

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

Clifford Chance LLP welcomes the opportunity to respond to the Competition and Markets Authority's (**CMA**) consultation on the draft revised text of CMA87 (the **Draft Guidance**) and the accompanying consultation document (the **Consultation Document**). We appreciate the CMA's proactive engagement with stakeholders and its willingness to revisit the selection, design, and implementation of remedies in merger cases. In particular, we note the CMA's consideration of feedback received through the call for evidence earlier this year.

Our comments are informed by 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 our clients.

1. **GENERAL COMMENTS ON THE DRAFT GUIDANCE**

1.1 We welcome the CMA's update to the Draft Guidance that provides for: (i) greater flexibility in assessing merger remedies' effectiveness and proportionality; (ii) clearer guidance on the ways in which risks of carve out remedies can be mitigated; (iii) openness to behavioural remedies, including in phase 1; (iv) the value of monitoring trustees and independent experts in the assessment of complex remedies; and (v) earlier engagement on remedies, including during prenotification, and additional opportunities for the merger parties to discuss remedies with the case team and decision maker, without prejudice to the CMA's assessment of the merger.

2. **SPECIFIC COMMENTS ON THE DRAFT GUIDANCE**

2.1 We consider there are several areas in the Draft Guidance that are relevant to discuss in more specific detail. These are outlined as follows.

Mitigating remedies

2.2 We reiterate that the statutory framework under s.41(2) and 73(1) of the Enterprise Act 2002 (**EA02**) specifically and explicitly provides for orders and undertakings for the purpose of "mitigating" – as an alternative to "remedying" or "preventing" – an SLC. This is not to be seen as a concession, but is instead an integral part of the architecture of the merger control system, expressly envisaged in the legislation. Moreover, proportionality (as a public law obligation on the CMA, as well as a current policy priority) requires that mitigating remedies be accepted where appropriate. Consequently, the CMA should not interpret the requirement for remedies to be "comprehensive" as an absolute bar to mitigation where such measures are proportionate and practical to address any finding of a substantial lessening of competition (**SLC**). However, in this context, we welcome the CMA's recognition in the Draft Guidance that mitigating remedies will be considered at Phase 1 where all effective remedies are disproportionate.

Proportionality assessment

- 2.3 The current Guidance states that the CMA "will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties" than the costs incurred by other parties. Paragraph 3.16 of the Draft Guidelines goes further, stating that the CMA will generally attribute "considerably" less significance to such costs. While we accept that it is legitimate for the CMA to prioritise costs of third parties, the CMA and other monitoring agencies, we submit that the Final Guidance should clarify that, where those costs are not significant, the costs incurred by the merging parties (including the loss of cost saving efficiencies, even if these do not amount to RCBs) will be an important factor in the CMA's proportionality assessment. The realisation of efficiencies through M&A activity can be an important driver of economic growth and it should be no part of merger control policy to have a chilling effect on such legitimate economic activity.
- 2.4 In addition, in paragraph 3.17 (which remains largely unchanged from the existing Guidance) the CMA states that, with respect to completed mergers, it "will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy". However, divestment remedies impose costs on merging parties irrespective of whether the merger is completed or anticipated. We therefore suggest that this statement clarifies that the CMA will not normally take into account the costs or losses that will result from the separation of activities that have already been integrated in a completed merger, but that other costs will be taken into consideration.

Pro-competitive efficiencies and "relevant customer benefits" (RCBs)

- 2.5 While the Draft Guidance proposes earlier engagement on RCBs and acknowledges their potential relevance, it would benefit from a more pragmatic and transparent framework assessing RCBs. In particular, it should clarify how parties can credibly substantiate such benefits, including the types of evidence the CMA considers persuasive. It would be helpful if the CMA would provide additional illustrative examples of how RCBs and efficiencies have influenced remedy selection or modification in past cases. This will assist merger parties in understanding how to frame and evidence their claims, and would promote consistency and predictability in the CMA's approach.

Divestment remedies

- 2.6 Paragraph 6.20 of the Draft Guidance indicates that the CMA may require parties to add further assets to a remedy that has been agreed or imposed pursuant to UILs, a Final Undertaking or a Final Orders "for example pursuant to a 'wrong pockets' clause". Paragraph 6.27 states that the CMA "may require a 'wrong pockets' clause giving the purchaser the right to additional assets if the initial scope of the remedy is deemed insufficient." This requires further clarification, in our view. Unlike the market investigation regime, the CMA does not have a power to unilaterally amend remedies that it considers to have been ineffective and it is not clear from paragraph 6.27 in what circumstances a remedy may be "deemed insufficient" or the process by which such a decision is made. Moreover, footnote 58 states that a "'wrong pockets' clause is a provision in transaction agreements that ensures assets or liabilities mistakenly received by one party after a transaction are transferred to the correct party", which appears to be inconsistent with the way that such clauses are described in paragraph 6.27.

Behavioural remedies

- 2.7 We welcome the acknowledgement in the Draft Guidance that behavioural remedies will be assessed for effectiveness on their merits. While implicit in the Draft Guidance, we consider that the Final Guidance would benefit from a clear statement that the availability of a feasible structural remedy does not preclude consideration of the effectiveness of an alternative behavioural remedy.
- 2.8 In addition, we consider that the Draft Guidance remains overly cautious in respect of behavioural remedies to address horizontal concerns. The legislation (s.86(4) EA02, read with Schedule 8) specifically provides for behavioural as well as structural remedies and a proportionate approach requires that this be an option (to be chosen rather than prohibiting a merger) if it can remedy or mitigate an SLC. The *Vodafone/Three* case shows how effective - and how beneficial for promoting growth, innovation and investment - behavioural remedies can be.
- 2.9 The Final Guidance should therefore recognise that, in certain horizontal cases, behavioural remedies may offer a proportionate and effective solution. In particular, we consider that the position expressed towards controlling remedies in paragraph 7.12 of the Draft Guidance – i.e., that "they are unlikely to be appropriate other than for a limited duration or unless there is no effective or practical alternative remedy" – and in paragraph 7.37 – i.e. that they are "unlikely to be appropriate unless there is no effective alternative remedy" remains too negative. For instance, in *Macquarie UK Broadcast Ventures / National Grid Wireless Group*, the Competition Commission cleared a merger to monopoly on the basis of long-term controlling remedies that would ensure that around 80% of the very substantial merger-specific efficiencies would be passed on to customers, despite an effective divestment remedy being available. While some of those efficiencies were treated as RCBs, because of gain-share clauses in the parties' agreements with customers (including agreements that were entered into post-merger), there should, in our view, be no difference in treatment between efficiencies that qualify as RCBs because they would be passed on absent any remedies, and efficiencies that are passed on because of the remedies, as the end result is the same. In line with this precedent, we submit that the Final Guidelines should clarify that behavioural remedies to control outcomes may be preferable where the merger will give rise to substantial efficiencies, the remedies ensure that most of those efficiencies are passed on to customers in the form of lower prices (or better quality products at the same prices) than would have existed in the counterfactual without the merger and (as was the case in *Macquarie/NGW*), customers are broadly supportive of that outcome.
- 2.10 Similarly, paragraph 7.11(a) of the Draft Guidance states that enabling remedies "typically do not directly address the SLC at source as, in most cases, they are not a one-time remedy, but are required to remain in place to continue to modify the merger parties' conduct". We disagree with this statement. An enabling remedy such as an access remedy in a vertical merger ensures that competition is not substantially lessened as a result of the merger and does, therefore, directly address the SLC: foreclosure concerns require an ability and incentive to foreclose and a supply remedy removes the remedy-giver's ability to foreclose. The fact that it is not a one-time remedy is irrelevant to that conclusion, in our view.

- 2.11 Finally, we welcome the improved guidance on how to ensure effective monitoring of behavioural remedies, including through the use of monitoring trustees, divestment trustees and independent adjudicators/experts. We note that the European Commission routinely appoints monitoring trustees at phase 1, and that this may be a reason why the Commission has historically been more open to accepting complex remedies, including carve-out and behavioural remedies at phase 1.

Early engagement and process improvements

- 2.12 Merger parties that choose to opt out of the 40WD KPI when formulating a remedy should not be disadvantaged by the CMA failing to progress its investigation in a timely manner. Once the CMA has identified the core remedies issues, it should commit to a clear and reasonable timeframe for addressing them. Opting out of the KPI does not absolve the CMA of its responsibility to provide transparency and predictability around likely timings. Parties need assurance that the process will continue at pace, even where formal KPIs do not apply.

3. CONCLUDING REMARKS

- 3.1 Clifford Chance appreciates the CMA's efforts to update and improve CMA87 and welcomes the positive changes reflected in the Draft Guidance. We encourage the CMA to further refine its approach in the areas identified above, to ensure that the Final Guidance is fully aligned with legislative intent, international best practice, and the needs of businesses and consumers.

Clifford Chance LLP
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