RESPONSE OF CLIFFORD CHANCE LLP TO THE COMPETITION AND MARKETS AUTHORITY'S CALL FOR EVIDENCE ON THE REVIEW OF MERGER REMEDIES APPROACH

Clifford Chance welcomes the opportunity to respond to the call for evidence by the Competition and Markets Authority (**CMA**) regarding the review of its approach to merger remedies. Our observations below are based on our experience advising on merger control proceedings in the UK and other 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.

SUMMARY

- We welcome the CMA's decision to review its approach to remedies with a view to improving its pace, predictability, proportionality and processes. Our experience, and that of our clients, is that the CMA's past approach to remedies has lagged behind that of other major competition authorities with respect to pace, proportionality and process, in part because of its predictable opposition to behavioural remedies. The tone of the CMA's Merger Remedies Guidance and its focus on hurdles reflects a mentality that behavioural remedies, and the benefits they bring, should be as difficult as possible. But this approach is inconsistent with the CMA's objectives of promoting growth while protecting competition; it deprives the economy and consumers of the efficiencies and consumer benefits that can flow from remedies, and that would be lost if an efficiency-enhancing or pro-innovation merger is blocked because of excessive rigidity on remedies. Our response suggests a number of ways to address this.

- Consistent with the legislative intent of the Enterprise Act 2002 (**EA02**) and the drive for pace and proportionality, there should be more scope to allowing remedies (particularly in Phase 1) that mitigate the CMA's concerns, rather than completely remedying or preventing them, in appropriate cases. The CMA should not ignore the word “mitigating” in EA02 s73(2) as though Parliament had not put it there. Similarly, the CMA's current requirement for Phase 1 remedies that "comprehensively" address its concerns takes insufficient account of the legislative requirement for remedies to be reasonable and practicable.

- The CMA's current approach is not flexible enough to allow for behavioural remedies that result in substantial pro-competitive benefits for consumers, in cases where such effects arise from the remedy itself rather than the combination of the parties' respective businesses. Consequently, the CMA should adapt its approach to assessing the effectiveness or remedies, rivalry enhancing efficiencies and relevant customer benefits (**RCBs**) to take better account of the pro-competitive effects of behavioural remedies that are offered by the parties. It should also reconsider other aspects of its approach,

such as its insistence that there should be no feasible, clear cut structural remedy available before it will consider behavioural remedies in Phase 1.

- The CMA should consider making greater use of independent, third-party consultants with sectoral expertise to assist with its assessment of remedy effectiveness.

- The CMA's new fining powers removes one of the principal concerns about behavioural remedies - namely, that they are hard to enforce - as incentives to comply will be greatly increased. In our experience, many of these concerns can, in any event, be addressed by the use of monitoring trustees, dispute resolution mechanisms and measurable remedy outcomes, and we do not agree that the presence of a sector regulator should be a decisive factor in the assessment of whether behavioural remedies can be effectively monitored.

- The CMA's approach to carve-out remedies should recognise that there are circumstances in which carve-out remedies can be more effective in addressing the alleged SLC than the divestment of a standalone business which includes assets and staff that the remedy taker does not need or want, as this can reduce the pool of potential remedy takers.

- The CMA could achieve substantial procedural efficiencies by adapting its Phase 1 procedures to allow for more engagement on remedies in the Phase 1 pre-notification process, as this would avoid lengthy and duplicative Phase 2 reviews. The current Phase 1 remedy process is extremely time constrained and does not give the opportunity for meaningful negotiation between the parties and the CMA.

THEME 1: CMA'S APPROACH TO REMEDIES

1. THE CMA'S CURRENT GUIDANCE APPROACH

Phase 1 remedies that mitigate the SLC

1.1 As noted in paragraph 27 of the consultation document, the Enterprise Act 2002 (**EA02**) recognises that mitigation of any SLC may be sufficient, both at Phase 1 (s.73(2)) and at Phase 2 (ss.35(3) and 36(2)), and that the CMA need only "have regard" to achieving as comprehensive a solution to the SLC and as is "reasonable and practicable" (s.73(3)).

1.2 Yet the current Merger Remedies Guidance (CMA87) effectively rules out Phase 1 remedies that mitigate the alleged SLC without fully preventing it: paragraph 3.27 says that "*In order to accept UILs, the CMA must be confident that **all** of the potential competition concerns that have been identified at Phase 1 would be resolved by means of the UILs without the need for further investigation*." (emphasis added).

1.3 Consider, for example, a remedy that addresses almost all of the competition concerns expressed by the CMA in a Phase 1 issues letter. The competition concerns that would not be fully addressed by the remedy are speculative and relate to products within the market that are low value and, if they comprised the entirety of the market, would fall within the CMA's discretion not to refer the merger on the basis of the *de minimis* exception in s.33(2)(a) EA02. As the CMA notes in its guidance on exceptions to the duty to refer (CMA8), the *de minimis* exception "is designed primarily to avoid references being made where the costs involved would be disproportionate to the size of the market(s) concerned." We submit that the same principle applies where the statutory *de minimis* exception is not applicable (because the market concerned, as a whole, in not *de minimis*), but the costs of a Phase 2 reference, both to the taxpayer and the parties, are disproportionate to the likelihood and magnitude of any SLC that would remain following implementation of a mitigating remedy. Another example is a remedy that mitigates the SLC and gives rise to substantial RCBs, that will not be taken into account if the mitigating remedy is considered not to pass the threshold of effectiveness (see also our comments at 1.10 and 6.3 below in this respect).

1.4 It is a principle of statutory construction that the inclusion of a word is presumed to reflect legislative intent. Consequently, not allowing for the possibility of mitigating remedies negates the legislative intent behind the word “mitigating” in s.73(2) EA02 and the requirement in s.73(3) to accept undertakings-in-lieu (**UILs**) that are as comprehensive as is "reasonable and practicable". By making it harder to avoid an extended and costly Phase 2 process, it is also at odds with the need, under the CMA’s 4Ps, to be “proportionate” and to act at “pace”.[1]

1.5 We recognise that the Competition Appeal Tribunal (**CAT**) and Court of Appeal have ruled in, a number of cases, that the CMA is entitled to take into account the proportionality of a remedy after the stage of selecting the remedies that it considers to be "effective" and is not required to do so before that stage. However, this does not preclude the CMA from adapting its approach to serve better the aims of pace and proportionality. Given the statutory framework, the CMA is, in our view, equally entitled to consider, in appropriate circumstances, that a mitigating remedy is the most comprehensive solution that is reasonable and practicable or, alternatively, that such a remedy would be effective notwithstanding that it might not address all potential competition concerns.[2]

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1 See para 24 of the consultation document.

2 We note that the Court of Appeal in *Ryanair Holdings v Competition Commission* [2015] EWCA Civ 83 stated that the CMA's duty is to "remedy or prevent the SCL concerned" and to ensure that "no SLC either continues or occurs". However, that case did not involve mitigating remedies and we do not consider the Court intended to reinterpret the statutory test (i.e. it used the word "remedy" as shorthand for mitigating or remedying the SLC).

The clear-cut standard does not take adequate account of reasonableness and practicability

1.6 A related point is that the CMA's current guidance does not take adequate account of the requirement in s.73(3) to accept UILs that are as comprehensive as is "reasonable and practicable". Paragraph 3.28(a) of the Merger Remedies Guidance states, with regard to the clear-cut standard for Phase 1 remedies:

> *"In relation to the substantive competition assessment, it means that there must not be material doubts about the overall effectiveness of the remedy. The more extensive the competition concerns, in terms of magnitude of potential customer harm, the more significant the error costs of an ineffective remedy, and hence the greater the belief must be that the UILs will* ***comprehensively*** *resolve those concerns. Whilst the CMA will require that the clear-cut standard is applied to any remedy where the test for reference has been met, in those cases where the potential magnitude of harm is especially large, the CMA will be particularly cautious in its approach to accepting UILs."* (emphasis added)

1.7 By failing to recognise that the requirement for remedies to be comprehensive is subject to a test of reasonableness and practicability, and by omitting any explanation of how the CMA assesses that test, the CMA's guidance is far more onerous than the legislation expects, again contrary to legislative intent. Consequently, it unnecessarily minimises the prospects of reasonable and practicable remedies being accepted.

Opportunities for more complex remedies in Phase 1

1.8 Our experience is that the CMA routinely rejects non-divestment remedies in Phase 1 even if they are not particularly complex, and that this is primarily because it takes the CMA longer to assess whether such remedies will adequately address its competition concerns. We recognise that the shorter Phase 1 timetable can justify that approach once a merger has been notified. However, the open-ended nature of the pre-notification period means that there is no such justification at that earlier stage. Moreover, taking the time to assess non-standard remedies in Phase 1 can yield very substantial efficiencies for the CMA (as well as cost-savings for the merging parties), because it can avoid a Phase 2 reference (see also our comments at 7-7.2 below). Phase 2 proceedings place more of a burden on CMA resources and often end up duplicating at least some of the analysis of substantive issues and remedies that has taken place in Phase 1.

1.9 Consequently, the CMA could improve its pace, proportionality and process by subjecting fewer cases to Phase 2 proceedings. It could accomplish this by being more

open to discussing its substantive concerns and non-divestment remedies that might address those concerns in the Phase 1 pre-notification period, as well as undertaking market testing of those remedies in cases where the parties are amenable to that. It is difficult to know what remedies to offer or discuss at Phase 1, as it is not necessarily obvious until the Issues Statement which theories of harm the CMA is pursuing, at which point the parties need to focus their efforts on preparing for the Issues Meeting. A much more candid engagement between parties and case team would be valuable in allowing parties to formulate effective remedies.

Effectiveness and proportionality

1.10 In addition to our comments in paragraphs 1.1-1.5, the CMA's current approach to effectiveness and proportionality appears to pay insufficient regard to remedies that give rise to pro-competitive efficiencies, as opposed to remedies (such as those in *Vodafone/Three*) that "lock in" RCBs to which a merger gives rise. For example, in the CMA's final report on *Microsoft/Activision* (as first notified), there was no assessment of the pro-competitive effects that would arise from the proposed remedy in terms of bringing forward competition in the market by a number of years,[3] or the propensity of these effects to offset any residual aspects of the SLC that were not considered to be directly addressed by the remedy.[4]

1.11 The CMA in that case took the general position that pro-competitive efficiencies arising from a remedy (as opposed to those arising directly from the merger itself) could not amount to RCBs within the meaning of s.30 EA02.[5] However, even if that interpretation is correct (which is, in our view, debatable - see 6.2 below) that would not have prevented the CMA from considering such efficiencies in its assessment of the effectiveness of the proposed remedies. The legislative framework allows such pro-competitive efficiencies to be taken into account and, if the CMA does not do so, it is failing to take into account a relevant consideration, in our view.

2. THE CMA'S APPROACH TO BEHAVIOURAL REMEDIES

2.1 It is clear from the consultation document, paragraphs 32 and 33, that behavioural remedies to address an SLC[6] are accepted far less in the UK (in around 3% of cases in

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3 The report having found that Activision would otherwise have made its content available to streaming providers within the next five years.

4 These pro-competitive effects having been a decisive factor in the European Commission's decision to accept the remedies. The then-EU Competition Commissioner, Margrethe Vestager, commented that the remedies would "significantly improve the conditions for the emergence of cloud game streaming" and "kick-start this market".

5 *Microsoft/Activision* Final Report, para 11.156.

6 3 cases out of 88 that were subject to remedies, or Phase 2 prohibition or abandonment, and excluding water utility cases in which the remedy was not to address an SLC.

the last 5 years) than in the US (6% of challenged cases)[7] and the EU (around 8% of cases in the last 5 years).[8] This suggests that the CMA is putting an unnecessarily, and exceptionally, tight straitjacket on itself.

2.2 In our view, the CMA's new fining powers under the Digital Markets, Competition and Consumers (**DMCC**) Act present a good opportunity for the CMA to remove this straitjacket. The possibility of large fines will act as a very important deterrent against incomplete or improper implementation of behavioural remedies and that this change alone justifies greater openness of the CMA towards behavioural remedies.

2.3 To address the excessively restrictive current approach of the CMA, its Remedies Guidance should be amended. In particular, paragraph 3.48 of the Guidance sets out conditions that must typically apply irrespective of whether the merger raises horizontal or vertical concerns and indicates in paragraph 3.52 that it will only consider behavioural remedies in vertical mergers where they are expected to result in substantial RCBs. Applying these strict criteria necessarily excludes behavioural remedies even if they would effectively address the SLC and be capable of appropriate implementation, monitoring and enforcement. As such, the criteria are inconsistent with the CMA's duty to have regard to the need to achieve as comprehensive a solution to the SLC as is reasonable and practicable. In particular, the availability of a feasible structural remedy is not, in our view, relevant to the assessment of whether an alternative behavioural remedy would also effectively address the relevant SLC.

2.4 As regards mergers raising horizontal concerns, we recognise that behavioural remedies are less likely to be appropriate. However, it is clear from cases such as *Vodafone/Three* that they can be effective in the right horizontal cases too and *Mastercard/Vocalink* demonstrates that they can be developed in Phase 1 if given sufficient time. We consider that the circumstances set out in paragraph 3.48 of the CMA's Remedies Guidance[9] are generally appropriate for consideration of behavioural remedies in horizontal cases, subject to the following observations:

(a) as noted in paragraph 1.11 above, the CMA should also be open to considering behavioural remedies where the merger does not itself give rise to RCBs or rivalry enhancing efficiencies that would outweigh the SLC, but the proposed remedy does; and

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7 Paragraph 32 of the Consultation Document.

8 7 cases out of 71 that were subject to remedies, or Phase 2 prohibition or abandonment.

9 These are that "(a) Divestiture and/or prohibition is not feasible, or the relevant costs of any feasible structural remedy far exceed the scale of the adverse effects of the SLC; (b) The SLC is expected to have a relatively short duration (eg two to three years) due, for example, to the limited remaining term of a patent or exclusive contract; (c) RCBs are likely to be substantial compared with the adverse effects of the merger, and these benefits would be largely preserved by behavioural remedies but not by structural remedies."

(b) the absence of a feasible structural remedy should not be a decisive factor, given that (as noted above) it says nothing about the effectiveness of an alternative behavioural remedy.

Assessing the effectiveness of behavioural remedies

2.5 One of the biggest challenges for the CMA is how to assess the effectiveness of remedies in the face of conflicting evidence and opinions from market testing. Merging parties, customers and competitors will often have commercial incentives to exaggerate or downplay the effectiveness of proposed remedies. We recognise that the CMA will often lack the knowledge and understanding of the relevant markets to arbitrate between such competing views. However, we disagree with the suggestion in paragraph 39 of the Consultation Document that behavioural remedies are most likely to be appropriate in cases where the CMA can draw on the knowledge and experience of a sector regulator to assess effectiveness.

2.6 In particular, independent consultants with sector-specific expertise exist in most markets and could be engaged by the CMA (possibly at the cost of the merging parties) to serve that role. If remedies are subsequently accepted, this independent advisor could become the monitoring trustee. We recognise that consultants may, on occasion, have perceived conflicts of interest if they have done a lot of past work for the merging parties, but consider that such concerns can be addressed through appropriate vetting.

Behavioural remedies in Phase 1

2.7 In principle, a behavioural remedy that would be acceptable at Phase 2 should also be acceptable in Phase 1, provided the CMA has enough time in an extended pre-notification period to determine the scope of the SLC that must be addressed and whether the remedy will comprehensively address it. Avoiding a Phase 2 reference gives rise to substantial savings of costs and time for both the CMA and merging parties.

2.8 However, the CMA may have understandable concerns that being more open to considering behavioural remedies in Phase 1 may result in such remedies being offered more frequently and that the time required to assess such remedies would significantly increase the CMA's workload. To minimise this risk, we suggest the following principles that could be applied to limit proposals of inappropriate behavioural remedies in Phase 1:

(a) Behavioural remedies are unlikely to be considered unless, prior to the commencement of the Phase 1 review period, the CMA is reasonably satisfied that they are in principle capable of addressing (i.e. preventing or mitigating) the SLC and of being monitored.

(b) As a general rule, the CMA will be unlikely to consider purely behavioural remedies to address horizontal concerns in Phase 1, unless the magnitude or duration of the potential SLC is limited, or the remedy is clear cut and straightforward.

(c) Behavioural remedies to address vertical or conglomerate foreclosure concerns are more likely to be acceptable in Phase 1, in particular where:

(i) they replicate pre-merger conditions of access, such as:

(A) commitments to continue supplying inputs on the same terms and of the same quality as prior to the merger, and where they incorporate appropriate mechanisms to ensure that any future improvements in the products or services that are made available to the merged entity are also made available to its competitors; and

(B) commitments not to engage in contractual tying or bundled discounts of complementary products; or

(ii) they relate to fast moving, dynamic markets with low barriers to entry. In such markets the SLC is unlikely to persist for a long period, such that structural remedies would be disproportionate.

3. CMA'S APPROACH TO CARVE-OUT DIVESTMENT REMEDIES

3.1 Carve-out remedies are clearly appropriate for consideration in many circumstances to ensure that the remedy is proportionate to addressing the SLC. An important consideration that is not reflected in the CMA's current approach is that carve-outs (or more creative remedy solutions) may be a more effective way to address the SLC than divesting an entire business. For example, in global or multi-national businesses, it is not unusual for departments / units to be structured across functional reporting lines rather than geographically. In these cases, a carve out may be appropriate to addressing the SLC without adding 'the rest' of the company and requiring the remedy taker to acquire a diverse range of assets / personnel that it does not need or want, as this can impact the pool of prospective remedy takers.

3.2 It is not necessary to try to "reconstruct" a global business unit through carving out bits from multiple legal entities, especially where this might significantly limit the pool of potential remedy takers because they do not have an existing presence in all relevant countries and so cannot integrate those different carve-out businesses locally. If global capabilities are important, it is important to have regard to other alternatives – e.g. upskilling, transfer of individuals who can train a team, long-term Transitional Services

Arrangements etc. While these may be harder to monitor, they will often be easier to integrate from a remedy-taker's perspective, in which case they will enhance the effectiveness of the remedy, not detract from it.

3.3 It is important not to overstate the degree of difficulty that a carve-out might entail. In many cases, extricating a business unit from a company is not materially different to disentangling a company from the group. Many of the shared functionalities (e.g. HR, IT, other back office) are in any event the types of functionalities that the purchaser often looks to replace to minimize costs. Acquisitions of carved-out business are common commercial transactions outside the scope of remedy processes and are not perceived by businesses as involving a high degree risk.

4. ASSESSING, MONITORING AND ENFORCING REMEDIES

4.1 It is apparent from the CMA's decisional practice that purported difficulties in monitoring proposed behavioural remedies and the associated burden on CMA resources are frequently asserted as a reason to reject them. These hurdles, although real, are often overstated. Alongside the strengthened incentives for compliance that result from higher possible penalties under the DMCC Act, monitoring trustees can play an important role in assuring compliance and minimising the burden on CMA resources. There are now a range of firms that providing trustee services that have a proven track record of being independent and impartial, and it is relatively straightforward for such trustees to monitor compliance and to provided mandated monthly reports. In particular, monitoring and reporting can be based on measurable outcomes, such as spending on investment, investment outputs, price levels, etc.

4.2 Consequently, we encourage the CMA to make greater use of monitoring trustees in behavioural cases, instead of rejecting such remedies due to concerns about the burden on CMA resources. The CMA has extensive experience of using monitoring trustees in abuse of dominance cases that is equally applicable to monitoring of merger remedies. We also encourage the CMA to adopt a more sector-focused approach to its internal organisation of case teams, to ensure that case handlers develop focused experience and expertise in particular industries and sectors.

Avoiding burdens on CMA resources

4.3 It is not apparent from the Consultation Document which conflict of interest issues the CMA envisages arising (in QE4) from its monitoring of remedy compliance. If this is a reference to the conflicting interests of the merged entity and the beneficiaries of a remedy, then this is an inherent feature of all remedies, not just behavioural remedies. While it is true that it is ultimately the CMA that must decide whether remedies have been breached, there are a number of mechanisms that can mitigate the burden on the CMA's resources in this respect, including:

(a) the greatly increased incentives to comply that result from increased penalties for infringement;

(b) fast-track dispute resolution procedures of the type implemented in the *Microsoft/Activision* remedies. Provided beneficiaries have sufficient information to determine whether a potential breach has arisen, these mechanisms can serve to ensure that the remedies are effectively monitored and enforced by those that benefit from them and so have the incentive to enforce them. The CMA has in the past taken the view that arbitration is "*typically time and resource consuming and may be perceived as an option of last resort*"[10] for beneficiaries. That objection is misguided, in our view. Dispute resolution mechanisms underpin all contractual commercial relationships and are clearly effective in assuring that the vast majority of contractual obligations are performed. Moreover, where parties have recourse to dispute resolution procedures, this can create significant efficiencies for the CMA in the establishment of the relevant facts should the CMA be minded to impose a fine, *e.g.,* following an adverse arbitral ruling; and

(c) monitoring trustees can assume the burden of gathering information on possible infringements and offering an initial view to the CMA of whether an infringement has arisen.

4.4 The CMA might also consider measures that could strengthen the effectiveness of arbitration procedures. For instance, when including an arbitration mechanism in a remedy, the CMA could also include a statement of principles and objectives that could serve to guide an arbitrator in their interpretation of the obligations that are imposed.

THEME 2: PRESERVING PRO-COMPETITIVE MERGER EFFICIENCIES AND MERGER BENEFITS

5. THE CMA'S CURRENT APPROACH TO RIVALRY ENHANCING EFFICIENCIES

5.1 The CMA has in the past required merging parties to substantiate the likelihood of their claimed efficiencies to a standard that is typically higher than the standard to which the CMA holds itself when establishing the likelihood of an SLC. In cases where no remedy is offered to lock-in those efficiencies (i.e. ensure that they are converted into rivalry enhancing efficiencies in the form of increased output, quality or innovation), that is understandable. As noted in the Merger Assessment Guidelines, most of the information relating to the synergies and cost reductions resulting from a merger is held by the

[10] *Anticipated acquisition by LN-Gaiety Holdings Limited of MCD Productions Unlimited Company*, decision to refer, paragraph 30.

merger firms, and merging parties have incentives to exaggerate the likelihood and magnitude of claimed efficiencies in order to secure CMA clearance.

5.2 We submit, however, that where a remedy is offered that serves to lock in efficiencies, parties do not have incentives to exaggerate them, as they are effectively committing to achieve them or, if they do not, to accept losses as a result of implementing the remedy. Consequently, the CMA ought to hold merging parties to a less exacting standard when assessing the likelihood of efficiencies in such cases, and this should be reflected in the Merger Remedies Guidance.

Capturing rivalry enhancing efficiencies

5.3 *Vodafone/Three* shows that remedies can be designed to ensure that merger efficiencies are effectively converted into rivalry enhancing efficiencies (in the form of lower prices, improved product quality or greater innovation), in circumstances where the merger itself would not ensure that.

5.4 Importantly, remedies can ensure rivalry enhancing outcomes even when the expected efficiencies do not relate to variable or marginal costs. For example, a large merger between two multi-product firms may give rise to very substantial reductions in fixed costs across all the parties' product lines but give rise to an SLC in one market only. While it is true that the parties may have little incentive to pass on those fixed cost savings to customers absent a remedy, they will have very significant incentives to offer a remedy that secures clearance for their deal, so that they can achieve those savings across all their product lines. A remedy that ensures that merger efficiencies - whether relating to economies of scale or scope, to fixed costs or variable costs - are passed on to consumers to a sufficient degree to outweigh the SLC should therefore, in principle, be acceptable as a remedy that is capable of effectively addressing or outweighing the SLC.

5.5 Remedies to lock-in rivalry enhancing efficiencies can take the form of commitments to invest in increasing capacity or quality improvements (as in *Vodafone/Three*) or in increased innovation. Being more open to accepting such remedies would therefore serve to achieve the CMA's aim to prioritise "pro-growth and pro-investment interventions", as per its strategic steer from the government. In addition, it should be recognised that remedies can <u>create</u> rivalry enhancing efficiencies, even when not "locking in" efficiencies that are created by the merger (see our comments at 1.10 above).

6. THE CMA'S CURRENT APPROACH TO RCBS

6.1 As the CMA acknowledges in the Consultation Document (paragraph 61), it has "rarely exercised" its discretion to take account of RCBs as an exception to the duty to refer at Phase 1 or for clearance at Phase 2. This is unnecessarily restrictive, as:

(a) it makes a dead letter of an option that the legislature clearly intended; and

(b) it is inimical to growth not to allow the economy and consumers to take advantages of benefits that the legislation provided for.

6.2 In our view, one obstacle to a pro-growth approach that is more consistent with legislative intent is the position taken towards RCBs in paragraph 11.156 of the final report in *Microsoft/Activision*. In that case, the CMA interpreted s.30(3) EA02 as requiring that RCBs result from the combination of the parties' respective businesses and could not be taken into consideration where they resulted only from the remedies that were being offered. In our view, both s.30(3)(a) and s.30(3)(b) refer to the same causative element: whether the RCBs would arise but for the relevant merger situation, and that therefore includes any RCBs arising from remedies that the parties have offered to ensure that the relevant merger situation takes place. Contrary to the CMA's analysis in paragraphs 11.157-11.150 of the *Microsoft/Activision* final report, an equally valid interpretation of those provisions, and one that is consistent with the explanatory notes to the EA02, is that s.30(3)(a) is concerned with ensuring that RCBs arise within a reasonable period that s.30(30(b) is concerned with ensuring that they are unlikely to be achieved in a less anticompetitive way.

6.3 In any event, as noted at 1.11 above, the wording of s.30(3) EA02 does not prevent the CMA from assessing whether the pro-competitive benefits of a remedy are effective in remedying, preventing or mitigating the SLC. If they are, then they will inevitably be more proportionate than a divestment remedy and need not be considered within the RCB framework of s.30(3).

THEME 3: RUNNING AN EFFICIENT PROCESS

7.1 We welcome the CMA's focus on pace and process in its new Mergers Charter. In our view the most important procedural changes to achieve these objectives would be those that facilitate the discussion and acceptance of remedies in Phase 1. Phase 2 reviews are typically longer than the combined prenotification and Phase 1 review periods and involve some duplication of work that is done in Phase 1. Consequently, avoiding a Phase 2 referral results in substantial efficiencies for both the CMA and merging parties. There are a number of procedural changes (in addition to the substantive changes to approach that we advocate above) that the CMA should, in our view, consider:

(a) Increased engagement on substantive issues in Phase 1 would allow merging parties to design and offer appropriate remedies earlier in the process. We recognise that the substantive issues under consideration by the CMA would, at that stage, be preliminary and subject to change in light of subsequent information and views of third parties. However, even such tentative indications of the "open issues" would help the merging parties to design remedies that address all the CMA's potential concerns.

(b) Where the merging parties are amenable, carrying out some market testing of the parties' proposed remedy and providing the resulting customer feedback to the merger parties as early as possible during the prenotification process. This early feedback would help merger parties devise potentially complex remedies within the Phase 1 timeframe.

(c) While we welcome the new 40-working day KPI for pre-notification, it is important that merging parties can opt out of the CMA's KPI (in which case their case would not count towards the CMA's achievement of its KPI) in order to have sufficient time to engage in remedy discussions in prenotification.

7.2 In our view, implementing the above procedural proposals to allow for earlier and more detailed engagement on remedies in Phase 1 would bring the CMA in line with other regulators, such as the European Commission, and would therefore minimise the risk of the CMA pushing cross-border deals into a disproportionate Phase 2 investigation when other authorities proceed to clear the transaction with remedies in Phase 1.

Clifford Chance LLP
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