



# New merger remedies guidance

## Consultation seminar

Peter Freeman - Chairman

David Roberts – Head of Remedies and Chief Business Adviser

Cathryn Ross – Director of Remedies and Business Analysis

Adam Land – Director of Remedies and Business Analysis

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## New merger remedies guidance -seminar outline

- Context and purpose - Peter
- Overview of main changes, divestiture revisions - David
- Choice of remedies and decision criteria - Cathryn
- Behavioural remedies – Adam
- Questions



## Merger remedies context

- Transformation of CC to determinative body
- Variety of case experience –remedies in 21 mergers-  
17structural outcomes
- Outgrowing existing guidance
- Completed mergers a particular issue



## Purpose of new guidelines

- Comprehensive coverage –fill in the gaps
- Incorporate experience, legal judgements and research
- Consolidate merger remedies guidance in one document

*Overall aim – to provide clarity to users and improve effectiveness*

*Guidance will be applied flexibly – depends on the circumstances of each case*



## Main areas of new material and clarification (1)

### *General Principles*

#### *Section 1 -Introduction*

- New -outline of remedies process
- Clarify –CC criteria

#### *Section 2 –Choice*

- New – remedies universe,
- Clarify –selection –what remedy in which circumstances?



## Main areas of new material and clarification (2)

### *Section 3 – Divestiture and IP*

- New –IP remedies
- Clarify – divestiture packages, purchasers and process

### *Section 4 – Behavioural remedies*

- New –most of section NB risk analysis

### *Appendix A –Interim measures*

- Clarify – appointment of HSM and monitoring trustees



## Update of divestiture remedies - treatment of IP

- Defining divestiture packages, avoiding carve out risks
- Alternative divestiture packages
- Criteria and process for selecting purchasers
- Update on monitoring trustees, divestiture trustees

*IP remedies – may treat as form of asset divestiture  
– question of sufficiency*

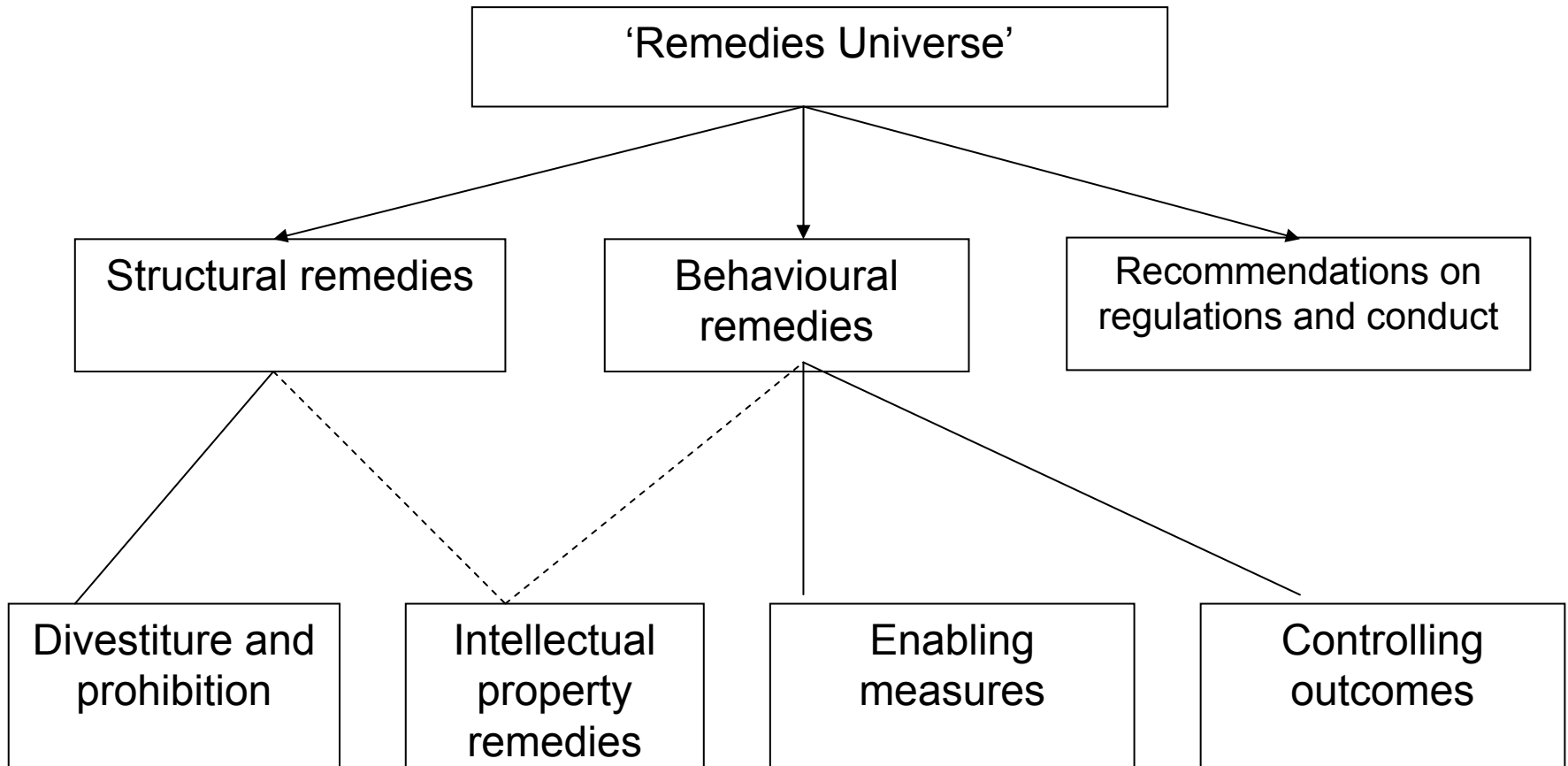


## Choice of merger remedies (1) -basis of CC approach

- If the CC finds an SLC, must consider:
  - Whether action should be taken by the CC for the purpose of remedying mitigating or preventing the SLC or any resulting adverse effect
  - Whether action should be taken by others
  - What action should be taken and what is to be remedied, mitigated or prevented
- CC required to achieve “as comprehensive a solution as is reasonable and practicable” – effective and proportionate
- Objective of fair and transparent process



## Choice of merger remedies (2)





## Choice of merger remedies (3)

- **Divestiture remedies:**
  - Restore pre-merger competition or create new source of competition
  - Addresses the loss of rivalry at source
- **IP remedies:**
  - Provide access to IP
  - IP-rights should enable acquirer to compete effectively
- **Behavioural - enabling measures:**
  - Aim to remove obstacles to entry or expansion
  - Include access remedies to deal with vertical effects
- **Behavioural - controlling outcomes:**
  - Eg price controls, supply and service commitments
- **Recommendations on regulations and conduct:**
  - Important to prepare the ground – outside CC control



## Choice of merger remedies (4)

- Consider effectiveness of remedy *then* proportionality
  - CC will identify the set of effective remedies and *then* choose the least cost or least restrictive
  
- CC will assess the risk associated with a given remedy
  - Risk -not effective if fully implemented -will not be fully implemented
  
- CC will generally prefer structural (divestiture) remedies
  - Directly restore rivalry
  - Low risk of market distortion
  - Low risk of ineffectiveness due to poor monitoring and enforcement
  
- CC will consider behavioural remedies, but:
  - Will prefer enabling measures where possible
  - Likely to use behavioural only in unusual circumstances



## Behavioural remedies (1) – overview

- Behavioural remedies involve significant risks - but they may be appropriate in limited circumstances.
  
- Proposed guidance clarifies:
  - When behaviour remedies may be appropriate
  - The standards they should fulfil
  
- We propose classification of two types of behavioural remedy:
  - “Enabling measures” to overcome barriers to competition
  - Measures to control outcomes



## Behavioural remedies (2) –risk assessment

- **Specification risks**
- **Circumvention risks**
- **Distortion risks**
- **Monitoring and enforcement risks**

**Addressing these risks to the requisite level may not be feasible or may be too complex or costly**



## Behavioural remedies(3) –appropriate circumstances?

Behavioural remedies can be used to enhance structural measures.

In a minority of cases, behavioural remedies may be preferred:

- Effective structural remedies not feasible (eg *Draeger / Airshields*)
- SLC is expected to be of short duration (eg *First / Scotrail*)
- Substantial relevant customer benefits would be lost by any effective structural remedy (eg *SE Water / Mid Kent Water*)



## Behavioural remedies(4) – “enabling measures”

“Enabling measures” seek to overcome barriers to competition, by:

- Restraining the impact of vertical mergers
  - Access remedies (*note specification risk*)
  - “Firewall” measures (*note enforcement risk*)
  
- Restraining horizontal market power
  - Prevent conduct that limits competition (eg switching costs or selective discounting)
  - Circumvention risks and “chilling effects”



## Behavioural remedies (5)- controlling outcomes (eg price caps)

Use as a last resort (often time limited). Significant drawbacks:

- Does not remedy the SLC
- High specification risks (eg in volatile markets)
- High circumvention risks (eg meet price cap but reduce quality)
- Directly overrides market signals (eg can inhibit entry)



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