RESPONSE OF CLIFFORD CHANCE LLP TO THE COMPETITION AND MARKETS AUTHORITY CONSULTATION ON DRAFT GUIDANCE ON MERGER REMEDIES

Clifford Chance LLP welcomes the opportunity to respond to the consultation on the draft CMA guidance on exceptions to the duty to refer in merger investigations. Our comments below are based on the substantial experience of lawyers in our Antitrust Practice of advising on merger control procedures for a diverse range of clients, and across a large number of jurisdictions. However, the comments below do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

Our comments below relate primarily to the limited substantive changes that have been introduced to the draft guidance, in comparison with the Competition Commission guidelines on merger remedies (CC8), Chapter 5 of the Office of Fair Trading guidelines on undertakings in lieu of reference (OFT1122) and Chapters 8 and 14 of the CMA's guidelines on merger jurisdiction and procedure (CMA2).

Is the content, format and presentation of the draft guidance sufficiently clear? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them. We are particularly interested in your views on the following areas:

(a) Clear cut standard for UILs (paragraph 3.28)

1. Paragraph 3.28 now provides that UIL proposals may be rejected if their complexity is such that their implementation "may not be feasible within the constraints of the Phase 1 timetable" (in place of the previous wording couched the question in terms of whether "unworkable resources" would be required). Potential unfeasibility is an even more subjective test than one that refers to resourcing levels. We therefore favour the previous wording.

(b) International constraints (paragraphs 3.55 to 3.56)

2. The reference to the limitations of section 86 EA02 on the CMA's ability to impose extraterritorial remedies is useful and, in our view, necessary. However, given the fairly lengthy analysis of that provision in judgment of the Court of Appeal in *Akzo v Competition Commission*[1], it seems to us that the CMA might usefully include a paragraph or two on how it interprets that judgment and, in particular, what it means to "carry on business in the UK".

(c) Early consideration of remedies (paragraphs 4.5 to 4.7 and 4.54);

3. Paragraphs 4.6 and 4.54 now provide for the possibility that that the decision maker (in Phase 1) or the inquiry group (in Phase 2) may choose to be involved in any discussions concerning remedies in "exceptional cases (eg where the remedies are likely to be complex in design and/or implementation or where competition authorities in other jurisdictions are considering a merger which the CMA is also investigating)".

[1] [2014] EWCA Civ 482

4. We recognise that these may be valid reasons for decision makers to risk remedy considerations affecting their judgment of whether there is an SLC. However, the statements in these paragraphs omit the most important consideration, which is the wishes of the merging parties. It is the merging parties who are best placed to assess whether the ability to develop more advanced or internationally-coordinated remedy proposals justifies the risk of a biased SLC finding, not the CMA. Accordingly, it should be at their option. Framing this as a strategic option for the merging parties would also address a third scenario in which early remedy proposals may be appropriate, i.e. where merging parties do not wish to dispute the presence of an SLC and are keen to commence remedy discussions with the decision maker in order to secure a swifter decision or to allow time to demonstrate that the presence of relevant customer benefits makes a particular remedy more desirable.[2]

(d) Multiple UIL offers (paragraph 4.10)

5. We welcome the move away from insisting on a single UIL offer and allowing instead two or three offers. We agree that this should result in a faster and more efficient process.

(e) Use of an upfront buyer (paragraph 5.29);

6. Paragraph 5.29 now describes a number of cumulative requirements that will typically need to be met before the CMA accepts that no upfront buyer is required for phase 1 UILs: "there is a liquid market for the assets or business, the assets or business are viable and profitable, there are a number of potential purchasers, and discussions with purchasers are at an advanced stage." It seems to us that the last of these goes too far. If the other conditions are clearly satisfied, it will often be the case that the relevant divestment business can be sold relatively quickly, such that presence of advanced discussions with purchasers should not be a requirement.

Is the draft guidance sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional or revised content that you would find helpful?

7. We note that the other significantly revised section of the content is that which relates to the process for agreeing remedies in phase 2 (paragraphs 4.57-4.64). This section appears to shift much of the process for determining the details of the chosen remedy option – and discussions with the parties and third parties to that effect - to the period prior to the final report. In place of the fairly detailed guidance on the process for implementing remedies after the final report, paragraphs 4.66-4.68 appear to envisage the 12 week implementation period being used for little more than the statutory consultation. In our view, that goes too far and comprehensiveness of the guidance would be best served by restoring some of the description of the post-final report process for determining details of the remedy.

8. In addition, footnote 35 contains an important statement that should be restored to the main text of the guidance (that "[m]ergers raising vertical concerns are potentially more suitable to some form of behavioural undertaking, as are mergers taking place in

[2] As was the case, for example, in the *Macquarie UK Broadcast Ventures / National Grid Wireless Group* merger.

markets in which there already exists a significant degree of regulation"), which otherwise portrays an excessively negative view of the likelihood that successful behavioural remedies can be negotiated in phase 1. The guidance might also include a reference to the *Mastercard/Vocalink* case in a footnote to the paragraphs dealing with enabling measures and/or intellectual property remedies.

9. Finally, paragraph 4.66 (or a footnote to it) should include the timing of the relevant consultation periods, as specified in Schedule 10 EA02.

Do you have any other comments on the draft guidance?

10. Not applicable.

Clifford Chance LLP
July 2018