require it to be done quickly, with no time for consultation with the CMA. Such surveys may still have considerable probative value. In our view, paragraph 17 should expressly recognise that fact.

3.2 Paragraph 21: This states that notifying parties may include in the draft filing a request not to provide information where the *"information requested should not be relevant for the CMA's assessment (eg in cases in which there is little or no overlap between the merging parties, it may not be necessary to provide responses to Question 23 on Countervailing buyer power or Question 24 on Efficiencies and customer benefits)"*. This example is not a useful illustration of the point. Questions

23 and 24 are phrased in the revised Notice as being optional (as parties need only complete them if they wish the CMA to consider those arguments), even if there is a very substantial overlap between the parties. Moreover, there is no indication of what degree of overlap would be considered by the CMA to be "little". We submit that a better approach would be to have clear thresholds to define overlaps that will not be considered material, and that below this threshold the only required information should be the parties combined market share and information on how they have defined the plausible Candidate Markets. This threshold would preferably be aligned with the 15% threshold (or 30% for vertical / conglomerate markets) that is set out in the various guidance notes to the questions, but failing that could be set at some lower level of materiality (e.g. 10%).

3.3 Paragraph 23: This states that "[i]n assessing if the information provided by the notifying parties is sufficient for a Satisfactory Notification, the CMA will consider whether it would be necessary and proportionate to request additional information in view of the complexity of the merger and the potential competition concerns on which the CMA is likely to focus its investigation." We suggest that the reference in the current notice to "additional information responsive to the questions in the Notice" (emphasis added) is used here. Section 96 of the Enterprise Act 2002 (**EA02**) does not permit the CMA to condition the start of the review period on the provision of information that is not prescribed in the Notice.

3.4 Paragraph 26: This repeats the statement from the current Merger Notice that the CMA's confirmation that a notification is satisfactory "will typically be within five (and no more than ten) working days of receipt of that Notice", but that "the CMA is likely to be able to provide such confirmation more promptly in those cases in which parties have engaged in pre-notification". We consider that a firmer commitment is needed here. Where parties have engaged in pre-notification and the CMA has considered earlier drafts of the same submissions, we see no justification for a period of longer than 5 working days, and it should in most cases be much shorter. In particular, a lack of "available CMA resources" should never be a justification for delaying the initiation of the Phase 1 review period in these circumstances.

Questions 9 and 10: internal documents

3.5 We welcome the clarification in the guidance notes to question 9 and 10 that the CMA does not expect to receive emails, handwritten notes or instant messages in response to this questions.

3.6 Question 9: In line with our comments in 2.2 above, we consider that question 9(b) should exclude documents which analyse the merger exclusively with respect to competitive conditions in candidate markets in which the parties have a share of less than 15%. This would make question 9 consistent with the revised guidance note for question 10, which now recognises that it is unnecessary to provide reports, presentations, studies (etc) relating to competitive conditions in markets in which the merging parties have a combined share of less than 15%.

3.7 In our experience, the CMA has on occasion, under the aegis of question 9 in the current Merger Notice, requested copies of analyses and studies carried out by economists for the purposes of assessing the competitive effects of the merger. Such analyses will have often have been carried out in at the instruction of the parties'

external counsel and for the purpose of allowing external counsel to advise on the prospects of merger control clearance. Consequently, we consider that the guidance note to question 9 should expressly reaffirm documents covered by legal professional privilege are not required to be disclosed in response to this question.

3.8 Moreover, recognising that the legal privilege status of analyses and studies prepared by economists for external competition counsel is sometimes complicated and unclear, we consider that the guidance note should expressly state that, irrespective of whether they are legally privileged, the CMA will not require the disclosure of economic analyses and studies that have been prepared for the sole purpose of allowing merging parties to receive competition law advice in respect of the merger. Without that comfort, merging parties may be deterred from commissioning such analyses and studies and will, as a result, be more likely to enter unknowingly into anticompetitive mergers that are subsequently subject to remedial action by the CMA.

3.9 Question 10: The guidance note to question 10 states that, in certain circumstances, the CMA may require the production of internal documents where there is a vertical relationship between the parties. We suggest that this statement is supplemented with clarification that any such requirement of additional information would be through the use of the CMA's information gathering powers (e.g. under s.109 EA02) and that the CMA would not therefore delay finding that a notice is satisfactory under s.92(2A) EA02 purely because internal documents relating to vertical relationships had not yet been provided. A guidance note should provide guidance on the information that is prescribed by the question to which it relates, and question 10 (sensibly) requires such documents only for markets in which there are horizontal overlaps.

Question 14: market shares

3.10 The guidance note to question 14 states that

> *"A Satisfactory Notification is likely to require shares of supply to be provided for the narrowest plausible Candidate Market (eg even if the plausible Candidate Market is broader than the UK, the notifying parties should provide data for a Candidate Market based on shares of supply within the UK). In particular, the CMA is likely to request the notifying parties to provide an estimate of each of the merger parties' share of supply in the Candidate Market(s) in which they have a significant combined share of supply (eg more than 25%)."*

3.11 This is unclear in two respects:

3.11.1 First, it seems to imply that parties should provide information on markets that are implausibly narrow. We suggest that that the example if the parentheses says instead "even if the parties consider that the likely scope of the Narrowest Candidate Market is broader than the UK […]".

3.11.2 Second, the statement says that the CMA "is likely to request" market share information in markets where the parties have a share of supply of "eg more than 25%". However, question 14 already requires this information for all markets in which the parties have a horizontal or vertical relationship. It should be clarified whether this statement is intended, for example, to:

(a) indicate that individual market shares need not typically be provided where the parties have a combined share of a Candidate Market of less than 25%; or

(b) distinguish – in the same way as questions 13(a) and (b) - between the Narrowest Candidate Market, for which parties' market shares must always be provided, and "other plausible candidate product/service and geographic market(s)", for which market shares need only be provided if the combined share is over 25%. If so, we suggest referring here expressly to the categorisation in Question 13(a) and (b).

3.12 In addition, we submit that there should be a threshold for the merging parties' combined share (e.g. 15% for horizontal overlaps and 30% for vertical relationships, or some lower *de minimis* threshold – see 3.2 above) below which information on competitors' market shares is not required in any event.

Question 15 – horizontal effects

3.13 For the reasons set out in 2.2 above, we consider that where the parties have a combined share of less than 15% (or some other *de mimimis* threshold), none of the information requested in this question should typically be necessary. The exclusions for supporting documentation regarding pricing and for data on capacity, switching and profit margins do not go far enough.

Question 16 – bidding data

3.14 We recognise that market shares may not always be an accurate indicator of market power in bidding markets. However, our view is that requiring extensive bidding data for all such markets, irrespective of the parties' market power, is disproportionate. Accordingly, we consider that some form of *de minimis* threshold should apply, below which such data is not typically required, e.g. where the merging parties have a combined share of supply in the Candidate Market of less than 15% in each of the past three years and/or at least four other undertakings have won contracts in the Candidate Market within that time period.

Question 18 – loss of potential competition

3.15 Question 18(a) should clarify whether internal documents are required to be provided in respect of existing plans to expand or enter another market only, or whether documents relating to historic (and ultimately failed or abandoned) plans that were "attempted in the last three years" must also be provided (along with the description of those plans, as required by the start of question 18).

Question 19 – vertical effects

3.16 We welcome the increase from 25% to 30% in the market threshold below which more limited information – describing the vertical supply chain and the importance of relevant inputs and the merged entity - may be provided in response to this question. However, we submit that if the parties' shares fall below this threshold in both upstream and downstream markets, it should not be typically necessary to provide any of this information, for the reasons set out in 2.2 and 2.3 above.

3.17 In addition, we suggest the guidance notes refer to market shares in "one of" or "both of" the vertically related Candidate Markets (as appropriate), instead of using the word "either" which can be (mis)interpreted as meaning "one of" or "both" depending on the context.

Question 20 – conglomerate effects

3.18 The guidance note to this question explains that it will not typically be necessary to provide a response to this question if the parties are not active in related markets or their individual shares are less than 30%. That statement is redundant as the question applies only to activities in related markets where the parties have a share of more than 30% - and if that is not the case then a response is never required (as opposed to not "typically" required).

3.19 In addition, the criterion relating to common customers has become unclear in the revised Merger Notice. In particular, it is unclear whether information on conglomerate effects is required if a party has an individual share of more than 30% but the parties do not have common customers (the current version states that in these circumstances the information is not typically required).

Question 21 – entry or expansion

3.20 It should be clarified whether a response to this question is required for a satisfactory notice or is optional. The combined guidance note for questions 21 to 24, as well as the text of questions 22, 23 and 24 indicate that provision of information in response to these questions is optional, i.e. that parties should provide this information if they want the CMA to consider arguments in relation to entry or expansion, buyer power or efficiencies, but if they do not it will not prevent the CMA from determining that the Notice is satisfactory. However, the text of question 21 does not state that it is optional and the guidance note dedicated to question 21 is ambiguous. If a response is intended to be mandatory, we consider that it should not be, for the reasons set out in 2.2 and 2.3 above.

Questions 26 to 29 – contact details

3.21 For horizontally overlapping markets, there is no threshold for the parties' combined market share below which customer and competitor contact details must be provided. For the reasons set out in 2.2 and 2.3 above, we submit that there should be – either the 15% threshold used elsewhere in the Notice, or some lower *de minimis* threshold (e.g. 10%).

Part IV – declaration

3.22 The reference to the need to comply with "requirements of section 126 of the [Enterprise] Act" when appointing a representative is unclear. Is this referring to the need to let the CMA know (or "specify" in s.126(4)) that a representative has been appointed?

Clifford Chance LLP
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