

Updated guidance on ‘sunset clauses’ in market investigation remedies

CMA response to consultation submissions

Introduction

1. As a result of the consultation on updated guidance on the use of ‘sunset clauses’ and the duration of remedies in market investigations, the Competition and Markets Authority (CMA) received six submissions in response, from Clifford Chance LLP, Freshfields Bruckhaus Deringer LLP, the Law Society of Scotland, the Office of Rail Regulation, RWE npower Group, and the Elcena Jeffers Foundation (all available on the [CMA webpage](#)). This paper summarises the CMA’s response to the submissions. The respondents were generally supportive of the CMA’s overall proposals, though a number of these proposed some changes to the text which they said could improve the final guidance. This paper outlines the changes the CMA has made to the updated text of the guidance following responses to the consultation (see Annex A for the revised text highlighting changes following the consultation) and gives its reasons where it has not made changes following respondents’ comments.

Submissions on commitment to consider sunset clauses

2. One respondent suggested giving more prominence to the possibility of defined events being the trigger for a remedy to expire. The CMA has amended the text to include an express reference to event based triggers (see paragraph 5 of Annex A for the updated guidance).
3. A respondent proposed an additional mechanism that would provide for the remedy to expire on the occurrence of a certain event, subject to the CMA or another regulatory body confirming that the event has indeed taken place. However, the CMA observes that the trigger for a sunset clause needs to be clearly defined in the relevant order or undertakings, as this provides legal certainty. Where the event is one that requires a decision-maker to exercise significant judgement as to whether it has in fact occurred, this would lack the necessary legal precision to be the basis of the expiry of a remedy. The statutory review process enables the CMA to ensure that a review process

takes place where appropriate. Where orders or undertakings are time-expired, lapse or are superseded, the CMA will remove those orders or undertakings, notify the parties and issue a notice that the order/undertakings have been removed.¹ Therefore, the CMA has not amended the final text of the guidance to accommodate this suggestion.

4. In addition to the use of long-stop and review dates, it was suggested that the CMA guidance provide a 'sunrise' clause mechanism allowing for the implementation of a remedy, or certain parts of it, to be deferred or made conditional upon a specific event. In response, the CMA notes that where it finds an adverse effect on competition in a market, it has a duty to remedy, mitigate or prevent it and any detrimental effects on customers so far as they have resulted from, or may be expected to result from it.² The remedy must therefore aim to rectify the competition concerns that have been identified rather than potential future concerns that the CMA anticipates could arise if a specific event occurred. The CMA is not taking this suggestion forward, as any event upon which the remedy is contingent can be identified in the commencement clause of an order or undertaking, which gives a date or event for the remedy to take effect. This mechanism provides greater legal certainty than a 'sunrise' clause.
5. Several respondents submitted that the considerations relevant to the duration of a sunset clause should also take account of changes in government policy and regulations relevant to the remedy.³ The CMA highlights that paragraph 9 of the text of the consultation draft stated that 'remedies may need to take account of existing laws or regulations either currently applicable or expected to come into force in the near future.' Nevertheless the CMA agrees that this could be given more prominence and broadened to include government policy as a consideration in setting the duration of a sunset clause. It has therefore amended the guidance accordingly to include reference to prospective changes in the policy and regulatory framework applying to the section (see paragraph 6(c) of Annex A).
6. It was suggested that there may be an argument for including a consideration of the costs involved in running remedies as an additional factor, to be balanced against the benefits derived. The CMA agrees that this is a relevant factor but believes that this comes within the non-exhaustive list of important

¹ Paragraph 3.40 of [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA11\)](#)

² Section 138 of the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013.

³ It was also suggested that the guidance should refer specifically to future changes anticipated in the energy market. The CMA's guidance does not make reference to specific ongoing market investigations as the role of this guidance is to provide a framework for the conduct of market investigations generally.

considerations outlined in paragraph 6 (see Annex A), without the need for it to be expressly included.

Submissions on review of remedies

7. The consultation draft states that ‘the CMA would normally expect to initiate an assessment of whether the remedy remains appropriate within ten years of the remedy coming into force’ (paragraph 8 of Amendment 1 in Appendix 1 to the consultation document).
8. It was suggested that the CMA could make a stronger commitment, at the time when the remedies are imposed, to review the remedies after a certain period or on the occurrence of a given triggering event. In response, the CMA indicates that in deciding whether to conduct a review, the CMA will follow its guidance in [Remedies: Guidance on the CMA’s approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA11\)](#), paragraphs 3.9 to 3.10. Whilst the inquiry group may recommend in its final report (when the remedies are outlined) that the CMA undertake a review after a certain period or on the occurrence of a given event, the decision on whether to conduct a review is taken by the CMA at the relevant point in time, and in accordance with the CMA’s published prioritisation principles. The group’s recommendation would be an important factor to consider alongside others in making the decision whether to review, however the CMA does not think it appropriate or necessary to make a stronger commitment along the lines suggested.
9. Some respondents proposed reducing the long-stop date to a period shorter than ten years (some suggested five years). It was also submitted that the CMA commit to releasing or reviewing transitional measures within two years of implementation. A shorter duration than for other longer term remedies would reflect the fact that transitional measures are designed to deliver improvements in the short term.
10. The CMA concluded that there was no reason to change its approach given that the period of ten years is a long-stop date within which the CMA would expect to have initiated a review of a remedy without a sunset clause or with a sunset clause which substantially exceeds ten years. An earlier review may not be appropriate in all circumstances, and, for example, there may be a benefit in setting an expectation that a particular measure will be in place for a certain amount of time so that players in the market can make a commercial decision taking the remedy into account. The expectation created in the updated guidance complements the CMA’s existing statutory duty to keep

remedies under review,⁴ and gives an indication as to what the CMA anticipates to be an appropriate maximum period for a remedy to be in place without a review. The ten year period is not intended to become the default period for reviews. As noted in the consultation paper, parties may request an earlier review of a particular remedy where there has been a change of circumstances, or the CMA may itself initiate an earlier review. The case for any review is decided on its merits and it is also conceivable that transitional measures might be in place for longer than 2 years as each case will depend on the nature of the market.

11. One respondent requested clarification on the interplay between remedies without sunset clauses and the long-stop date, and would welcome a commitment to periodic CMA-initiated reviews every five years after the initial long-stop date. As explained above, the CMA notes that the long-stop date does not prevent a review from taking place at the request of parties or initiated by the CMA when appropriate, whether before or after the long-stop date. The CMA's duty to review remedies is continuous and applies for as long as a remedy is in existence. We would expect groups reviewing remedies to also recommend when they should next be reviewed, should they decide to keep them in place. Therefore, the CMA did not deem it necessary to amend the final text of the guidance.
12. It was suggested that the updated guidance would benefit from clarification of the wording 'substantially exceeds' at paragraph 8 of the consultation draft (Amendment 1 in Appendix 1), in relation to the expectation that the CMA would normally initiate a review of a remedy where a sunset clause substantially exceeds ten years. The CMA considers that it is not necessary to be more specific about this wording, the purpose of which was to capture the common sense point that it may be more practicable to allow a slightly larger sunset clause to expire, rather than conduct a review which may not materially affect the time that a remedy was in force.
13. One respondent proposed that the CMA give an indication of the types of factors which it would take into account when considering whether a case would fall for review within the long-stop date. The CMA considers that some of the considerations that may be relevant to deciding whether to include a sunset clause, outlined in paragraph 6 of the consultation draft (Amendment 1 in Appendix 1), may also be relevant to determining whether a case should fall for review within a period less than ten years. Therefore the CMA has

⁴ Sections 92 and 162 of the Enterprise Act 2002; sections 88 of the Fair Trading Act 1973 (as preserved in Schedule 24 of the Enterprise Act 2002).

included a footnote stating this (see paragraph 6 of Annex A for the updated text of the guidance).

14. Clarification of the possible involvement of third parties in reviews of remedies was suggested by one respondent. The CMA agrees that this information should be available but believes that it is appropriately addressed in [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA11\)](#) at paragraph 3.2, where it states that reviews may be initiated at the request of parties who have given undertakings or who are subject to orders, or other interested parties.

General comments

15. The CMA was asked to ensure that it considers the needs of all members of the public when amending its guidance. The CMA agrees that this is an important consideration, and has tried to ensure that the updated guidance is clear and accessible to all.
16. The CMA was urged to adopt similar proposals for sunset clauses and remedy reviews in merger investigations. As stated in the consultation paper, the CMA has focused on market investigations primarily because behavioural remedies are used relatively frequently in market investigations, but have only relatively rarely been subject to a sunset clause. By contrast, most remedies in merger investigations are structural and do not impose material ongoing burdens. Further, where behavioural remedies have been introduced in a minority of merger investigations, there have frequently been sunset clauses. There is therefore little need for revision of our merger guidance in relation to these issues. Nonetheless, the CMA is continuously seeking to improve its processes for remedy reviews and understands the urgency in ensuring that measures do not remain in place where they are no longer necessary. Consequently the CMA will consider these issues when it next updates its merger guidance.

Conclusion

17. The new updated guidance, amended as set out above, will take effect from the date upon which the relevant CMA guidance is published and will apply to all market investigation cases leading to remedies from that point, including ongoing market investigations.

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Annex A

Amendments to the Guidelines showing changes following the public consultation

Amendment 1: the following text will replace paragraphs 334 to 341 of the Guidelines

Effectiveness

1. The CMA will assess the extent to which different remedy options are likely to be effective in achieving their aims, including their practicability.
2. The effect of any remedy is always uncertain to some degree. In evaluating the effectiveness of potential remedies, the CMA will consider the risks associated with different remedy options and will tend to favour remedies that have a higher likelihood of achieving their intended effect. Assessing the effectiveness and practicability of a remedy may involve consideration of several dimensions discussed further below.
3. First, a remedy should be capable of effective implementation, monitoring and enforcement. To facilitate this, the operation and implications of the remedy need to be clear to the persons to whom it is directed and also to other interested persons. Other interested persons may include customers, other businesses that may be affected by the remedy, sectoral regulators, and any other body that has responsibility for monitoring compliance. The effectiveness of any remedy may be reduced if elaborate monitoring and compliance programmes are required.⁵ Remedies regulating behaviour generally have the disadvantage of requiring ongoing monitoring of compliance and may also constrain beneficial aspects of competitive rivalry.
4. Secondly, the timescale over which a remedy is likely to have effect will be considered. The CMA will generally look for remedies that prevent an Adverse Effect on Competition (AEC) by extinguishing its causes, or that can otherwise be sustained for as long as the AEC is expected to endure. The CMA will also tend to favour remedies that can be expected to show results within a relatively short time. Some remedy options may have an almost immediate impact, while the effects of others will be delayed. In such instances the CMA may select a remedy package combining both types of measure, taking into account both when each measure would take effect and how long it would

⁵ The CMA will also consider the costs of compliance as part of its assessment of the impact of remedies and their proportionality (see [the Guidelines](#), paragraph 352).

endure. Where an AEC is expected to be short-lived (for example, because a specific future event is expected to bring it to an end) and the timescale for implementation of a particular remedy option would extend significantly into this period, the CMA will consider whether an alternative measure would be more appropriate.

5. When designing remedies the CMA will consider whether to specify a finite duration – for example, by means of a long-stop date in a ‘sunset clause’ – as part of the design of individual measures.⁶ A sunset clause will generally specify when individual measures cease to have effect, whether by reference to a specific date or a clearly defined future event (for example the expiry of an intellectual property right or concession). A measure which is the subject of a sunset clause will cease to have effect on the specific date or defined event specified and will not be enforceable or reviewable beyond that specific date or defined event. Some measures, for example an obligation to implement a divestiture within a specified period of time, take effect when they are completed and therefore a sunset clause may not be necessary for these measures.⁷
6. A number of considerations may be relevant to the CMA’s decision whether to specify a finite duration for a measure and the duration of any such ‘sunset clause’,⁸ including:
 - (a) The length of time over which the AEC is expected to persist. For example – if the CMA considered that an AEC and/or its detrimental effects would not endure beyond a particular date or event, then there would not need to be ongoing remedial action beyond that point, and the CMA may adopt a sunset clause linked to that date or event.
 - (b) The role that the measure is expected to play in tackling the AEC and/or resulting customer detriment. For example, some measures are intended to be a temporary arrangement to deliver improvements in the short term, while other longer-term measures take effect. Such a transitional measure might be suitable for a relatively short sunset clause – for example, of less than five years – which might be linked to the length of time it was

⁶ A sunset clause will generally specify when individual measures cease to have effect, whether by reference to a specific date or a clearly defined future event (for example the expiry of an intellectual property right or concession). While consideration may be given to the individual duration of elements of a remedy package; the CMA may also give consideration to applying a sunset clause across a package of measures.

⁷ Some ancillary measures accompanying divestitures – eg not to reacquire the divestiture package – may themselves involve ongoing obligations on parties, and these ancillary measures may themselves be subject to a sunset clause (see [the Guidelines](#), paragraph 27 of Annex B).

⁸ Some of these considerations may also be relevant to decisions about whether to initiate a review of a remedy.

expected to take for the longer-term measures to take effect.⁹ Other measures may be intended to work as a catalyst to introduce greater competition into a market – for example, by promoting new entry, or removing obstacles to competition – such that, once this change has become established there is no longer a need for ongoing intervention. For such a measure the CMA might consider adopting a sunset clause that might be linked to achievement of the desired change or the timescale within which it expects such a change to occur. Where remedies are intended to create enduring characteristics of how the market operates, the CMA might adopt a relatively long sunset period or not have a sunset period.¹⁰

(c) The extent to which the measure is expected to become obsolete over time. This might sometimes be anticipated if [prospective](#) changes in technology, [the policy and regulatory framework applying to the sector](#), consumer behaviour or other aspects of the competitive environment (for example, the way in which information is provided to consumers) mean that a measure is unlikely to serve its original purpose after a period of time. While the CMA will generally seek to ‘future-proof’ its remedies to prolong their effectiveness, all markets are subject to evolution and some more than others. The CMA might therefore adopt a sunset clause in some cases to reflect this, taking into account the characteristics of the market and remedy concerned.

7. Whether to include a sunset clause and the period used for any sunset date will therefore depend on the circumstances of the case and will be matters for the CMA to decide on a case-by-case basis. The duration of an AEC in the absence of an effective intervention by the CMA cannot always be predicted and there will similarly be some uncertainty about the precise timescale over which remedies will take effect. However, the CMA may nonetheless be able to identify a date (or event) beyond which it considers it would not be necessary to retain a remedy in force and, in these circumstances, the CMA would typically expect to adopt a sunset clause as part of the design of the remedy.

8. In addition to the upfront consideration that the CMA gives to duration in designing its remedies, the CMA is obliged to keep remedies under review¹¹

⁹ For example, in the report on [Veterinary Medicines](#) (April 2003) under the FTA, the package of remedies included an obligation on veterinary surgeons not to charge for writing prescriptions for a period of three years.

¹⁰ For example, in the statutory audit services market investigation, the CMA introduced a requirement for FTSE 350 companies to put their statutory audit engagement out to tender at least every ten years. This type of longer-term remedy is less well-suited for a sunset clause, as it will take at least a decade to fully take effect.

¹¹ A statutory duty under [section 92](#)(1), (2) and (3) and [section 162](#) (1), (2) and (3) of the EA02; sections 88(4) and (5) of the FTA (as preserved in Schedule 24 of the EA02).

and may remove or revise those that are no longer appropriate. Such reviews might take place as a result of parties applying for variation or revocation of remedies on the basis of a change of circumstances.¹² Alternatively, the CMA might identify a change of circumstances following a review conducted on its own initiative. Consistent with the CMA's objective to avoid retaining remedies in force when they are no longer needed, when introducing a remedy without a sunset clause (or if the sunset clause substantially exceeds ten years), the CMA would normally expect to initiate an assessment of whether the remedy remains appropriate within ten years of the remedy coming into force. In some cases, the CMA may recommend consideration of the continued need for particular measures within a shorter timescale and/or specify the types of future circumstances which might be expected to trigger such a review – for example significant new entry.¹³

9. Thirdly, remedies may need to take account of existing laws or regulations either currently applicable or expected to come into force in the near future. Such other legislation may include both UK and EU legislation and could cover any aspect, for example competition law, health and safety, or data protection. Where there is a tension between existing laws or regulations and the actions that the CMA considers necessary to achieve an effective remedy, the CMA may make recommendations to the body responsible for the laws or regulations in question. Remedies will also need to take into account the extent to which the prohibitions on anti-competitive agreements and abuses of market power are applicable to the market concerned and what impact, if any, these have on the need and ability to impose remedies (see paragraph 17).¹⁴
10. Fourthly, where more than one measure is being introduced as part of a remedy package, the CMA will consider the way in which the measures are expected to interact with each other. As a general rule, measures that have a shared aim of introducing or strengthening competition within a market will tend to be mutually reinforcing. For example, where market-opening

¹² For example, in 2012, the CC decided to remove the Domestic Electrical Goods Order (the DEGs Order) (and certain associated undertakings). The DEGs Order, which was introduced in 1998, prevented suppliers of goods such as televisions and washing machines from recommending resale prices or making agreements that restricted the resale prices of wholesalers and retailers, and from restricting or withholding supply from particular retailers. In deciding to lift the DEGs Order, the CC found that a number of changes since the Order was introduced had significantly increased competition in the market and removed the need for the safeguards provided by the Order. The CC also considered that the enactment of the Competition Act 1998 provided an effective mechanism to address attempts to fix prices or restrict supply unfairly. A [memorandum of understanding](#) set out how the OFT and CC approached their respective roles on reviews of undertakings and orders.

¹³ For example, in the 2002 report on the [supply of banking services by clearing banks to small and medium-sized enterprises](#) under the FTA, the CC recommended that, three years after implementation of the remedies, the OFT should review whether further measures were needed or, on the other hand, in the light of market developments, whether any or all of the measures in the CC's package of remedies could be modified or discontinued. Following a review by the OFT, the CC decided in 2007 to release the UK's four largest clearing banks from most of the Transitional Undertakings given by them in 2002.

¹⁴ Of [the Guidelines](#).

measures are being introduced that increase customer choice by facilitating entry or removing barriers to switching, these may be accompanied by information remedies that help customers choose the best product available to them.¹⁵

Amendment 2: The following text will replace paragraph 45 of Annex B of the Guidelines

Duration [of behavioural remedies]

1. As behavioural remedies are designed to have ongoing effects on business conduct throughout the period they are in force, the duration of these measures is a material consideration. The CMA may specify a finite duration, for example, if measures are designed to have a transitional effect or are otherwise expected to become obsolete within a specified period. In such circumstances, the CMA might consider setting a finite duration or ‘sunset clause’ beyond which the measures will definitely not apply. The period the CMA adopts for the sunset clause date will depend on the circumstances of the case. Where no sunset date or event has been set, or if the period is for substantially longer than ten years, the CMA would normally expect to assess the continued need for the remedy within ten years. Relevant parties remain able to apply for variation or revocation of the remedies on the basis of a change of circumstances rather than awaiting an own-initiative review or the expiry of a sunset clause.¹⁶

¹⁵ For example, the packages of remedies in the market investigations into [home credit](#) (November 2006), [domestic bulk liquefied petroleum gas](#) (June 2006) and [payment protection insurance](#) (January 2009) each included a combination of market-opening measures and information remedies.

¹⁶ [Section 162 of the EA02](#). For example, in 2007, acting on the basis of advice from the OFT, the CC decided to release the UK’s four largest clearing banks from most of the Transitional Undertakings given by them in 2002 following the investigation into [supply of banking services by clearing banks to small and medium-sized enterprises](#) under the FTA.