

Updated guidance on 'sunset clauses' in market investigation remedies

Consultation document

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1. About the consultation

Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting on updated guidance on the use of 'sunset clauses' and the duration of remedies in market investigations. A sunset clause is a clause specifying a date or event beyond which the measures will no longer apply. Such a clause may be used to specify a finite duration for individual measures enacted by the CMA.
- 1.2 The purpose of this updated guidance is to set out the CMA's approach to sunset clauses and to reviewing the continuing appropriateness of remedies in market investigations.

Scope of this consultation

- 1.3 The scope of this consultation covers the guidance on the use of sunset clauses issued in [Guidelines for market investigations: Their role, procedures, assessment and remedies](#) (CC3 (revised) – the Guidelines) in paragraphs 334 to 341, and paragraph 45 of Annex B to that document. Our proposed revisions to these sections are set out in Appendix 1.
- 1.4 Updating this guidance will be implemented by updating [Market Studies and Market Investigations: Supplemental guidance on the CMA's approach \(CMA3\)](#) (the Supplemental Guidance). This document supplements existing guidance on market investigations as set out in the Guidelines and should be read in conjunction with that guidance. To the extent that any conflict arises between the content of these two guidance documents, the content of the Supplemental Guidance will prevail.

Background

Context

- 1.5 The CMA is a non-ministerial government department, which took on its powers on 1 April 2014. It is a unified competition and consumer authority which took over a number of the functions formerly performed by the Office of Fair Trading (OFT) and the Competition Commission (CC). The CMA works to promote competition for the benefit of consumers, both within and outside the UK, it aims to make markets work well for consumers, businesses and the economy.
- 1.6 Prior to 1 April 2014, responsibility for the various stages of remedies development, implementation, monitoring and enforcement in market

investigations was split between the OFT and the CC. As a new single authority, the CMA is now responsible for the entire 'remedies lifecycle' and has decided to initiate a programme of work to capitalise on the potential benefits arising from institutional reform in this area of activity.¹

- 1.7 This has a number of strands. Firstly, the CMA intends over the coming years to take stock of the current suite of merger and market remedies, in order to identify and remove those remedies that it considers are no longer needed. The CMA inherited 37 sets of market investigation remedies from its predecessor bodies – while around half of these are less than ten years old and/or have been recently reviewed, others have been in place for significantly more than a decade, sometimes without formal review.² Removing or reforming those existing remedies for which the need has been superseded by market and other developments, will enable the CMA to focus monitoring and enforcement resources on those remedies for which there is still a need.³ It also helps to ensure that measures are not kept in place which give rise to unnecessary burdens on business or which, in view of changed circumstances, may now risk stifling innovation or creating market distortions.
- 1.8 Secondly, the CMA is seeking to implement an integrated approach to the review of merger and market remedies. To this end it has examined the processes and policies supporting the monitoring, evaluation and review of remedies and has made some changes, for example, the creation of a Remedies Monitoring Team responsible for all aspects of monitoring and enforcement of merger and market remedies.
- 1.9 Thirdly – and the subject of this consultation – the CMA is seeking to develop its guidance on the use of sunset clauses and the duration of remedies in market investigations. The CMA is already able to impose time-limited remedies (and has done so in some past cases, particularly in relation to merger remedies), and the duration of a remedy is an important part of remedy design.⁴ (Through this consultation, the CMA is seeking to commit more clearly to considering the use of sunset clauses and reviewing the ongoing need for remedies, with a view to ensuring that remedies do not remain in force where they are no longer necessary to achieve the purposes for which they were imposed).

¹ See the [CMA annual plan 2015/16](#), paragraphs 4.12 and 4.17

² A similar pattern has arisen in relation to merger remedies in relation to which, in March 2015, the CMA initiated a review of non-reacquisition clauses over 70 structural merger remedies.

³ This emphasis on reviewing regulatory measures is consistent with recent legislation that will impose a duty on ministers to review new regulatory provisions in secondary legislation: sections 28 to 32 (not yet in force) of the Small Business, Enterprise and Employment Act 2015.

⁴ [The Guidelines](#), paragraph 339.

1.10 While issues of remedy duration can arise in both merger and market investigations, the CMA has focused this consultation on the treatment of these issues in its market investigation guidance. This is primarily because behavioural remedies are used relatively frequently in market investigations, but have only relatively rarely been subject to a sunset clause. Behavioural remedies typically impose ongoing obligations on firms and hence require the CMA to actively monitor them and to enforce them where necessary. By contrast, most remedies in merger investigations are structural – eg a divestiture – and do not impose material ongoing burdens.⁵ On the minority of recent merger cases in which behavioural remedies have been introduced, there have frequently been sunset clauses, as one of the main reasons for choosing a behavioural remedy in a merger investigation is an expectation that a substantial lessening of competition will be time limited. Consequently there is little need for revision of our merger guidance in relation to these issues. Furthermore, by focusing this consultation on updates to the market investigation guidance, the CMA seeks to obtain responses that engage with the particular circumstances and requirements of remedies in market investigations.

Key changes proposed to guidance

- 1.11 The CMA has identified two ways in which existing guidance in market investigations could be varied to consider the appropriate duration of remedies in every case and to ensure that remedies are kept in place only when they continue to be necessary. Accordingly, the CMA proposes to amend its guidance to introduce:
- (a) a commitment that when designing new remedies the CMA will consider whether to specify a finite duration for remedies – for example, by means of a long-stop date in a sunset clause – as part of the design of individual measures; and
 - (b) a clear statement of the CMA’s objective not to retain remedies in force that it finds are no longer needed. To this end, when introducing a new 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 a remedy remains appropriate within no more than ten years of the remedy coming into force. This is in addition to the process of taking stock of the current suite of remedies (see paragraph

⁵ Where structural remedies contain ancillary measures that do impose ongoing obligations, such as a prohibition on re-acquiring a divested business, the CMA’s current merger and markets guidance already anticipates introducing a sunset clause, typically of ten years. This has not always been the position, which explains the large number of historic merger remedies still in force, see footnote 2.

1.7) and does not affect the ability of affected parties to make a case to the CMA that there has been a change of circumstances necessitating an earlier review of a particular remedy.⁶

Commitment to consider sunset clauses in the design of all new market remedies

- 1.12 The current CMA guidance for market investigations, contained in the Guidelines, provides some guidance on the use of sunset clauses, but makes clear that generally the CMA will rely on the ability to review the ongoing need for remedies after the event, whether on its own initiative or following a party's application for variation or revocation of remedies on the basis of a change of circumstances.⁷
- 1.13 The CMA proposes to amend the Guidelines to remove the presumption that it will rely primarily on its ability to conduct future reviews to ensure that remedies are not kept in place longer than necessary, and to state clearly that it will consider whether to include a sunset clause when designing new remedies in market investigations (see paragraph 5 of Amendment 1 in Appendix 1).
- 1.14 The proposed amendment then includes examples of the considerations that may be relevant to the CMA's decision on duration and introduction of sunset clauses (paragraph 6 of Amendment 1 in Appendix 1). The current Guidelines already identify the length of time that an Adverse Effect on Competition (AEC) is expected to persist as being an important consideration in relation to decisions about the duration of remedies – if an AEC or the resulting customer detriment is expected to be relatively short-lived, then this may increase the rationale for including a sunset clause on any remedy aimed at addressing that AEC. The proposed amendment includes two further factors that may also be relevant to this assessment, namely the role that a particular measure is expected to play in tackling the AEC and/or resulting customer detriment (eg whether the remedy is intended to play a 'long-term' role in the operation of the market, or have a catalytic or transitional effect) and the extent to which the measure is expected to become obsolete over time. This amendment to the Guidelines therefore aims to set out the approach the CMA will take to considering the appropriate duration of remedies and approach to introducing sunset clauses, where this is justified by the circumstances of a

⁶ The CMA has a statutory duty to keep remedies under review and, from time to time, must consider whether, by reason of a change of circumstances remedies are no longer appropriate and need to be varied, superseded, released or revoked. See [section 92\(1\), \(2\) and \(3\)](#), and [section 162 \(1\), \(2\) and \(3\)](#) of the Enterprise Act 2002 (EA02); sections 88(4) and (5) of the Fair Trading Act 1973 (FTA) (as preserved in Schedule 24 of the EA02). See also [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders](#) (CMA11).

⁷ [The Guidelines](#), paragraph 339.

particular case, and to set out a richer analysis of the factors that could influence this decision and the length of any sunset clause.

- 1.15 Given the diversity of markets and of the range of remedial action that could be taken following a market investigation, decisions on whether to include a sunset clause and the length of any such clause will be made on a case-by-case basis and will depend on the circumstances of the case (paragraph 7 of Amendment 1 in Appendix 1).

Commitment to proactive monitoring and review of market remedies

- 1.16 The CMA's objective is not to retain remedies in force when they are no longer needed. A significant number of the market remedies that were previously introduced have remained in place for many years, sometimes without formal review (see paragraph 1.7). While it will take some time to review the current stock of remedies, the CMA wishes to ensure that future remedies do not stay in place for long periods without review.
- 1.17 Decisions on when to review the continuing need for remedies will be taken by the CMA having regard to all relevant factors, including its general prioritisation policy concerning allocation of its resources.⁸ However, one particular factor it will expect to take into account in such cases is the importance of ensuring that, as far as reasonably practicable, remedies are not retained for longer than is necessary to achieve their purpose; in particular it expects to review remedies that are not subject to sunset clauses sufficiently regularly to pursue this goal. To this end, the CMA proposes a further amendment to the Guidelines to set out its approach in this regard and the fact that it would normally expect to initiate a review of whether a remedy remains appropriate within no more than ten years of the remedy coming into force (see paragraph 8 of Amendment 1 in Appendix 1, and paragraph 1 of Amendment 2 in Appendix 1). This policy will apply when the CMA introduces a new remedy without a sunset clause, or if the sunset clause substantially exceeds ten years.⁹
- 1.18 While the precise timing of any individual review will be determined by the circumstances of a particular case – and some reviews may take place significantly sooner than ten years – the CMA considers that setting an expectation that it would initiate a review within no more than ten years of a new remedy coming into force, strikes an appropriate balance between the

⁸ See the [CMA Prioritisation Principles](#).

⁹ This is notwithstanding the CMA's duty to keep remedies under review (see footnote 5), and the CMA may therefore conduct an earlier review if it considers it appropriate to do so, either in response to a request or on its own initiative.

resources associated with conducting such reviews and the risk of retaining remedies in force when they are no longer needed.

- 1.19 It remains open to the relevant parties to apply for variation or revocation of the remedies on the basis of a change of circumstances rather than awaiting the CMA's own-initiative review.
- 1.20 The CMA will keep any revised policy or approach under review, and may amend or adjust it in future in the light of its further experience of using sunset clauses or reviewing remedies.

Consultation process

- 1.21 We are publishing this consultation on the CMA webpages and sending it to a range of interested parties to invite comments.¹⁰ We would welcome your comments on the content of the updated draft Guidance and the questions raised in this document.

How to respond

- 1.22 We are seeking interested parties' views on the updated draft Guidance in Appendix 1 and the questions set out in Section 2 of this document. Please respond to as many of the questions as you are able to and, where relevant, please support your answers with any evidence or examples you may have.
- 1.23 When responding to this consultation please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 1.24 In pursuance of its policy of openness and transparency, the CMA will publish non-confidential versions of responses on the CMA's webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, it would be helpful if you could also provide a non-confidential version for publication on the CMA's webpages which omits that material and which explains why you regard it as sensitive at the same time.

¹⁰ In accordance with [section 171\(9\)](#) of the EA02.

Duration

- 1.25 The consultation will run for eight weeks, from Wednesday 27 May to Thursday 23 July 2015. Responses should be submitted by post or email, by no later than **5pm on Thursday 23 July 2015** and should be sent to.

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Compliance with the government consultation principles

- 1.26 In consulting, the CMA has taken into account the government consultation principles, which sets out the principles that government departments and other public bodies should adopt when consulting with stakeholders. Full details can be found on GOV.UK.

Data use statement for responses

- 1.27 Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is subject to Part 9 of the Enterprise Act 2002 (EA02). We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.
- 1.28 Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the EA02.

- 1.29 If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

After the consultation

- 1.30 After the consultation we will publish a final version of the relevant guidance documents and a summary of the responses received that fall within the scope of the consultation. As noted above, we also propose to publish non-confidential versions of the responses received. These documents will be available on our webpages and respondents will be notified when they are available.

2. Questions for consideration

- Q1. In your view, does the updated text of the Guidelines in Appendix 1 give effect to the CMA's intentions as described above?
- 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.
- 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?
- 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?
- Q5. Do you have any other comments about the proposed amendments to the Guidelines?

Appendix 1: Draft amendments to the guidance

Amendment 1:

The following text would 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.¹¹ 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 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

¹¹ 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).

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.¹² A measure which is the subject of a sunset clause will cease to have effect on the date specified and will not be enforceable or reviewable beyond that date. 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.¹³
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’, 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 expected to take for the longer-term measures to take effect.¹⁴ 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

¹² 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.

¹³ 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).

¹⁴ 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.

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.¹⁵

- (c) The extent to which the measure is expected to become obsolete over time. This might sometimes be anticipated if changes in technology, 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 review¹⁶ 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.¹⁷ Alternatively, the CMA

¹⁵ 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.

¹⁶ 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).

¹⁷ 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.

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.¹⁸

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 anticompetitive 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 17¹⁹).
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 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.²⁰

¹⁸ 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.

¹⁹ Of [the Guidelines](#).

²⁰ 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.

Amendment 2:

The following text would 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 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.²¹

²¹ [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.