RESPONSE OF CLIFFORD CHANCE LLP TO THE COMPETITION AND MARKETS AUTHORITY'S CALL FOR INFORMATION ON PHASE 2 MERGER PROCEDURES

1. Clifford Chance welcomes the opportunity to respond to the call for information of the Competition and Markets Authority (**CMA**) on its Phase 2 merger investigation process. Our comments below are based on the substantial experience of our lawyers of advising on in-depth merger control reviews 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.

2. Our overall experience is that while there are certain positive unique features of the UK Phase 2 merger control regime (such as the site visit) there are a number of areas where reform is required. The main concern (other than the duration of the process) is that there is considerably less constructive bilateral engagement between the decision makers and merging parties in contrast to other regimes. For long stretches of the CMA Phase 2 proceedings, merging parties have little access to the inquiry groups' emerging thinking (often resulting in unwelcome surprises when it is finally revealed) and have limited opportunities to engage with inquiry groups to identify and correct any factual misapprehensions, to discuss the evidence that may be available to assuage any concerns that they have, or to identify and negotiate acceptable remedies. As a result, the process is less efficient, considerably more burdensome for businesses, and more prone to factual misunderstandings that, in turn, increase the risk of unnecessary or disproportionate prohibition or remedy decisions. We have set out below our views on how these issues could be mitigated.

<u>Early engagement</u>

3. While we recognise the value of the "fresh pair of eyes" that is brought by the panel system, it does mean that inquiry group members have to familiarise themselves with the case and are therefore unable to engage with parties on an informed basis as quickly as decision makers in other jurisdictions. Moreover, the benefits of the fresh pair of eyes are reduced if (as is typically the case) inquiry groups' initial views are formed solely on the basis of information and briefings by the CMA case team, because the merging parties have had no opportunity to put their case to the inquiry group until a relatively late stage in the process. These issues could be mitigated by:

   (a) allowing for an initial meeting with the inquiry group shortly after the launch of the Phase 2 proceedings (which could be combined with, or separate to, the site visit) in which the merger parties and their advisers are given the opportunity to present the factual information and arguments that they consider to be most relevant to the case. It should ideally be early enough (i.e., within the first two weeks, when the inquiry group are still digesting the phase I and first-day letter materials) that it could help target the first major RFI, which otherwise tends to be very wide ranging. The initial meeting might follow or be accompanied by the submission of a brief outline (no more than a few pages) succinctly stating the merger parties' main views; and

(b) ensuring that inquiry groups are formed with panel members that have appropriate expertise in competition economics, competition law and/or the sector in question, so that they can get up to speed quickly.

Issues letter and meeting

4. At present, there is a long gap between the site visit and the main parties hearing in which there is a lot of information gathering and sifting via the case team but minimal engagement between the merging parties and inquiry groups. This should be bridged by the sending of an issues letter around 7-8 weeks into the Phase 2 process, shortly followed by a state of play meeting of at least two hours with the inquiry group, in which the merging parties can respond to the issues letter. The issues letter would indicate the theories of harm that the inquiry group is considering (similar to the Phase 1 issues letter and/or annotated issues statement in the current process) and would replace the current Phase 2 issues statement which, in our experience, does not contain enough information to be a particularly useful document. The Phase 2 issues letter should be accompanied by the disclosure of any key third party documents (including written submissions and transcripts of calls) in a confidentiality ring (see 9 below).

5. We recognise that many working papers would not be finalised by then and that (as is the case for Phase 1 issues letters) such Phase 2 issues letters would likely ask the parties to address certain issues that, in time, inquiry groups may exclude. However, we consider that such a step would help inquiry groups to identify the relevant issues more quickly, while giving the merging parties an important opportunity to present their case proactively, and to identify and correct any misapprehensions, at an earlier stage in the process. We understand that the CMA has reservations about creating too many points of engagement with the inquiry group in the Phase 2 process, but our view is that some additional engagement is precisely what is missing at present.

Main parties hearing

6. At present, the main parties hearing is too focused on questions posed by inquiry group members, with little indication or discussion as to the reasons for those questions. Merging parties are given only 15 minutes of speaking time at this crucial stage of a 24-32 week inquiry, which is clearly insufficient. As indicated above, it is important to create an appropriate opportunity for the merger parties (together with their advisers) to present the positive case in support of the merger and not only react to the inquiry group's questions.

7. If an issues letter/meeting is introduced, the main parties hearing should take place around weeks 12/13, around a month after the issues meeting and two weeks or so before provisional findings are issued. It is also important to allow greater time between the issuing of working papers and the hearing for the merger parties to fully consider and prepare to address the emerging views, in contrast to the current very short time frame of typically 2 weeks or so.

Engagement between economists

8. Our experience of the current process is that opportunities for regular or ad-hoc engagement between the parties' economists and those of the CMA are lacking, despite the latter not having the same restrictions on their availability as inquiry group members.

Such engagement can be very beneficial for the proper development and discussion of robust theories of harm and the supporting evidence base.

Confidentiality rings and role of the Procedural Officer

9. The recent increased use of confidentiality rings to disclose key documents and third-party evidence has been beneficial but (as noted above) should be implemented at an earlier stage, prior to the issuance of the provisional findings. In addition, our experience, when advising third parties, is that summaries of those third parties' evidence that have been prepared by the case team are often skewed or inaccurate, unless the third parties take the time to carefully correct them. Consequently, suspicion easily arises on the part of merging parties that summaries of third-party evidence may not be reliable. This would be addressed through giving access to the underlying written evidence (or transcripts of oral evidence) to merging parties. Giving parties the "gist" of the evidence received is not sufficient, particularly in circumstances when parties cannot be confident that the gist accurately reflects third party views.

10. In addition, the role of the Procedural Officer should be expanded to cover disputes relating to the evidence that is disclosed to the merging parties (not just information that is disclosed in published documents). A more impartial arbiter of the evidence that is critical for merging parties to understand the case against the merger would, in our view, considerably reduce the likelihood of subsequent appeals of the CMA's decisions.

Remedies

11. In our view, the main barriers to earlier and more constructive engagement on remedies are:

    (a) the fact that merging parties are given limited insights into the competition issues that are being considered by the inquiry group, and which remedies may therefore be needed to address them, until a relatively late stage. In this regard, the current form of Remedies Notice is not particularly helpful since it is produced at a very high level and provides little, if any, useful direction on the crafting of a remedy; and

    (b) the difficulty in securing time to discuss remedies with the inquiry group, or with a person with sufficient authority to engage in discussions on behalf of the inquiry group. While it is possible to engage with the case team on remedies, this rarely results in any constructive feedback on what is considered to be wrong with the parties' proposed remedies, or how this might be fixed. This could be addressed by ensuring increased availability of the inquiry group, with additional bilateral discussions, during the key period for remedy discussions, between the issue of provisional findings and the final report.

Engagement with other regulators

12. The Phase 2 process would also be improved by better engagement with other regulators. Where the merger involves a market within the remit of a UK sectoral regulator, that regulator should have a significantly weightier role in the process than other third parties. This might include, for example, participation in a tri-partite meeting with the CMA and

the merging parties to identity the "common ground" on sector-specific and regulatory matters that are within their area of expertise.

13. Similarly, the CMA's engagement with overseas competition authorities could be improved, in cases where the markets under consideration are broadly the same. Exchanges of views and information (including the results of market testing) with overseas regulators create important opportunities to prevent decisions being made on the basis of inaccurate or inconsistent information and allow for efficient remedies without over-stepping into overseas regulators' jurisdiction. Our impression is that such exchanges do not happen enough in the current process.

Information gathering

14. Finally, we would urge case teams to take better account of merging parties' ability and resources to respond to RFIs and s.109 requests within the Phase 2 process. The Phase 2 process often takes a significant toll on businesses' ability to function as usual, so harming their ability to compete, as well individuals' well-being. In particular, information requests are frequently less focused than is the case in other jurisdictions, impose unreasonable deadlines and request too much irrelevant information. Often, multiple information requests, with conflicting deadlines, are issued at the same time, and response deadlines frequently fail to take into account public holidays and pending office closures, including in countries outside the UK, and to be based on the assumption that merging parties and their advisors can and will work weekends and bank holidays, in addition to the late nights that are already taken for granted. Moreover, case teams often resort to s.109 notices as a matter of routine when requesting internal documents, even for targeted issues where the use of such measures is disproportionate.

15. The system would be much improved if there were greater engagement in advance with the parties to identify essential information and to establish a reasonable methodology and timelines for delivery.

16. Please let us know if it would be helpful for us to elaborate on any aspect of the points raised in this submission.

Clifford Chance LLP
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