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3 **COMPETITION COMMISSION**
4 **MERGER REMEDIES GUIDANCE LAUNCH SEMINAR**

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6 **Notes of a Seminar**
7 **held at the Competition Commission**
8 **on 27 May 2008**
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11 **FOR THE COMPETITION COMMISSION**

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14 Adam Land - Director of Remedies
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1 THE CHAIRMAN: Thank you all for giving up your post Bank Holiday morning to
2 come and talk about merger remedies. We much appreciate it. As you know,
3 the purpose of this is just to explain the thinking behind the document we
4 published for consultation recently and give an opportunity for you to ask
5 questions and clarify issues.

6
7 SLIDE: NEW MERGERS REMEDIES GUIDANCE – SEMINAR OUTLINE

8
9 Right, that is the outline of what we shall be doing this morning. My role in
10 this will be strictly as the front man. The people you need to talk to are sitting
11 on my left and right. That is David Roberts, who is the Head of Remedies;
12 Cathryn Ross, who I am sure you know, who is Director of Remedies; and
13 Adam Land, who is another Director of Remedies.

14 Fine, okay. Well, I am going to set the scene very briefly. David will then take
15 you through the major changes and some signposts. Cathryn will then take
16 us through the varieties of remedies and how we choose between them, and
17 Adam will talk about behavioural remedies.

18
19 SLIDE: MERGER REMEDIES CONTEXT

20
21 As you know, we now make remedies decisions. We no longer just advise.
22 We have had this power for nearly five years. We have had to do quite a lot
23 of learning and catching up with other authorities who already prescribe
24 remedies. We have gained a lot of experience. We have had more than 40
25 merger decisions and some market cases as well, but that is not what we are

1 talking about today. I think our first merger case was Stena/P&O in 2004. It
2 seems a long time ago. We have quite a lot of experience to talk about and
3 that is why we have chosen to revise and publish the guidance which covers
4 divestment and behavioural remedies and which encapsulates our
5 experience. In fact, the guidance we operated under, which was the merger
6 guidance, the divestiture guidance and the guidance on interim measures,
7 has served us pretty well. Interestingly, the first two were published before we
8 had any cases. We will be talking about completed mergers as a particular
9 issue a bit later on.

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11 SLIDE: PURPOSE OF NEW GUIDELINES

12
13 This slide sets out the purpose of the guidance: to fill in the gaps, to
14 incorporate our experience and to consolidate everything into a single
15 document. The aim is to provide clarity, explanation and to improve
16 effectiveness. You will recall that in the Somerfield judgment the CAT paid
17 particular attention to the fact that our remedies process had followed the
18 guidance we had published, so the guidance is quite important.

19 Okay, over to David now.

20 (Mr Roberts) Thank you, Peter. As Peter mentioned, we have outgrown our
21 guidance, although the guidance that exists has served us pretty well. In
22 producing the new guidance we have sought to provide clarity regarding our
23 principles, processes and requirements. The objective of all this is really to
24 get us and the merger parties quickly into the right ballpark regarding
25 remedies. Basically, we want to avoid wasting valuable time of the parties

1 and ourselves rehearsing well-established arguments and taking apart
2 proposals which do not pass muster. We are trying to get to the critical
3 remedies stage at an earlier juncture so that we can concentrate on those
4 issues that really matter. As Peter has mentioned, in drafting the guidance we
5 have built on our own experience and remedies research. We paid particular
6 attention to the EU Remedies Study. We have also done research of our own
7 into the actual effects of merger remedies. In putting the guidance together,
8 we have sought to embody a risk-based approach so that remedies are no
9 more intrusive than is necessary to produce an effective remedy with a
10 relative degree of certainty. The corollary of that, of course, is that the greater
11 the perceived risk, the more we will require measures that protect our
12 position. You will also notice that we have included sunset clauses for the
13 first time in the guidance, and that is another feature.

14
15 SLIDE: MAIN AREAS OF NEW MATERIAL AND CLARIFICATION (1)

16
17 Let us briefly look at the main areas of change. First of all, the introductory
18 section provides much more detail on our processes and the criteria that we
19 employ, such as effectiveness and proportionality. It is a pretty certain fact
20 that in most remedy stages there is a disproportionate use of the term
21 “disproportionality” by the parties’ advisors and, who knows, we might go
22 some way to curbing that tendency.

23 The second section gives our overview of the available range of remedies and
24 the appropriate circumstances in which they can be used. Cathryn will take
25 us through this in a moment, but much of that is new or extended.

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SLIDE: MAIN AREAS OF NEW MATERIAL AND CLARIFICATION (2)

Moving on to section 3, I will be dealing with the main new material on divestitures in a moment, and that is largely a clarification of our existing guidance. So there is not much new there apart from the treatment of intellectual property remedies. Adam will then take you through the substantially new section on behavioural remedies. The fact that there is so much more coverage of behavioural remedies in this guidance should not be taken as implying that we are going to make more use of them in the future. On the contrary, in section 2 we make it rather clearer, I think, that we will tend to use behavioural as the main remedies only in rather specialised circumstances. In section 4 we are much more explicit about the standards we would expect if behavioural remedies are appropriate because we have spent quite a lot of time in the last four years looking at behavioural proposals. The standard response to most merger notices has been some form of behavioural remedy that, in most cases, was not adequate. So, we are much more explicit about what we require. In the appendix on interim measures, which is largely drawn from the other guidance that we have at the moment on interim measures, the main change is that we have clarified the circumstances in which we would seek to appoint a hold-separate manager and monitoring trustee. So that hopefully provides a bit more clarity on that score.

SLIDE: UPDATE OF DIVESTITURE REMEDIES – TREATMENT OF IP

1 Let us turn now to divestiture remedies. Divestiture remedies are likely to
2 remain by far the most frequent form of remedy that we use and, within
3 divestiture remedies, the identity of the divestiture package is generally the
4 most contentious issue for obvious reasons. In the guidance we have sought
5 to clarify current practice. We will normally seek divestiture of the smallest
6 viable stand-alone business that can compete successfully and contains
7 everything pertinent to the area of competitive overlap. In our current
8 guidance, we talk about the smallest business unit that is stand alone, and in
9 a sense that has tended to be stretched by parties. However, we are very
10 conscious of the step-up in risk as between selling a viable business and
11 selling a collection of assets. We now place greater emphasis on the
12 importance of selling a viable business. If that is not necessary or not
13 appropriate and a divestiture of a set of assets is required, then we will require
14 measures such as up-front buyers to guard against the increased risks that a
15 package of assets would involve.

16 We have added more detail on alternative divestiture packages and I think
17 you will see that we have studiously avoided the term “Crown jewels”, which
18 generally generates more heat than light.

19 If divestiture packages are the most contentious issue in a divestiture remedy,
20 then the second most contentious issue is the identity of the purchaser. In
21 looking at the requirements for a suitable purchaser, we have clarified firstly
22 that the purchaser must have access to sufficient finance to develop the
23 business competitively and not just cling on to financial survival. I think that is
24 quite an important distinction because we have often had highly leveraged
25 acquisitions presented to us and a concern that we have sometimes had is

1 that while this may be viable if the business were to compete just as a fringe
2 operator, it may not necessarily compete as in the pre-merger situation or as
3 the situation would have developed in the absence of a merger.

4 The other element is that we clarified that the purchaser must be committed to
5 competing in the relevant market. You will recall from the Somerfield decision
6 that we were unhappy in making divestitures in the first instance to limited
7 range discounters because we were not really convinced that they would
8 compete across the full range of the relevant market.

9 Regarding the process of divestiture, we made it explicit that we will require
10 any monitoring trustee to monitor the divestiture process, not just the hold
11 separate provisions, and we could require divestiture trustees to be appointed
12 before the end of the first divestiture period rather than it just being taken as
13 read that we will wait until the end of that period.

14 We have added a small section on IP remedies. In most cases we are likely
15 to treat these as a form of asset divestiture. A key issue for us, though, in
16 considering IP remedies is whether IP alone is sufficient to enable the
17 purchaser to compete more effectively. Typically you will also require other
18 things, like know-how, expertise and sales networks and to compete more
19 effectively. In that case, our preference will be to look at business divestiture,
20 including IP rights attached to that.

21 Okay, enough from me. I will pass on to Cathryn.

22
23 SLIDE: CHOICE OF MERGER REMEDIES (1) – BASIS OF CC APPROACH

24
25 (Ms Ross) So, David has been through the highlights of what is new in the

1 current guidance. I am going to spend some time talking about the principles
2 that we use when we choose remedies in merger inquiries. I think for many of
3 you who have been through merger inquiries this will not be new, but
4 obviously now it is much more clearly set out in the guidance than it was
5 previously. I think - I hope - that it will not be surprising to you to learn that
6 when we are thinking about merger remedies we start by going back to our
7 statutory duty. If we have found an SLC in a merger investigation, then we
8 are then required to consider what action should be taken by us or by others
9 for the purpose of remedying, mitigating or preventing that SLC. We may also
10 make recommendations; apart from just implementing remedies ourselves,
11 we may also make recommendations to others. We have to be clear about
12 what action it is that should be taken and we have to be clear how that action
13 is going to address the SLC. We take very seriously the requirement in the
14 statute that we have regard to the need to achieve as comprehensive a
15 remedy as is reasonable and practicable. I think this goes to the heart of our
16 function as an authority and I think if we do not take that very seriously then,
17 in a sense, we are undermining the effectiveness of the regime as a whole.
18 Obviously we are very concerned about getting the right answer, but we are
19 also concerned about getting there using the right process. We do aim to
20 have a fair and transparent process. That is valuable for its own sake, but it is
21 also very helpful in terms of making sure that we get the right answer because
22 this is our means of exposing our thinking, and the thinking also of the merger
23 parties, to third parties who can comment helpfully from the perspective of
24 people who are perhaps more informed about the market than we are about
25 the effectiveness of those remedies.

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SLIDE: CHOICE OF MERGER REMEDIES (2)

So that is, at a very high level, the basis for the approach. Now, this slide sets out an overview of the tools we have in our toolkit. I will not say too much about the detail of them now; that comes later. The structural / behavioural remedy side of this slide on the middle and the left will probably be a familiar classification to most of you. We have split out with its own distinct box recommendations on regulation and conduct. When we are talking about structural and behavioural remedies within this merger remedies universe, we are actually talking about things that we as the CC can do. We thought it was worth splitting out these recommendations on regulation and conduct and treating them slightly separately because they are not things that we will implement directly; they are recommendations to others - and we will come back to this when we talk about the risk-based assessment that we do in a minute - but they are inherently less certain because we do not implement them ourselves.

SLIDE: CHOICE OF MERGER REMEDIES (3)

So, going through what we set out on that overview slide in a little bit more detail: David has already talked about divestiture remedies. Essentially, what they are doing is they are addressing the competition problem at source. They are removing the source of the SLC and, as David said, what we then really do is seek to divest the smallest stand-alone viable business that covers

1 the area of concern. The advantage of those divestiture remedies is
2 essentially that they address the loss of rivalry at source. I think in general if
3 we are confident that the divestiture can happen, that something suitable will
4 be sold to a suitable purchaser, we are very confident that that will address
5 the SLC that we found.

6 IP remedies, if you remember on the overview slide, we had those sitting
7 slightly between structural and behavioural. They do have some
8 characteristics of structural remedies - they involve a transfer of property
9 rights, a transfer of assets to some extent - but they also have characteristics
10 of behavioural remedies in that they involve an ongoing link, they involve
11 restrictions on behaviour, and we say more about this in the guidance now
12 than we did previously. One of the things that we talk about is the importance
13 of the nature and extent of those ongoing links in our assessment of the likely
14 effectiveness of IP remedies. For example, you could imagine the way that
15 payments are made for intellectual property could actually have an effect on
16 the incentives of the parties to compete.

17 So, we also talk about behavioural remedies. We are very keen on splitting
18 behavioural remedies into two categories. The first is behavioural remedies
19 that enable competition to happen, that facilitate the process of competition;
20 the second, those that control outcomes. I think generally our preference if
21 we are talking about behavioural remedies - and our preference is generally
22 that we are not - then we would prefer those remedies that are aimed at
23 facilitating or enabling the process of competition rather than those that
24 directly control outcomes. Adam is going to say more about those later.

25

1 SLIDE: CHOICE OF MERGER REMEDIES (4)

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3 That was a quick canter through the tools in the toolbox, but then how do we

4 actually choose between those tools on an individual inquiry? I think it is very

5 important - and this is spelled out now very explicitly in the guidance - that we

6 consider effectiveness questions first and then we move on to considering

7 proportionality. Now, that is perfectly logical because if a remedy will not be

8 effective then it is not worth pursuing at all. So our primary focus when we

9 are thinking about remedies is to identify the set of remedies that we think will

10 be effective in addressing the SLC. Once we have that set of remedies, we

11 will then think about choosing the least cost, the least intrusive remedy. Now,

12 obviously when we are thinking about proportionality, we are thinking about

13 the costs associated with the remedy, but it is very important - and this is

14 stressed very much in the draft guidance - that the approach in relation to

15 completed mergers is essentially the same as in relation to anticipated

16 mergers. There should be no advantage to parties from going ahead and

17 completing a merger as opposed to notifying an anticipated deal. With this in

18 mind, we do not generally consider the cost to the divesting parties of

19 divestiture in completed mergers. Those costs are generally avoidable and

20 the parties generally proceed at their own risk. We do consider other costs

21 associated with remedies when we are considering proportionality. Again, it is

22 important to note here that we do not just consider the cost to the merger

23 parties; there are also wider costs. There are costs of third parties, there are

24 risks of distortions; all these things get taken into account when we are

25 thinking about proportionality.

1 As David mentioned earlier on, we do take quite an explicit risk-based
2 approach to our assessment of remedies and this is quite important. Going
3 back to our statutory duty, we need to achieve as comprehensive a remedy as
4 is reasonable and practicable. So again, what we are doing when we assess
5 risk is we are assessing the risk that a remedy will not be effective in
6 addressing the SLC. In a sense, we are assessing the risk that our statutory
7 duty will not be achieved. We make more explicit in the guidance exactly how
8 we will do this, but basically we are considering what impact a remedy will
9 have on the SLC. We are also considering how long that remedy is likely to
10 be effective for, whether its effect will persist over time or over the duration of
11 the expected SLC, and we are also focusing quite heavily on practicality. It is
12 no use if a remedy is very elegant, theoretically perfect and it is a very neat
13 solution in principle, if the thing will not actually work in practice. There we
14 are considering whether the remedy will, in fact, be implemented, whether it is
15 capable of ready implementation. We are also thinking about its monitoring
16 and enforcement as well.

17 So, generally the message here is that we will generally prefer structural
18 remedies. These are all case by case decisions, but generally we will prefer
19 structural remedies. If you think back to this risk-based assessment you can
20 see that they tick a lot more of the boxes more obviously than behavioural
21 remedies. There may be situations where a structural remedy is not possible
22 and not appropriate; that is when we will think about behavioural remedies. If
23 we are thinking about behavioural remedies, again our focus is more likely to
24 be on restoring rivalry, through enabling measures, than on directly controlling
25 outcomes. In a sense, the behavioural remedies that control outcomes are

1 more likely to be a last resort, but again they may be appropriate and it is a
2 case by case assessment.

3
4 THE CHAIRMAN: Thank you, Cathryn. Adam?

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6 SLIDE: BEHAVIOURAL REMEDIES (1) OVERVIEW

7
8 (Mr Land) Thank you. This slide sets out the basics about behavioural
9 remedies. As David said, this is a substantially new part of the guidance and,
10 as David also said, you should not read too much into this. We have not
11 changed our approach. We felt that this was a very good opportunity to
12 expand on some of the existing themes within the guidance and also to place
13 behavioural remedies more explicitly into the risk management framework that
14 we apply across all of our remedies.

15 The bottom line on behavioural remedies is as set out in the first of these
16 bullets, which is that, as we see it, they involve some significant risks, but in a
17 fairly limited set of circumstances they may be the most appropriate way
18 forward. The guidance that we are proposing clarifies what the circumstances
19 are where behavioural remedies may be appropriate and also what the
20 standards are that they should fulfil. Then the other main innovation in the
21 guidance is, as Cathryn said, this distinction between the two types of
22 behavioural remedy that we typically look at: firstly, enabling measures which
23 enhance competition, and then measures which do not directly address
24 competition but which are aimed at controlling outcomes and mitigating the
25 harm to customers.

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SLIDE: BEHAVIOURAL REMEDIES (2) – RISK ASSESSMENT

This slide talks about risks. Before going into the particular risks, it is worth making some general points. Intrinsically, it is rather a hard thing to do to impose an effective behavioural remedy following a merger. I think the reason for this is that when you are looking at remedying a merger following a finding of substantial lessening of competition, you are dealing with firms whose market power has been enhanced or created by the merger, which means that they have the ability and the incentive to exploit that market power and that position. With behavioural remedies you are trying to constrain the merged firm's ability to exploit their position but you are leaving their incentives to exploit their market power intact and also you are not really addressing the underlying cause of the increase in their market power, which is the structural change. So you are trying to force the firm with market power to behave in a way that goes against its economic interest, and that is intrinsically quite a hard thing to do. The way in which we have set this out in the guidance is to articulate these problems in terms of four risks, and they are on the slide here.

So, the first is specification risk. Can we determine with enough precision what it is that the merged company should be required to do or prevented from doing? The second area is what we have called circumvention risk, which is whether it is possible to design a remedy in such a way that the merged company cannot get round it in some way or other. The third area is

1 distortion risk. I think by the time you have specified your remedy quite
2 precisely, as we tend to do, and put in measures to avoid circumvention risk,
3 there is a risk that you are then starting to control a lot of aspects of the
4 company's behaviour in areas that could be pro-competitive or would best be
5 left to the management, but because you have to nail down the remedy you
6 risk creating distortion elsewhere. Then finally, and a very important area in
7 terms of behavioural remedies, are what we have called monitoring and
8 enforcement risks. Is it easy for the OFT to detect a failure to comply with the
9 remedy? If they do so, will they be able to enforce the breach promptly,
10 rapidly and effectively? This is critical to the effectiveness of behavioural
11 remedies because if the parties and third parties do not believe that they will
12 be effectively monitored and enforced then the impact of the remedy on
13 behaviour and on market outcomes may be limited.

14 As I have noted at the bottom of the slide, it may not be feasible to deal with
15 these risks in relation to particular behavioural remedies. In other cases, it
16 may be possible as a theoretical idea to deal with the risks, but in practice it
17 may be very complicated to do so or it may be costly. Also, as I have
18 mentioned, there can be a bit of a tension between trying to sort out one type
19 of risk and creating other risks. In particular, trying to deal with specification
20 and circumvention risks tends to get you to nailing down more and more and
21 more aspects of a firm's behaviour and that starts to create remedies which
22 are more complex, more likely to give rise to distortions, more expensive to
23 monitor and potentially harder to enforce. So it is quite difficult to address all
24 of these risks at one time.

1 SLIDE: BEHAVIOURAL REMEDIES (3) – APPROPRIATE CIRCUMSTANCES

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3 Having said all that, we think behavioural remedies are an important part of
4 our toolkit, really, in two sets of circumstances. First of all, they can be used
5 to enhance effectiveness of a structural measure. An example here is in the
6 London Stock Exchange merger where we had a package combining some
7 structural and some behavioural measures to address what was a very
8 complex set of issues. Then in a minority of cases, a small minority of cases,
9 we have actually preferred behavioural remedies to structural remedies. In
10 the guidance we set out three sets of circumstances where this might be the
11 case, and these are exemplified to some extent by cases that we have had so
12 far.

13 The first scenario is a situation where there is not an effective structural
14 remedy available. The case that we have used to illustrate this was a case
15 called Dräger/Air-Shields, which involved neonatal incubators. It was an
16 international merger and there were not very many UK assets involved in the
17 transaction. This created a great difficulty for identifying an effective
18 divestiture package. So in that situation we made some recommendations to
19 the purchasers, who were in this case NHS purchasers and also we put in
20 place a time-limited price cap.

21 The second scenario is where there is a substantial lessening of competition
22 as a result of the merger but it is not expected to last for long. The example
23 we used here is First/Scotrail, which was a very complicated case, but one of
24 the factors was that the merger was created by the acquisition of a passenger
25 rail franchise which was by its nature time-limited and that was one factor

1 which contributed to the decision to go with behavioural remedies. There
2 were lots of other things going on in that case. The nature of the overlap
3 routes meant that there was not a simple straight-forward divestiture that
4 would have addressed the SLC, but certainly the timing aspect was relevant
5 also.

6 Then the third situation is where the merger itself is likely to give rise to
7 substantial benefits to the customer - relevant customer benefits in our
8 terminology - and that those would be lost by any structural remedy that would
9 be effective. Here the case that we cite is the recent water merger between
10 South-East Water and Mid-Kent Water where the concern was about the
11 prejudice to Ofwat's ability to regulate the water industry. We found that there
12 was a prejudice arising from the merger but that it was fairly small in relation
13 to the benefits associated with that merger. So in that case again we went for
14 a behavioural remedy, a price cut in essence, over a structural remedy which
15 would have removed those potential benefits.

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17 SLIDE: BEHAVIOURAL REMEDIES (4) – “ENABLING MEASURES”

18
19 I am just going to finish off with a couple of notes about this distinction
20 between enabling measures and measures to control outcomes which we
21 have been talking about.

22 So, enabling measures seek to overcome barriers to competition. You have
23 different types of measures that can be put in place for vertical and horizontal
24 mergers.

25 With vertical mergers, we highlight in the guidance two particular types of

1 measures which are access controls, which will be very familiar to people
2 from regulated sectors where one level of the supply chain is monopolised
3 and you have a regulatory measure to enable competitors to have access to
4 those facilities. The terminology from regulation, telecoms regulation and so
5 on, is that access needs to be on fair, reasonable and non-discriminatory
6 terms, which is relatively easy to say, but it is actually quite hard to do. It is
7 very difficult to disagree with the idea of fair, reasonable and
8 non-discriminatory terms, they are all good things, but it is actually very
9 challenging to nail down exactly what that means in a specific industry. A
10 particular problem with access regulation is what we have called soft biases.
11 These relate not to the price on which firms have access but some of the
12 aspects of service quality that firms have access on, things which are harder
13 to measure but which can have a very big impact on a firm's ability to
14 compete.

15 We have also got firewall measures. These are essentially about regulating
16 the control of information between different parts of the merged company. As
17 we have noted, it is very hard to monitor something that is internal to a
18 company effectively, and that makes it hard to enforce. A recent example
19 where we did have firewall measures was Centrica/Dynergy in the energy
20 sector with a company that was very used to dealing with compliance.
21 Certainly, when we reviewed that we were struck by quite how many people
22 within the company were engaged in enforcing internal compliance associated
23 with that remedy. So we tend to think if it is done properly it is quite a heavy
24 measure and there are risks associated with enforcement.

25 Then looking at horizontal mergers, the types of enabling measures are about

1 recreating competition at the horizontal level, so you might seek to prevent
2 behaviour by the merged firm that limits competition. One example might be
3 that you might have a restriction on the ability of the merged company to enter
4 into long-term contracts either with critical suppliers or with critical customers.
5 Here again there are risks, and we have noted them just on the bottom line.
6 First of all, the merged company may simply look to find other ways of
7 excluding its competitors from the ones that you have sought to regulate
8 through the behavioural remedy. That is a circumvention risk, so if you
9 prevent people from entering into a certain form of long-term contract the firm
10 might find a different way of achieving the same outcome. Secondly, it is
11 quite difficult to find enabling measures for horizontal mergers that do not
12 create the risk of some sort of distortion. So, in the example of long-term
13 contracts, there can be perfectly good pro-competitive reasons for entering
14 into long-term contracts with a supplier or a customer. The customers may be
15 able to get a better deal and so on and by proscribing that through a remedy
16 you may chill the competitive process.

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18 SLIDE: BEHAVIOURAL REMEDIES (5) – CONTROLLING OUTCOMES

19
20 Finally, I will briefly talk about price caps and other measures to control
21 outcomes. I think, as we have established, they are certainly not the first tool
22 in the toolbox that we would reach for, and this is because they have some
23 significant drawbacks. First of all, and foremost I think, is that these
24 measures to control outcomes such as price caps do not remedy the
25 substantial lessening of competition that we found and they do not even seek

1 to do so. So that is an immediate drawback and intrinsic to the type of
2 remedy.

3 I think, secondly, price controls have high specification risk, so are difficult to
4 specify particularly in markets where you have, for example, regular cost
5 shocks.

6 Third, it is fairly well known in the economics literature that there are high
7 circumvention risks. So an example again taken from a price cap is that if a
8 firm is subject to an RPI minus X type price cap and nothing else, then your
9 incentive is to price up to the price cap and just lower the quality. So if there
10 was a price cap on Mars bars, people would just make smaller Mars bars and
11 price up to that amount.

12 Then, finally, there is a distortion risk in that with price caps and other types of
13 measures to control outcomes, competition authorities are directly overriding
14 market signals. We are imposing our judgement on what prices should be
15 over those of the firm subject to the price cap, and this matters because
16 prices in a market can fulfil a range of functions, not just about setting the
17 appropriate price for customers but they also act as a signal to entry, a signal
18 to investment, signal to innovation, and you are removing the ability of the
19 price mechanism to fulfil those other roles.

20 So, as I have said, we see price caps as a last resort, but it is one that we
21 have used and that we will use in a limited number of cases where it is the
22 most effective or the least bad option at our disposal.

23 That is it from us on the draft guidance. I will now hand back over to Peter for
24 the questions and answers.

25 THE CHAIRMAN: All right. Thank you, Adam, very much. Well, we are here at your

1 disposal, really. Who would like to lead off? This is meant to be a relaxed
2 and informal session where you will not be held to account for anything you
3 say, but could you identify yourself, please, just for posterity? Mr Wotton?

4 Q. (Mr Wotton) John Wotton, Allen & Overy. What I wanted to take up was a
5 comment Adam made about Centrica/Dynergy. It was, I think, one of the four
6 cases that were subject to the CC's research and came out with a fairly clean
7 bill of health. One of the, if I may call it such, criticisms you made of it was
8 that it was quite a heavy remedy because of the number of people involved.
9 But that in a sense was to do with the costs the company itself incurred and
10 you would think that, if it is right to disregard costs incurred by the merging
11 parties on a divestment remedy because the parties may be taken to have
12 discounted them in valuing the deal, then should the same principle not apply
13 to a behavioural remedy as well? There may be a risk of a remedy or a
14 number of remedies and it seems to me that one should apply a consistent
15 principle there because external costs are equally relevant in both cases, but
16 probably internal costs are equally irrelevant in both cases..

17 Just on that same track, that was not the only case you identified in relation to
18 behavioural remedies which was in a regulated industry; the other was a rail
19 case. That would also be true of other historical behavioural remedy cases,
20 like the contract rights renewal situation. I just wonder whether one might
21 infer that it is more likely that there would be behavioural remedies accepted
22 in a regulated industry, particularly where there is a sector regulator who may
23 become involved, presumably the costs of the sector regulator being equally
24 relevant as the costs of any other enforcement body such as the OFT or CC.

25

1 THE CHAIRMAN: Do you want to comment on that?

2 A. (Mr Land) Why not? On Centrica/Dynergy the point I was making in the talk
3 was essentially that for a firewall-type measure to be effective it has to be
4 properly enforced, and I think in that case we think it was properly enforced
5 and that it is not a light touch option when it is being properly implemented.
6 And if it is not, then it is not an effective option.

7 In terms of the regulated sectors, some of the risks I have talked about, may
8 be different to some degree in the regulated sectors. So, for example, in
9 relation to a price cap, if there is a mechanism of price control already in place
10 as there was in the water industry, then to some extent the regulator has been
11 dealing with some of the specification risks associated with defining what an
12 appropriate price cap mechanism would be and that may be some comfort.
13 There is clearly an additional player who could be involved in monitoring and
14 again that is a different situation. I think some of the other risks associated
15 with behavioural remedies are still in place, so generally I think most
16 regulators would say that their price control mechanisms are imperfect
17 mechanisms and that the main trend within regulation has been to try and
18 make less use of price controls and other behavioural-type remedies and try
19 and get competition into place. So I do not think it is a knock-out argument. I
20 think it may make things different in particular cases where a sector regulator
21 exists.

22 A. (Mr Roberts) Yes, I think the critical issue is will it make monitoring and
23 enforcement more feasible? Quite often you could imagine that would be the
24 case in a regulated sector . It is perhaps not a decisive argument but it is a
25 helpful argument. I think your point on costs is well made and, in fact, in the

1 guidance we consider that we will obviously place less stress on the costs
2 imposed by the parties on themselves than on costs that might be imposed on
3 third parties. So in terms of Centrica being a heavy remedy, then I think that
4 is perhaps more indicative of the feasibility of doing this sort of measure
5 effectively given the sheer number of people that you have to control, and the
6 variety of avenues that they have to deal with.

7 THE CHAIRMAN: And we identified, what, 135 people working on the firewall
8 alone? That would be a little worrying.

9 A. (Mr Roberts) Yes.

10 THE CHAIRMAN: All in a good cause. Yes, more questions?

11 Q. (Mr Smith) Martin Smith, Simmons & Simmons. I had a comment in relation
12 to one of the points you made, Cathryn. It seems to me one of the central
13 issues here is this notion of effectiveness and proportionality. If I understood
14 correctly, you were saying -- I know you did not put it in these terms --
15 essentially that it was a two-stage process: effectiveness, and there may be
16 one or more remedies in the effectiveness category, and then you come on to
17 proportionality. My question is whether the statutory test, when it talks about
18 "as comprehensive as reasonable and practical", is actually more of an elided
19 test than that. Secondly, I wonder whether in a sense your notion almost
20 suggests absolutes of effectiveness. I think there will frequently be gradations
21 of effectiveness. So I just wondered whether it is appropriate to take it in such
22 a two-stage way and, secondly, whether one should at least come back and
23 revisit the effectiveness once one has done the proportionality. I wonder
24 whether the water case almost is an example of that because in absolute
25 effectiveness terms I would have thought that the price cap was less effective

1 but you took into account the customer benefits and came up with the
2 outcome you did. So it is really about where those two elements of
3 effectiveness and proportionality, how they fit together.

4 A. (Ms Ross) I think basically you are right in what you say. It is a little bit more
5 subtle than I set out on the slide. I think you are right that the statutory test is
6 slightly more elided than the two-stage process that I set out. But the way
7 that we think about effectiveness and proportionality is very much the way that
8 I described it. We start off by working out what the effective set of remedies
9 would look like, and I take your point that there are grades of effectiveness,
10 and at that stage all the remedies that would be effective at some level stay
11 in. We then think about least cost, least intrusive. Clearly there are cases
12 where essentially you have a choice between a relatively high cost, relatively
13 intrusive, very effective remedy, and a relatively low cost, relatively less
14 intrusive, less effective remedy. I am afraid that that is where we have to
15 exercise our judgement as an expert body.

16 One of the things that you prompt me to come back to is the idea that
17 proportionality does include two aspects. There is this aspect of the least
18 cost, least intrusive effective remedy so you are going no further than you
19 need to do to address the SLC. There is also a question of whether the least
20 cost, least intrusive effective remedy is proportionate to the scale of the SLC,
21 and I think that is really where we come back to the water merger question,
22 although that is slightly different because it is a Water Industry Act reference
23 rather than an Enterprise Act reference, but let us use it as an example. In
24 that case we could have prohibited the merger but, in fact, we were able to
25 calculate what the effect of the merger would be within reasonable bounds.

1 We did not think that having a prohibition would be proportionate, also having
2 regard to these relevant customer benefits that we were very confident would
3 be passed on to consumers in that case because of the nature of regulation in
4 the industry. So you put the scale of the effect on competition plus the
5 relevant customer benefits into the pot with what would certainly have been
6 an effective remedy on the other side, which was a total prohibition, and we
7 ended up taking the view, using our expert judgement, that that would not
8 have been a proportionate solution and, in fact, the best thing to do was to try
9 to design a remedy that would address some of the adverse effects of the
10 merger and also would ensure that those relevant customer benefits did flow
11 through. So, it was a slightly peculiar case but it does serve, I think, as you
12 say, to illustrate the point that you are making that there are these two
13 different aspects of proportionality and we do, of course, consider both.

14 THE CHAIRMAN: Right at the back, and then Oliver.

15 Q. (Mr Lahnborg) I am Douglas Lahnborg, Heller Ehrman. First of all, I think
16 these are helpful guidelines. There are several areas where they provide
17 particularly useful guidance to merging parties such as clarifying that
18 behavioural remedies might be more appropriate where the SLC is likely to
19 have a limited duration, such as two to three years. Also, it provides a
20 balanced view, I would say, on the use of short and long-term exclusivity
21 arrangements. There is a tendency I think for regulators to require dominant
22 parties in merger situations to commit to short term exclusivity arrangements,
23 say two years, and then assume everything is fine, but actually there might be
24 some quite negative results coming out of that. I think you have addressed
25 that correctly.

1 There is one area, though, that I have some concern with, and that is the CC's
2 use of recommendations of changes to regulations, or policy changes. I do
3 not see how that fits into a merger investigation, I have to say. It is very
4 clearly set out: you have behavioural remedies, you have structural remedies
5 and then you have these "recommendations" or changes to regulations. Now,
6 there are in my view at least two areas of concern or perhaps areas where
7 you could clarify things. One is the extent to which this impacts on the parties'
8 right to close a transaction and whether the recommendation will have any
9 impact at all on the parties going forward if the recommendations do not result
10 in a change to regulation?

11 The other area is a more practical one. I think for policy changes you need
12 quite a lot of time to investigate and fully understand what the consequences
13 are of those changes. We all know that you have a limited period of time
14 available to you in merger investigations and I fear that you may not always
15 have time to fully understand the consequences of such changes. So, it might
16 be that those type of changes are better dealt with in another context than
17 merger investigations.

18 A. (Mr Roberts) Shall I start off?

19 THE CHAIRMAN: You start off and then I'll help.

20 A. (Mr Roberts) Yes. I think you are right in saying that basically in merger
21 inquiries the time constraint is such that you are not going to see
22 recommendations that often and it tends to be quite a difficult thing to fit in,
23 but rather like some behavioural remedies you may have to use these
24 because you have no other alternative. So, for instance, the
25 Dräger/Air-Shields case was one in which we could not actually do very much

1 about the merger, but alongside the sort of temporary price cap there were
2 recommendations to the NHS Federation in terms of organising their buying
3 power appropriately to use their countervailing force. So that is an example
4 where we have used a recommendation. Of course, that has to be something
5 for which you thoroughly prepare the ground with the relevant body. All I can
6 say is that one would not generally use recommendations if we are in a
7 position to carry out measures ourselves. So it is something which,
8 particularly in merger inquiries, you would not tend to use very often at all. In
9 limited circumstances it may be appropriate but you do need to prepare the
10 ground for that.

11 THE CHAIRMAN: I would say it is a case of which would you rather? If the choice is
12 between a prohibition which is fairly empty of effect and permission to
13 proceed subject to recommendations, say, in a regulated industry to change a
14 licence condition - which would be quite carefully researched, it would be
15 discussed with the regulatory body first so it would carry some likelihood of
16 being implemented, it would not just be an empty regulation - then
17 presumably the merging parties would prefer that. So I think David is quite
18 right, this is not a major focus of our merger remedies. It is there in the toolkit
19 for an appropriate case. It would be very carefully used and it would not be
20 something that we shot up into the air and ...

21 Q. (Mr Lahnborg) Can I just comment?

22 THE CHAIRMAN: Please do.

23 Q. (Mr Lahnborg) So you ask what I would prefer. Well, if I am representing one
24 of the merging parties, then yes, of course, that would be fine; I would prefer a
25 change to regulation, to a prohibition. The question and the concern I had had

1 more to do with the consequences to non-merging parties. Because changes
2 to regulation would apply to everyone in the industry..

3 THE CHAIRMAN: Not necessarily. I mean, it depends what sort of recommendation
4 we are talking about. It might be quite specific.

5 Q. (Mr Lahnborg) But the way you set it out and the way you describe changes
6 to regulation, it seems very general and that is why it raises real concerns.

7 THE CHAIRMAN: I think your points are perfectly fair.

8 A. (Mr Roberts) We can certainly have a look at that and see if we can reflect on
9 this more specifically.

10 THE CHAIRMAN: I do not think we particularly like clearing mergers on the basis of
11 recommendations. I think we are at one there. Oliver?

12 Q. (Mr Bretz) Yes, Oliver Bretz, Clifford Chance. I just want to come back to the
13 relevant customer benefits because I think it is one of those areas that has
14 some quite interesting questions associated with it. There are really two
15 points I wanted to pick up. The first is the word "customer". Does that mean
16 immediate customers or does it mean all the way down the supply chain and
17 who do these benefits actually have to be passed on to? I think maybe you
18 ought to try to clarify that a little bit.

19 The other thing that struck me was that it says in the guidance clearly that
20 those benefits are only relevant customer benefits as defined in the Act if they
21 could not be achieved in the absence of the merger. Now, I just wondered
22 how that is going to tie in with the counterfactual that the Commission sets up
23 obviously in relation to the SLC findings. So, for example, if the
24 counterfactual is the world without the merger, could you, at the relevant
25 customer benefit stage, actually say, "Well, could these benefits have been

1 achieved through a joint venture, even if that was not the counterfactual that
2 was actually used in the SLC findings?” Again, I just want to see whether
3 there may be some further clarity that could be brought to those sorts of
4 issues.

5 THE CHAIRMAN: Just on which customer, I think it is all customers. I do not think
6 we regard the word “relevant” as qualifying “customer”. I think we regard it as
7 qualifying “benefit”.

8 Relating these things to counterfactuals is a fascinating source of argument;
9 indeed, there is an argument going on at the moment I think along those lines.
10 Obviously we would take a realistic approach at the merger assessment stage
11 as to what benefits might be brought about by the merger and what might be
12 lost if the merger was banned. I think that is all really I can say.

13 A. (Mr Roberts) With regard to the first point in terms of who are the customers
14 that it has to be tracked through to, then I do not think it has to be traced
15 through to ultimate consumers. So that is why it is called customer benefit,
16 not consumer benefit. It can cover any relevant markets in the UK, and so we
17 do not have to track it all the way through to ultimate customers.

18 In terms of whether you have to demonstrate the counterfactual as the only
19 alternative and, therefore, if that did not, say, embrace a joint venture which
20 would have given rise to those features, I think that is a good question. It
21 would really depend on the circumstances. But I just observe that often there
22 is not just a single counterfactual which is -- well, maybe there is one that is
23 more likely -- but actually there might be a little constellation of
24 counterfactuals of which a joint venture might be another. I think it would be
25 difficult not to bear in mind that another means of getting those benefits may

1 have been available and in the absence of this merger. But it is a difficult
2 decision issue and we would not discount that particular point.

3 THE CHAIRMAN: More questions? Yes.

4 Q. (Mr Hoehn) Tom Hoehn, PWC. Two questions: one on process, the other
5 one on enforcement of access remedies. On process, I notice that the
6 process of choosing and discussing and consulting on remedies is more
7 transparent than anything in Brussels. Instead of negotiating a remedy with
8 the parties behind closed doors, you have decided to do it differently and
9 publish a remedies notice. Why? For what reason?

10 THE CHAIRMAN: So you are saying it is more transparent here than in Brussels?

11 Q (Mr Hoehn) You are more transparent, yes. The second question is about
12 access remedies. Access remedies may require access terms to be decided
13 on fair, reasonable and non-discriminatory terms. Now, that is difficult. If you
14 have a trustee to monitor and evaluate these FRND terms -- a private
15 regulator of access terms - then that raises a number of questions about the
16 role of the trustee, whether the trustee going too far in assuming powers that
17 you hold and whether you should be doing and undertaking that role yourself.
18 Related to that, FRND terms are not dissimilar to a price cap. What is the
19 difference between a price cap and a FRND access remedy? Sorry, these
20 are quite a lot of questions.

21 THE CHAIRMAN: Well, just to lead off, Adam did say that fair, reasonable and
22 non-discriminatory was easy to say. I think he is wrong, I think it is quite
23 difficult to say!

24 Just on the transparency, I think the reason we operate the process we
25 operate is that you cannot have a black and white view of transparency. It is

1 a matter of degree. The more that you can fit into the process the better the
2 chance of any problems with remedies being aired before it is too late. I do
3 not think we have a perfect level of transparency. We do what we can.
4 Other authorities do their best in the circumstances they have. There are
5 differences in the system but I do not think we, therefore, regard our system
6 as inherently better. It is just what we do and it is what is appropriate for us.

7 A. (Ms Ross) I absolutely take your point about the difficulty of fair, reasonable
8 and non-discriminatory and I absolutely take your point that there is a point at
9 which fair, reasonable and non-discriminatory essentially becomes a price
10 cap. How far you want to push, then, on fair, reasonable and
11 non-discriminatory is going to be a judgement call for any individual inquiry
12 group on any individual inquiry. It goes back to the risks associated with
13 behavioural remedies that Adam was talking about. If you need to go as far
14 as saying access prices shall be no more than X, then that is what you need
15 to do and you have to take into account the downsides of that in deciding on
16 that being the remedy that you want. It may be, for example, where you have
17 particularly well-informed customers, perhaps well-resourced customers who
18 are able to see what is going on and who will be proactive in terms of
19 essentially enforcing a regime of compliance by complaint, that you can allow
20 a little more latitude, but then, of course, you get into exactly the territory that
21 you describe where somebody needs to take a view on what constitutes fair,
22 reasonable and non-discriminatory. If you have a trustee in that role, then you
23 have a trustee essentially in a decision-making role and there are questions
24 about whether that is appropriate. But I think the only thing that I can say, you
25 know, at this stage is it will depend on the facts of the case and what we think

1 is appropriate, but this is exactly the sort of area where you would have to
2 exercise some pretty careful judgement.

3 Q. (Mr Hoehn) Yes, thanks. An alternative would be to look at arbitration if there
4 is dispute over what is a fair remedy and fair access terms, whether this is IP
5 related case or otherwise. Rather than choosing a trustee and rely on them to
6 make a decision, you say, "Let us go to arbitration" and that would be an
7 alternative. I have not read any details in your notice or I have not seen that
8 alternative mentioned or discussed today.

9 A. (Ms Ross) I take your point. It is an option. It is not necessarily as easy an
10 option as it looks. There is not just arbitration, there is also mediation that you
11 might want to think about first and then, even if we are thinking about
12 arbitration, are we thinking about binding arbitration and what happens with
13 an appeal and who makes the decision on the appeal? So arbitration is a
14 nice, neat piece of outsourcing, if you like, but it does not necessarily get you
15 all the way to a simple solution.

16 THE CHAIRMAN: More questions? Simon.

17 Q. (Mr Holmes) Simon Holmes, SJ Berwin. Just picking up on the
18 recommendation point, Peter, you were talking about the fact that you would
19 consult with a body with whom you are recommending did something. Can
20 you see circumstances where they might be able to come to a decision within
21 the same sort of timescale? You have consulted with them; they could put out
22 a view, a statement or change at the same time as you having made that
23 determination?

24 THE CHAIRMAN: Everything is possible. It is not something we have any control
25 over. Obviously if that were possible, that would give us greater comfort that

1 that was an effective remedy or an effective aspect to a remedy. I am not
2 aware of that happening so far, so we have not really got any experience.

3 A. (Mr Roberts) Certainly in merger timescales it is rather tricky to see that
4 happening.

5 Q. (Mr Holmes) No, I can see that, particularly if you are recommending that the
6 government did something. But if perhaps the recommendation was that
7 another regulator did something, then I can see it would be more possible that
8 they might be able to do something within a similar timescale and you could
9 put out a joint statement.

10 A. (Mr Roberts) Yes. The odds look better but it is still quite tight in that last two
11 months or so of the remedies process to achieve it.

12 THE CHAIRMAN: Yes, but it is a nice idea. Nobody has asked us why we are not
13 doing joint guidelines on remedies with OFT. Anybody want to ask that? The
14 answer is we are a bit further down the line and there is a much clearer
15 bifurcation between OFT remedies work and ours and it did not seem in the
16 end to us to make a lot of sense. On the substantive guidance we are
17 committed to making that a genuine joint effort.

18 A. (Mr Roberts) Also, we have discussed this draft with the OFT and they are
19 very comfortable with the approach that we have embodied in this and they
20 gave us useful feedback at an earlier stage. So in terms of the approach of
21 the two authorities, it is fairly similar but obviously undertakings in lieu provide
22 a different context from our final remedies . They are meant to resolve a
23 clear-cut problem with a clear-cut solution and the timescales involved are
24 rather different. So, given their difference in circumstance, we have not gone
25 for joint guidance, whereas in terms of the substantive merger analysis it

1 makes sense to go for joint guidance.

2 THE CHAIRMAN: Can I go to Marc first and then I will come back. Yes?

3 Q. (Mr Israel) Mark Israel, Macfarlanes. On behavioural remedies, clearly we
4 have heard that they involve many more risks, whether specification or
5 circumvention risks. Do you see a role in the process where you may engage
6 a third party - for example, a consultant to carry out a customer survey in the
7 way you often do at the earlier stages of an inquiry - to try and ascertain in a
8 particular case where you need to draw the line on behavioural remedies if
9 necessary, or is it that you feel that your own experience and the Remedies
10 Standing Group probably has sufficient experience and that nobody else is
11 going to be able to do it better when you are trying to decide whether or not a
12 behavioural remedy - particularly, for example, in conjunction with a structural
13 remedy - is the right way to go?

14 A. (Ms Ross) Okay. There are a number of different things I want to pick up.
15 The first one is that in actually choosing which remedy is appropriate, is going
16 to be a matter for the inquiry group because that is going to happen pre-final
17 determination. As you know, we will consult quite heavily with third parties,
18 particularly I think in the case of behavioural remedies where we are
19 essentially talking about perhaps looking after the interests of third parties
20 with behavioural remedies to some extent. So we are going to want to talk to
21 the people who will be affected, and we do that. We do that quite widely and
22 that is before the final remedy decision has been taken. If you are asking
23 about decisions in relation to the remedy after final determination, so the
24 remedy already exists and maybe there is a decision to be taken about
25 whether something constitutes non-compliance or not or something that is

1 actually written into the remedy, that will be a decision for the Remedies
2 Standing Group and what the Remedies Standing Group does to inform that
3 decision will depend on the nature of the decision that it is making. I would
4 not rule out that in particular cases it may wish to talk to third parties; it is just
5 going to depend on whether that would be helpful in the particular case.

6 THE CHAIRMAN: Simon, are you still on?

7 Q. (Mr Holmes) It is just an observation. You were asking yourself the question
8 about why we were not asking about the OFT.

9 THE CHAIRMAN: I often ask myself questions!

10 Q. (Mr Holmes) You mentioned the read-over between CC guidelines and the
11 OFT's activities. I am also interested in the read-over between the CC's
12 guidance on remedies in the merger context and in other contexts, particularly
13 market investigations. Clearly, you have a different context and you have a
14 different timescale but, nevertheless, a number of the observations which
15 people have made today and are here, one can actually read across into your
16 thinking on market investigations.

17 THE CHAIRMAN: One can but one should be careful. The read-across is not
18 automatic and we are not revising our market investigation remedies guidance
19 until we have more experience. Because, in contrast to around 60 cases, 40
20 reports and 20 sets of remedies, the population in the market investigation
21 field is richer in one sense but it is much smaller in another. The timescales
22 are different and, to some extent, the function is different. So yes, of course,
23 there are obvious parallels, but there are obvious non-parallels, too.

24 A. (Mr Roberts) Yes, I would elaborate on that and say that many of the design
25 principles, in terms of the type of risk analysis, you can read across.

1 However, the big point of departure is the circumstances of use, because
2 basically you are comparing a market inquiry where you might find a whole
3 panoply of features resulting in an adverse effect on competition, as opposed
4 to a single event, a merger which is resulting in a redistribution or creation of
5 market power. So I think it is really the circumstances of use which would be
6 quite different as between market inquiries and mergers, whereas actually
7 some of the design principles having alighted upon a set of remedies might be
8 quite similar and there might be significant read-across in those situations.

9 THE CHAIRMAN: More questions?

10 Q. (Ms Trapp) Deirdre Trapp, Freshfields. Back on behavioural remedies, I
11 think a lot of the test presupposes a full control situation. I was wondering
12 whether you were going to enlighten us at some point on how you saw
13 material influence cases in the remedies context going forward. In particular,
14 whether some corporate governance style remedies - officers agreeing not to
15 go on boards or shareholders not voting in given situations - were structural,
16 behavioural or a combination of the two.

17 THE CHAIRMAN: Do you mind if we do not?

18 Q. (Ms Trapp) But it would be useful if the guidance were to include something.

19 THE CHAIRMAN: Yes, that is true. I do not want to go into the consequences of
20 material influence particularly in detail because it is currently before the CAT.
21 We may be in a better position to elaborate afterwards or we may not, I do not
22 know. That is up for grabs. Anything you want to say on the extent to which
23 all these design principles apply in material influence cases?

24 A. (Mr Roberts) Well, I think in deciding not to say more about those, I think we
25 were led by the fact that so often material influence very much depends on

1 the precise circumstances in which you find it. For instance, in LSE there was
2 certainly an element of corporate governance style remedy alongside a
3 structural remedy and that was basically to soak up residual influence so you
4 would not rule that out. But it depends on circumstances in the individual
5 case and we felt that general principles could be so affected by particular
6 circumstances that elaboration would not be helpful. So, basically, rather than
7 cast these guidelines to deal with every conceivable situation and then end up
8 with a very bulky and unusable document, we decided to say as much as
9 would be helpful but yet embody the principles.

10 A. (Mr Land) In some areas I would imagine you can read across fairly easily;
11 for example, the issues around price caps would be pretty much unaffected by
12 the notion of control.

13 THE CHAIRMAN: Okay. Yes.

14 Q. (Mr Bretz) I have a question on the last page of the draft guidance in relation
15 to anticipated mergers, and particularly paragraph 17 would suggest that in an
16 anticipated merger you could have a set of undertakings or order which would
17 be prepared preventing the parties from proceeding with the acquisition.
18 Now, the two circumstances where you could imagine that being the case is
19 where either you are bound to complete through a pre-existing legal obligation
20 under section 79 of the Enterprise Act, or where it is an asset acquisition. I
21 just wondered about the word "undertakings". Could you ever conceive of a
22 party's undertaking not to comply with their legal obligation to complete and, if
23 so, what are those circumstances? The second question I had was about the
24 word "order". Would the Commission really contemplate making an order that
25 could effectively frustrate the legal obligations of the parties to complete

1 where they have specifically structured the transaction in a way to fall into one
2 of the legal exceptions?

3 THE CHAIRMAN: Well, I think the answer to the last question is if the circumstances
4 were appropriate, yes, but it would depend on the circumstances. Whether
5 we would expect undertakings to give undertakings ...

6 A. (Mr Roberts) No. That would be rather unusual. I mean, we have actually
7 used undertakings in anticipated merger cases. It is not something we
8 normally do, but certainly we have had to do that in the past where the risk
9 required it.

10 THE CHAIRMAN: My experience is anything is possible in these circumstances. It
11 is quite hard to predict what the circumstances will be, but that is the answer
12 to your question. Any other questions? I think this is going to be the last,
13 John, so make it a good one.

14 Q. (Mr Wotton) Again, it is in the behavioural remedies area - the border between
15 enabling measures and controlling outcomes measures. Just take, for
16 example, an EU case, News Corp/Telepiu - a whole raft of behavioural
17 measures were imposed, all characterised as enabling access to the
18 monopoly platform, but some very specific about the outcomes which should
19 or should not take place. For example, you may buy films for so many years
20 and not more, or football rights, or whatever. But where are the boundaries
21 drawn? Are "measures to control outcomes" price caps only or something
22 more than that?

23 A. (Mr Roberts) Well, it is important to have the distinction in your mind even if it
24 is quite hard to draw it in particular circumstances, and it is not going to give
25 you an absolute answer in each case.

1 A. (Mr Land) I think the distinction is between measures which are still seeking
2 to restore competition and a competitive process that has been lost by the
3 merger as opposed to measures which essentially give up on competition and
4 which are about mitigating the harm. As you say, there will be grey areas in
5 there but that is the fundamental distinction we are trying to make.

6 A. (Mr Roberts) Yes, and in practice it may be a bit grey along that boundary,
7 just as, for instance, in IP remedies that is very much a grey area between
8 behavioural and structural remedies.

9 THE CHAIRMAN: Okay. Well, unless there are any other burning issues, it remains
10 for me to thank my team for all the hard work they put into this and thanks to
11 you all for coming along and contributing. This is a continuing process.
12 Please send comments, written comments, not only to this but also to the
13 substantive merger guideline process. We will take them very seriously as
14 indeed we do all our consultation exercises. So thank you very much for
15 coming. We look forward to seeing you again. Thank you.

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and didn't finish the sentence.
- xx xx xx -	A pair of single dashes are used to separate strong interruptions from the rest of the sentence e.g. An honest politician – if such a creature exists – would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way – or was there?