Consultation Response

Competition and Markets Authority consultation
*Mergers: Exceptions to the duty to refer in markets of
insufficient importance*

13 February 2017

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 Competition & Markets Authority consultation: *Mergers: Exception to the duty to refer in markets of insufficient importance.*[1] The Sub-committee has the following comments to put forward for consideration.

Response to Questions

Q1. Do you agree with the proposed changes to the thresholds?

In principle, a reasonable increase in the thresholds to take account of inflation and some noted cases where a cost-benefit analysis might have suggested that some (very few) investigations might not have been net beneficial, seems sensible. This would fit in with a wider emphasis by the CMA on a cost-benefit approach to regulation, as encouraged by its consultative functions to other government departments.

Q2. Do you agree with the potential benefits of these proposals?

As above, some movement in the headline figures suggesting whether a reference is, in general, beneficial seems sensible. One small point that is perhaps worth emphasising with a view to more regional markets is the importance of not operating these thresholds in too mechanical a fashion. Some relatively small markets still affect consumers greatly - see e.g. the vertical foreclosure issues highlighted in the *Western*

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585147/small-mergers-consultation.pdf

Isles Road Fuels[2] case. Although a slightly different legal context, the *Western Isles* case aptly demonstrates significant impacts that can occur even in smaller markets, and it is perhaps less clear that the strict cost-benefit approach is called for here where distributional impacts may be significant, and where the alternative seems likely to be monopoly supply.

In short, we would see benefit in keeping in mind the importance of the word "generally" in maintaining an exception to the thresholds where (i) the potential for market harm seems particularly significant, or (ii) a significant regional impact is possible, even if the regional market in question is relatively small. This sensitivity could avoid the risk that regions might possibly otherwise be sacrificed to monopoly supply and be denied the benefits of a competitive marketplace. We are also mindful that Brexit will, in all likelihood, bring significant changes to CMA's operational activities and therefore may result in more pressure on time or resources for consideration of regional markets.

Q3. Do you have any other comments about the proposed changes?

We support the suggestions, subject to retaining the possibility to depart from the thresholds where appropriate, which could perhaps be outlined in guidance documents.

For further information, please contact:
Carolyn Thurston Smith
Policy team
Law Society of Scotland
DD: 0131 476 8350
policy@lawscot.org.uk

[2] See further: https://www.gov.uk/government/news/cma-accepts-commitments-to-improve-access-to-road-fuels-market-in-the-western-isles