

**RESPONSE OF CLIFFORD CHANCE LLP TO THE CONSULTATION ON UPDATED GUIDANCE  
ON "SUNSET CLAUSES" IN MARKET INVESTIGATION REMEDIES**

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

- 1.1 We strongly support the CMA's proposal to improve the efficiency of its remedies through better design of remedy duration and more timely reviews. Sunset clauses mitigate the risk that remedies remain in place long after the original AEC has expired<sup>1</sup> and the risk that the remedies themselves have market-distorting effects that operate in favour of incumbent market players (who may not be expected to request their variation). They also avoid unnecessary and costly review processes.
- 1.2 We therefore favour a policy that allows for maximum flexibility in the design of such sunset clauses, and guidance that goes further in describing how that flexibility might be used. There are two areas in particular in which the guidance might allow for, or describe, a more flexible and innovative approach to determining duration of remedies.

**Event based triggers**

- 1.3 The draft guidance does refer to the possibility of defined events being the trigger for a remedy to expire (in footnote 12), or for a review of the remedy (paragraph 8). However, the possibility could be given more prominence – for instance, it could be expressly referred to in paragraph 5 – and with more examples given of how this mechanism might operate. For instance, in addition to the examples described in footnote 12 (expiry of an IP right or concession), suitably clear and objective triggering events might be defined by reference to a measure of market concentration, switching levels or individual market share (e.g. prepared by a recognised third-party report or index).
- 1.4 In addition, we consider there to be scope for a mechanism that sits between a true sunset clause (in which the remedy falls away automatically when the trigger event occurs) and a clause providing for a full review upon the occurrence of a certain event (as described in paragraph 8 of the draft guidance). Such a mechanism 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. This would:
- 1.4.1 allow more subjective trigger events to be used than would be possible under a sunset clause, such as the introduction of new legislation or regulation with certain features, new market entry taking place, or where market concentration or individual market shares fall below certain defined levels (the latter would

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<sup>1</sup> For example, in the review of the Domestic Electrical Goods (DEG) Order and associated undertakings, the entire review took some 15 months from the date on which the OFT launched the review in November 2010 to the date on which the order was revoked in February 2012. The OFT's report noted a number of material changes in circumstances and it is clear from the report that many of the relevant changes had been in place since at least 2007 (such as the decline of video cassette technology and changes to audio payback technology) and in some cases much earlier (e.g. evidence from the Commission's 2003 report on Extended Warranties that consumers shop around for DEGs, and implementation in 2000 of the Competition Act 1998 and the EU vertical agreements block exemption).

be useful where there are no independent third party statistics that can be relied on, but the relevant information could be gathered periodically by the CMA from market participants). Such a provision might, for example, have allowed for a quicker review and revocation of certain aspects of the Northern Ireland Personal Current Account Banking Market Investigation Order 2008, following the introduction of the EU Payment Services Directive and the Consumer Credit Directive;

- 1.4.2 provide greater market certainty regarding the likely duration of the remedy, and better incentives for market participants to alert the CMA to new circumstances that would trigger a review;
- 1.4.3 minimise the risk that distorting remedies remain in place because they favour incumbents (who will therefore not request their review). In addition, if there is a risk that a given remedy might have a distorting effect on competition, the CMA might define appropriate trigger events based on possible indicators of such adverse effects;
- 1.4.4 allow for a shorter and more efficient review process, focused on whether the relevant trigger event is satisfied; and
- 1.4.5 allow for determination of the trigger event to be made by other regulatory bodies who may be better placed to make the relevant assessment, within parameters defined by the CMA. We recognise that there are limits to the extent to which the CMA can delegate its statutory powers, but consider that these should not, for example, prevent the CMA from conferring on a separate body the power to determine whether a particular triggering event, of the type described above, has arisen, or to arbitrate on disputes relating to interpretation of the provisions of the relevant order or undertaking.

### **"Sunrise" clauses**

- 1.5 In addition to the use of long-stop and review dates, the guidance might provide for mechanisms to allow implementation of a remedy, or certain aspects of it, to be deferred and made conditional on a certain triggering event, or an event that meets certain conditions.
- 1.6 A contingent implementation of remedies may be particularly useful if imminent market changes are anticipated, but are not certain, or if their likely impact is difficult to assess. For example, in the Movies on Pay-TV inquiry, it was fortunate that substantial new market entry took place before the date of the Commission's final report – but what if it had happened shortly after remedies had been finalised and imposed? Clearly, affected parties could have applied for variation or cancellation of the remedies, but in those circumstances it would have been very difficult to assess whether the market entry would have happened absent the imposition of remedies (and the natural inclination of the CMA will be to conclude that its remedies have had a positive impact).

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.

2.1 As noted above, we favour increased use of the possibility to specify the circumstances in which the CMA expects to initiate a review of the appropriateness of a remedy in the future. However, paragraph 8 of the updated text retains references to the CMA "recommending" a review within a certain period, or specifying the circumstances which "might be expected" to trigger a review. That made sense when it was the Competition Commission recommending action to be taken by the Office of Fair Trading, but makes less sense in the context of the CMA recommending action to its future self. We see nothing in the Enterprise Act that would prevent the CMA from making a stronger commitment, at the time when remedies are imposed, that a review will be carried out after a certain period or on the occurrence of a given triggering event. For the reasons set out in 1.4 above, there would be a number of advantages to offering, from the outset, a stronger commitment to review the remedy in certain, defined circumstances.

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?

3.1 Yes, subject to our comments above in response to Question 1.

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?

4.1 We have some reservations that the proposed maximum 10 year period for a review may (i) become the default period for reviews; and (ii) be too long. In particular, the CMA should be prepared to commit to carrying out a review within a shorter period in fast-moving, innovative sectors, and to make more use of triggering events, as described above.

4.2 While it is true that parties can request an earlier review if they identify a change of circumstance, relying on market participants to do so, without specifying trigger events in which a review will take place, has not in the past been a fully effective way of ensuring the obsolete and potentially market-distorting remedies are removed in a timely manner.

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

5.1 We assume that the intention is for the revised guidance to apply upon publication, i.e. to current and ongoing market investigations, but would be grateful if the CMA would confirm this when publishing the revised guidance.

**Clifford Chance LLP**  
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