

**RESPONSE TO THE CMA'S UPDATED GUIDANCE ON 'SUNSET
CLAUSES' IN MARKET INVESTIGATION REMEDIES
- CONSULTATION (27 MAY 2015)**

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1. INTRODUCTION AND SUMMARY

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on the Competition and Markets Authority's (**CMA**) public consultation (the **Consultation**): "*Updated guidance on 'sunset clauses' in market investigation remedies*" (the **Guidance**), 27 May 2015.¹

1.2 Our comments are based on our experience of representing clients in market investigations conducted by the CMA (and previously, the Competition Commission) since the Enterprise Act 2002 and Enterprise and Regulatory Reform Act 2013 came into force, together with a significant number of sector-wide inquiries conducted by other competition authorities worldwide. We rely on this breadth of experience to provide these comments on the proper and effective conduct of market investigation references (**MIRs**).

1.3 We have confined our comments to those areas which we feel are most significant in terms of providing clarity and certainty for companies that might be subject to remedies following an MIR. The comments in this response are those of Freshfields Bruckhaus Deringer LLP and do not necessarily represent the views of any of our clients.

1.4 We welcome the CMA's review of its guidance on sunset clauses and the duration of remedies in MIRs to reflect current best practice. In particular, we support the CMA's efforts to provide:

- (a) a clear commitment that it will consider whether to specify a finite duration for remedies (e.g. by sunset clauses), as part of the design of individual measures; and
- (b) a clear statement of its objectives not to retain remedies in force that it considers are no longer necessary.²

1.5 We have divided our more detailed comments below between the benefits of an increased use of sunset clauses and the CMA's draft Guidance.

1.6 We would be pleased to discuss any of the points made in this response further if the CMA would find it helpful to do so.

¹ See current guidance in *Guidelines for Market Investigations: Their role, procedures, assessment and remedies* (CC3 Revised), paras. 334-341 and Annex B, para. 45.

² *The Consultation*, para. 1.11.

2. THE BENEFITS OF SUNSET CLAUSES

2.1 We welcome the CMA's focus on the duration of remedies commitments in the context of MIRs. We consider that limiting remedies' lifespans is critical in ensuring a well-functioning and competitive market post MIRs. Remedies of limited duration and/or a guaranteed review within a long-stop date:

- (a) take into account the dynamic nature of modern markets where developments frequently overtake MIR remedies more quickly than was the case in the early MIRs. The remedies are therefore less likely to stifle innovation or create market distortions in the medium and longer term;
- (b) result in efficiency gains stemming from upfront, rather than mid-term analysis as to whether remedies should be limited by a finite duration;
- (c) relieve the parties involved (including the CMA) of an unnecessary administrative burden – both in terms of time and cost – when remedies are retained unnecessarily;
- (d) give the parties involved (including the CMA) increased certainty when planning future projects, particularly in terms of human resources and budgets; and
- (e) ensure that the onus of review is shared evenly between the parties: the CMA must review the remedies arrangement within a given period of time while affected parties may make a case to the CMA that there has been a change of circumstances necessitating an earlier review of a particular remedy.³

2.2 We consider that the CMA's review of the Guidance is timely given that the CMA is charged with the entire remedy lifecycle for MIRs. Furthermore, the review will give affected parties in the two current MIRs (Energy and Retail Banking) clarity as regards the CMA's policy on remedy duration and review. We therefore encourage the CMA to publish the final version of the Guidance before September 2015, when the Provisional Decision on Remedies for the Energy MIR is due for publication.

2.3 We note that the CMA is not currently consulting on revised guidance for merger investigations involving behaviour remedies.⁴ We welcome the CMA's intention to "*implement an integrated approach to the review of merger and market remedies*"⁵ and so urge the CMA to review this guidance in due course. Such a review would ensure that the guidance is consistent with the outcomes of the Consultation and the CMA's overall review of merger and market remedies.⁶

³ *The Consultation*, para. 1.11.

⁴ *The Consultation*, para. 1.10.

⁵ *The Consultation*, para. 1.8.

⁶ *The Consultation*, para. 1.7.

3. THE AMENDED GUIDANCE

3.1 Our comments on the draft Guidance focus on the amended text.⁷

Commitment to consider remedy duration

3.2 We support the CMA's commitment to consider whether a remedy should have a finite duration by means of a long-stop date in a sunset clause⁸. We consider that this commitment makes it clear from the outset, that:

- (a) the CMA will not retain remedies in force unnecessarily; and
- (b) the onus of initiating a remedies review will fall evenly on the affected parties and the CMA.

Timescales for review of remedies

3.3 The CMA states in the Consultation that it wishes to “avoid retaining remedies in force when they are no longer needed”.⁹ Driven primarily by technological developments, markets are evolving more quickly than ever before. These developments have the potential to render remedies obsolete more rapidly than was the case in previous MIRs. Consequently:

- (a) *transitional measures*: we support the CMA's recognition that some measures are designed to deliver improvements in the short term¹⁰. However, whilst recognising that timescales will depend on the circumstances of the case, we believe that the Guidance should make it clear that such “transitional measures” will be of a defined shorter duration than other longer term remedies. We suggest that the CMA commits to releasing or reviewing transitional measures within no longer than two years following implementation¹¹;
- (b) *duration of other behavioural remedies*: we consider that, as a general principle, remedies should have either a long-stop date or date of first review no longer than five years after implementation, other than in exceptional circumstances. Where behavioural remedies are, in principle, still warranted after five years, their design or implementation may no longer be having the desired policy effects, or may even be contrary to original intentions, due in

⁷ See paragraphs 5-8 in *The Consultation*, Appendix 1, Amendment 1 and the text from “or are otherwise expected to become...” in Amendment 2. We note that in Amendment 1 paragraphs 1-4 and 9-10 remain unchanged from the CC3 Revised wording, bar replacing references to the OFT with those to the CMA. In Amendment 2, the first sentence remains identical to the CC3 Revised wording.

⁸ *The Consultation*, Appendix 1, Amendment 1, para. 5.

⁹ *The Consultation*, para. 1.1 and Appendix 1, Amendment 1, para. 8.

¹⁰ *The Consultation*, Appendix 1, Amendment 1, para. 6(b).

¹¹ We note, for example, that certain of the Transitional Undertakings introduced in 2002 following the CC's report on the supply of banking services by clearing banks to small and medium-sized enterprises are still in force.

part to changing market conditions. A review at five years would ensure that all remedies remain fit for purpose. We therefore propose the following wording:

*“...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 that sunset clause substantially exceeds ~~ten~~ five years), the CMA would normally expect to initiate an assessment of whether the remedy remains appropriate within ~~ten~~ five years of the remedy coming into force...”*¹²

3.4 This modification should also be reflected in Amendment 2 as follows:

*“...Where no sunset date has been set, or if the period is for substantially longer than ~~ten~~ five years, the CMA would normally expect to assess the continued need for the remedy within ~~ten~~ five years....”*¹³

Review of remedies without sunset clauses

3.5 The interplay between remedies without sunset clauses and the long-stop date could be clarified further. If the CMA initiated a review of a remedy without a sunset clause within the long-stop date, it is unclear from the amended Guidance when the next CMA-initiated review would occur if that remedy were retained. We recognise that the CMA’s resources are limited and that it must follow its prioritisation principles. Nonetheless, we would welcome a commitment to periodic CMA-initiated reviews every 5 years after the initial long-stop date. Without this measure, there may be a category of MIR remedies in relation to which the CMA risks undermining its commitment not to retain remedies longer than required.

Further clarifications

3.6 In addition to the points we have raised above, we would welcome further guidance on:¹⁴

- (a) *measures becoming obsolete over time*: we welcome the CMA’s recognition that measures may become obsolete due to changes in technology, consumer behaviour or other changes in the competitive environment¹⁵. However, we suggest that the Guidance should also, in paragraph 6(c) (considerations relevant to the duration of a sunset clause), take account of changes in regulation that might supersede or conflict with a remedy, and therefore initiate a review (we note that the CMA recognises elsewhere in the Guidance

¹² *The Consultation*, Appendix 1, Amendment 1, para. 8.

¹³ *The Consultation*, Appendix 1, Amendment 2, para. 1.

¹⁴ We assume that the process set out in *Remedies: Guidance on the CMA’s approach to the variation and termination of merger, monopoly and market undertakings and orders* CMA 11 (January 2014) will apply to the reviews discussed in the Consultation.

¹⁵ *The Consultation*, Appendix 1, Amendment 1, para. 6(c).

that remedies need to take account of existing and future laws and regulations)¹⁶;

- (b) *the wording “substantially exceeds”*:¹⁷ the period by which the sunset clause would need to exceed the long-stop date is unclear. Under the current wording, affected parties would be uncertain when a CMA-initiative review was due; and
- (c) *the type of cases which would normally be reviewed within the long-stop date*: we would expect the CMA to 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.

3.7 Without this additional guidance, we consider that: (i) the onus of prompting a sunset clause review would be disproportionately borne by the parties affected by the remedies;¹⁸ and (ii) the remedies may continue in force longer than necessary.

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¹⁶ *The Consultation*, Appendix 1, Amendment 1, para. 9.

¹⁷ *The Consultation*, para. 1.1 and Appendix 1, Amendment 1, para. 8.

¹⁸ See *The Consultation*, footnote 16 for statutory provisions.