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23.07.15

**Re: CMA Updated guidance on ‘sunset clauses’ in market investigation remedies**

Dear Alice,

Thank you for the opportunity to respond to the Consultation document dated 27<sup>th</sup> May 2015 entitled Updated Guidance on ‘sunset clauses’ in market investigation remedies. We have outlined our response, and specific responses to the questions posed below.

We support the idea that the CMA should commit to reviewing the duration of market investigation remedies on a regular and more consistent basis and that part of such a process should include consideration as to whether to specify a finite duration for remedies by means of a sunset clause. We therefore agree with the CMA’s statement and objective not to retain remedies in force that it finds are no longer needed.

We also believe the criteria by which the CMA will take into account in determining the relevant duration of a remedy and whether to invoke a sunset clause namely:-

- length of time the AEC is expected to persist,
- function the measure is expected to play in tackling the AEC and,
- extent to which the measure is expected to become obsolete,

which all seem sensible. However, we would also expect the CMA to anticipate future changes in the energy market giving particular consideration to energy policy and circumstances prevailing at the time any measure is implemented. Again the “case by case basis” approach the CMA has said it will adopt would enable such a process.

We do believe however that ten years is too long a time to leave a market remedy in place without review and therefore suggest that five years strikes a good balance and is more appropriate. Such a period would give sufficient time for the remedy to embed, whilst having a certain and robust process in place and long enough to make an assessment that would ensure that the market remedy is still appropriate and functioning effectively to tackle customer detriment and the adverse effect on competition it was designed to alleviate.

Please find below our responses to the five questions asked in the consultation paper.

Kind regards,

Chris Harris

Regulation Director, RWE npower Group

Cc Paul Cooper, Project Lead, CMA market investigation

**Q1. In your view, does the updated text of the Guidelines in Appendix 1 give effect to the CMA's intentions as described above?**

We believe that the updated text of the guidelines does give effect to the CMA's intentions.

**Q2. Is the updated text of the Guidelines sufficiently clear? If there are particular aspects of the amended text where you feel greater clarity is necessary, please be specific about the aspects concerned and the changes that you would propose to improve them.**

The updated text of the guidelines is sufficiently clear, however, we would propose the following:-

- Amendment 1 Paragraph 3 – we suggest incorporation of the word “precise” so that the second sentence reads *“to facilitate this, the operation and implications of the remedy need to be clear and **precise....”***
- Amendment 1 of Paragraph 8 - that the wording around initiating a review of market remedies should be more definitive.

For example: current proposed text is *“the CMA would normally expect to initiate an assessment of whether the remedy remains appropriate within ten years of the remedy coming into force.”*

We feel that this could be amended to read *“the CMA **will** initiate an assessment of whether the remedy remains appropriate within x years of the remedy coming into force.”*

The wording should capture that the CMA is committing to conduct the review within a given time period, unless there is good reason not to. As outlined in our response to question 4, we feel that ten years is too long a time period to wait to initiate a review.

**Q3. Do the factors set out in paragraph 6 (of Amendment 1 to Appendix 1) identify the key considerations the CMA should have regard to when considering the duration of remedies and the use of sunset clauses? Are there other factors to which the CMA should have regard?**

Whilst we agree with the considerations identified by the CMA we also believe that further consideration should be given to the prospective evolution of the market through regulatory change or policy issues. Whilst this is covered to an extent in 6(c) it is not entirely comprehensive and does not for instance reflect policy or other regulatory or government changes explicitly. We believe it sensible therefore to include it separately by way of an additional paragraph 6(d) to fully capture this point along the lines we refer to above. For instance Amendment 1 Paragraph 6 (d) might include – *“whether future changes are anticipated in the energy market giving particular consideration to energy policy, government and regulatory intervention and circumstances prevailing at the time any measure is implemented”*.

**Q4. Is the CMA's ability to achieve this objective enhanced by setting an expectation when introducing new remedies without a sunset clause (or with a long sunset clause), that the CMA will initiate a review of the continuing need for such remedies within ten years? Do you consider that ten years is a suitable long-stop date for a review, bearing in mind that if the parties to a remedy identify a change of circumstance earlier they can request a review?**

Whilst we welcome more certainty that market investigation remedies will be reviewed by the CMA and appreciate that having a time limit for review will allow the CMA to allocate resource to other activity, as we have indicated above we do believe that ten years may be too long to wait for a review.

We suggest instead that the time limit for review be reduced to five years, as this strikes the right balance between allowing sufficient time for the remedy to embed and take effect whilst measuring its effectiveness and appropriateness after a reasonable period of time within which any changes in the market may have arisen. Ten years is too long to presume that a remedy is appropriate to tackle competition in the market effectively, whereas

five years is a sufficient timescale within which to both implement the change and measure its effectiveness in removing any AEC, allowing it to effectively enhance competition.

We also feel that the responsibility of providing evidence for the appropriateness of a remedy to remain in place, during this review, should lie with the CMA.

**Q5. Do you have any other comments about the proposed amendments to the Guidelines?**

A final comment we would wish to make in respect of Amendment 2 is that in addition to the 10 year period being reduced to 5 years, paragraph 1 of Amendment 2, (whilst implicit that the CMA could if it wished carry out an earlier review), should make it explicit that where necessary the CMA may decide to recommend an earlier review in any event where in its discretion certain specified circumstances warrant it.