Law Society of Scotland

Consultation Response

Draft guidance on exceptions to the duty to refer

July 2018

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Competition Law Sub-committee welcomes the opportunity to consider and respond to the CMA's consultation *Draft guidance on exceptions to the duty to refer*.[1] The Sub-committee has the following comments to put forward for consideration.

Response

2.1 Is the content, format and presentation of the draft guidance sufficiently clear? In particular, does the draft guidance clearly explain the relationship between RCBs and remedies? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.

Overall, the draft guidance is clear and informative for practitioners in this area. However, further clarification on the following points would be beneficial.

The 'value of the market' terms appears to be used interchangeably with the turnover. This can be seen, for example, at paragraph 20 of the draft guidance, where the £15 million threshold is defined both as 'annual market in the UK' and later as an 'aggregated turnover'. For the avoidance of doubt, it would be helpful to specify at the outset what the CMA means by the 'annual value of the market', and clarify that this is a proxy for the turnover of the entire market (presuming that this is the intention). While the draft guidance specifies in paragraph 36 that overall market is calculated based on the turnover of all parties, which is helpful, it would be better to set this out at the beginning.

[1] https://www.gov.uk/government/consultations/exceptions-to-the-duty-to-refer

Furthermore, the draft guidance states that the market is determined on the basis of the turnover of all the players in the market. The parties will have their own turnover figures, but may in certain instances struggle to find turnover data of competitors to estimate the overall value of the annual UK market (for example where the public accounts of all third parties active in the market are not available or are available in an aggregated form which cannot be used for the market segments). It would therefore be helpful to the parties to include examples of the evidence that the CMA would accept for this purpose. For example, where the annual turnover data for the entire market is not available to the parties, the Guidance could refer to circumstances where eg third party or consultancy reports might be used as alternative means for estimating the value of the market.

2.2 Is the draft guidance sufficiently comprehensive? In particular, does the it provide enough examples of the type of evidence that the CMA requires in its assessment of RCBs? Does it have any significant omissions? Do you have any suggestions for additional or revised content that you would find helpful?

Paragraph 18 of the draft guidance states that "the expected customer harm that directly results from the individual merger under consideration will be a function of a number of factors: the size of the market, the likelihood that the SLC will actually occur, the magnitude of competition that would be lost by the merger, and the duration of the SLC." As regards the duration of the SLC, it would be appropriate to give examples or illustrations of the factors that would be taken into account to estimate the duration of the SLC. For example, would the CMA consider barriers to entry for the purposes of this analysis? Clarifying how the duration of the SLC will be considered would steer the parties in providing the required evidence to the CMA.

2.3 Do you have any other comments on the draft guidance?

More generally it may be useful to consider other jurisdictions that apply similar *de minimis* exceptions for the in-depth analysis. For example, in Germany transactions affecting *de minimis* markets (that is, concentrations exclusively affecting a market in which goods or commercial services have been offered for at least five years and which had a market volume of less than €15 million in the last calendar year), are exempt from substantive review but must be notified.[2] It may be worth considering if the five year limb of the test is adds value in ensuring that 'novel / developing' markets are not exempted from the *ex ante* review pre-maturely. This could be one of the considerations for the duration of the SLC.

[2] OECD Working Party No. 3 on Co-operation and Enforcement, *Local nexus and jurisdictional thresholds in merger control*, 14-15 June 2016, footnote 38

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