RESPONSE OF CLIFFORD CHANCE LLP TO THE COMPETITION AND MARKETS AUTHORITY CONSULTATION ON DRAFT GUIDANCE ON REQUESTS FOR INTERNAL DOCUMENTS IN MERGER INVESTIGATIONS

Clifford Chance LLP welcomes the opportunity to respond to the consultation on the draft CMA guidance on requests for internal documents 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.

Does the draft guidance generally provide sufficient information in relation to the CMA's practice in relation to internal document requests? Are there any aspects of the CMA's practice on which further information would be useful?

1. Subject to our comments below, the draft guidance does generally provide sufficient information in relation to the CMA's practice in relation to the process of requesting internal documents. However, even in this respect it seems to us that by limiting the guidance to internal documents, and excluding from its scope the production of certain "estimates, forecasts, returns or other information",[1] the CMA is missing an opportunity to provide more comprehensive guidance on its use of powers under section 109 of the Enterprise Act 2002 (**EA02**). Given that there remain significant uncertainties as to the extent to which merging parties are required to generate, prepare or process data in response to a section 109 notice, we consider that such guidance would be valuable. It would also be useful to understand whether the CMA's plans to increase the use of section 109 notices are equally applicable to requests for information specified in section 109(3) EA02.

2. In addition, we do have concerns that the draft guidance does not properly address how the CMA will satisfy the requirement for proportionality of its document requests, and the factors it will take into account when assessing proportionality. Disproportionate document requests place a burden on the CMA's resources, as well as those of the merging parties, and the anticipated increase in the CMA's caseload after Brexit will make it even more important that those resources are not wasted in reviewing large volumes of documents that afford the CMA no better understanding of an issue than targeted engagements with the merging parties and customers. In particular, we consider that:

   (a) the guidance should expressly recognise that internal documents are more often than not of limited probative value, particularly when generated by more junior employees or in draft form. In particular, statements of junior employees do not typically represent the view of their employer's management and such employees often lack the experience or knowledge to arrive at an informed view of the relevant issue. While the conduct of the CMA's substantive assessments is outside the scope of the draft guidance, the fact that certain types of internal document tend to have much lower evidentiary value, such that their gathering is less likely to satisfy the requirement for

[1] Footnote 5 of the draft guidance.

proportionality, is a relevant consideration that should, in our view, be covered in the guidance;

(b) the guidance should draw a clearer distinction between phase 1 and phase 2 when setting out the CMA's approach to requiring the provision of internal documents. For example, it is unclear whether the factors listed in paragraph 10 are intended to be understood in the context of phase 1 investigations only. Moreover, they give the impression, when combined with the subsequent descriptions of the CMA's approach to scoping and IT issues that the CMA's standard response to an evidence gap of the type described in paragraph 10(d) will be to request, during phase 1, all potentially relevant documents held by any potentially relevant custodian, which are to be gathered using costly forensic search tools. Such an approach would impose large burdens on both the merging parties and the CMA that would be unjustifiable and disproportionate, given that such evidence gaps can often be addressed in phase 1 through effective engagement with customers and follow-up where required to ascertain whether concerns could arise; and

(c) the guidance should better explain the factors that it will take into account when assessing the proportionality of a document request. For example, in light of the propensity of the UK merger control regime to capture mergers between small businesses, the guidance should clarify that relevant factors include the lack of administrative resources of the respondent, as well as the costs of compliance with the notice as a proportion of their overall financial resources.

Does the draft guidance provide sufficient information in relation to the circumstances in which merging parties may be asked to provide material volumes of internal documents?

3. In light of the CMA's stated policy of using section 109 notices routinely to gather internal documents (which may extend to enquiry letters – see 4 below), we do not consider it appropriate for the draft guidance to refer to the CMA's "typical" expectations for responses to enquiry letters,[2] as this implies that merging parties may be found to have failed to comply with a section 109 notice if they failed correctly to anticipate those expectations. For example, where "commercial decisions are taken via email (rather than set piece events such as meetings of a board of directors)"[3] is that one of the atypical situations in which the CMA would expect emails to be provided in response to an enquiry letter issued under section 109? In our view, the guidance should set out a bright line rule that emails, handwritten notes and internal messages will not be required unless the CMA expressly asks for them.

[2] Paragraphs 8-10 of the draft guidance. This is also true for the guidance notes to the Merger Notice, which refer to the CMA's expectations "in most cases".

[3] Paragraph 10(a) of the draft guidance.

Does the draft guidance provide sufficient information in relation to the circumstances in which the CMA will use its statutory powers to request internal documents?

4. The draft guidance states that the CMA is likely to use section 109 notices as standard in future investigations where internal documents are requested from merging parties.[4] It might usefully clarify whether this policy extends to requests for internal documents that are contained in enquiry letters, given that paragraph 6.17 of the CMA's jurisdictional and procedural guidance (CMA2) provides for the possibility of enquiry letters being issued under section 109.

5. We recognise the justification for the CMA's proposed policy of using section 109 notices as standard, but consider that it should also be made clear that exceptions to that policy will apply where appropriate, e.g. where the CMA has not been able to discuss the scope of the information request or the feasibility of the proposed deadline with the merging parties in advance.

6. We welcome the indications in the draft guidance that the CMA intends to use its powers under section 109 reasonably and proportionately. In particular, we welcome the confirmation that the CMA may consult with parties on the basis of draft requests and that this is particularly likely to be appropriate for complex and extensive document requests that may impose a material burden on the parties.[5] However, we note that it will often not be within the gift of the CMA to assess accurately the degree to which a particular document request will be burdensome. We therefore consider that the sharing of draft document requests should be standard practice prior to *any* section 109 document request. Moreover, unless the document request relates to specific, identified documents, we do not consider there to be any circumstances in which it would not be appropriate to consult with the parties in advance, on the basis of a draft request. At minimum, the guidance ought to offer some examples of the circumstances in which the CMA considers that sharing a draft would not be practicable or appropriate. In addition, the guidance might also usefully clarify that when sharing a draft document request, the CMA will also indicate the timeframe that it anticipates imposing as a deadline for a response to the notice.

7. Finally, we consider that it should only be in truly exceptional circumstances that parties to a notified merger would be served with a formal section 109 information request during phase 1. The parties will engage with the CMA in (often lengthy) pre-notification discussions, where the CMA will have an opportunity to discuss the extent to which internal documents will be required as part of the merger notification, and what additional documents it may require beyond those that are responsive to questions 9 and 10 of the merger notice. With a view to ensuring that it deploys its section 109 powers proportionately, the CMA should commit to requesting such additional documents by way of informal requests during the pre-notification period, before proceeding to use section 109 powers if those documents are not provided with or before the notification. Where parties wish to obtain a phase 1 outcome in a merger raising potential competition concerns (including agreeing suitably scoped commitments) they should be given the opportunity in the course of the phase 1 investigation to provide additional documents that, for example, rebut complaints

[4] Paragraph 15 of the draft guidance.

[5] Paragraph 26 of the draft guidance.

received from third parties. However, it should be made clear that this is not a mandatory requirement.

Does the draft guidance provide sufficient information in relation to the likely scope of internal document requests?

8. We welcome the acknowledgement that the CMA will carefully consider the proportionality of its document requests, "in light of the circumstances of the case".[6] However, given that a lack of proportionality is the objection to CMA document requests most often raised by merging parties, we consider that the guidance could usefully cover what factors the CMA will take into account when assessing the proportionality of its requests (see our observations in this respect in paragraph 2 above).

Does the draft guidance provide sufficient information in relation to the CMA's likely approach to IT issues and legally privileged materials?

9. Our only comment on the description of the CMA's approach to IT issues and legal privilege is that the reference to "all relevant attachments" in paragraph 22(g) is unclear. Does it require respondents to provide all attachments to all emails in the entire chain, including attachments to emails that are not responsive or relevant to the document request (in which case we suggest removing the word "relevant") or are parties expected to remove irrelevant attachments to other emails in the chain?

Does the draft guidance provide sufficient information in relation to the likely format of document requests (and, in particular, in relation to the proposed standard question for explanation of methodology and the use of compliance statements)?

10. Paragraph 30 of the draft guidance explains that the CMA cannot pre-emptively give assurances that no breach of a section 109 notice would occur in the event that the CMA has engaged with a respondent on its methodology for responding to a document request, but relevant material later comes to light which the parties could and should have provided. While that statement is correct, the CMA does have administrative discretion when it comes to deciding whether to impose a penalty for any such breach – exercisable in line with its policy statement on administrative penalties[7] - and cannot impose a penalty if the respondent has a reasonable excuse for their failure to comply.[8]

11. In our view, the guidance could and should state that in most cases a respondent's engagement with the CMA in respect of its proposed methodology for responding (and in particular, the search terms and technology that it proposes to use), and its compliance with that methodology, is likely to afford the respondent a reasonable excuse for any subsequent failure to uncover relevant documents and/or would usually be evidence that any such failure was not intentional or negligent within the meaning of paragraph 4.2 of the CMA's administrative penalties policy statement. Given that it is not evident that the CMA has the power under section 109 to compel

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6 Paragraph 17 of the draft guidance.

7 Administrative penalties: Statement of Policy on the CMA's approach (CMA4).

8 Section 110 EA02.

respondents to explain their methodology for producing documents, we consider that such a statement would be as much in the CMA's interest as it would be in the interests of merging parties.

Clifford Chance LLP
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