Law Society of Scotland

Consultation Response

Introduction

The Law Society of Scotland is the professional body for over 12,000 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.

Our Competition Law sub-committee welcome the opportunity to respond to the Competition and Market Authority (CMA) consultation on Draft guidance on the application of the Chapter I prohibition in the Competition Act to horizontal agreements.[1]

We have the following comments to put forward for consideration:

Consultation questions

Is the content, format and presentation of the Draft Guidance sufficiently clear? If there are particular parts of the Draft Guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.

We note that the CMA's focus appears to be primarily on the clarity of the guidance. Our comments reflect this focus. None of the comments made in this response should be taken as either approval or otherwise of the substance of the Guidance (other than some limited comments below) by the Society.

The issue of clarity is an important one given that in most cases advisers are called on to self-assess the compatibility of commercial agreements with competition rules.

[1] Consultation (publishing.service.gov.uk)

Centre of gravity

We welcome the CMA's guidance on determining the centre of gravity of agreements that integrate different stages of cooperation. In particular, the guidance in paragraph 3.4 regarding the various combinations of stages of cooperation is helpful. The guidance in paragraph 3.5 relating to the relationship between assessing an agreement's centre of gravity and the block exemptions is useful.

We believe that it would be helpful for the CMA to provide some worked examples of the four indented points it makes at paragraph 3.4. The worked examples at the end of each part of the guidelines are amongst the most useful aspects of the document. While many commercial agreements do indeed cover just one type of co-operation, many agreements cross over (as the four examples set out in paragraph 3.4 recognise). We consider that it would be useful to give further clarity on the CMA's potential thinking on this by fleshing out these examples and providing an "Analysis" section as the CMA and/or Commission has done in the individual parts of the guidance.

Barriers to Entry

Throughout the document, when discussing the conditions under which an agreement would come outside section 2 due to the absence of market power and other reasons, we consider there is insufficient discussion of 'barriers to entry'. We think it would be beneficial for the CMA to explain how barriers to entry play a role under each type of agreement.

Crisis Production Cartels

Regarding joint production, we consider that it would be useful to address the possible terms under which genuine over-capacity brought about by some crisis or other major event, could lead to a crisis cartel being exempt under section 9. The covid-19 pandemic and the war in Ukraine have shown the possibility of systemic shocks to industries leading to over-capacity. There has been Commission decisional practice that predates the covid pandemic that seemed to accept in principle the possibility of crisis cartels. While we are conscious that extreme impacts and strict conditionality would be pre-requisites for exemption, we consider it would be beneficial if the CMA could address this.

Exemption Analysis

We consider the issue that lacks the most clarity in the guidance across all parts is the section 9 analysis., Currently the drafting here is basically the wording of section 9 with some minor added details. We believe this is a missed opportunity and an unfortunate one. Firstly, as the CMA will be aware, in the process of self-assessment, quite often if the market definition is uncertain, and if a restriction is likely to exist, one 'models' the impact of higher market shares and if that (less optimistic) analysis goes over a relevant safe harbour, any guidance on exemption would be very useful. We believe it would be beneficial if the CMA could provide insights into its likely approach in this important respect.

We note in passing that unlike the Commission guidelines, these guidelines do not cross-refer to an equivalent of the 81 (3) Notice. Further, the latter is primarily an economic analysis and not a legal guide. We have provided further comments on the s.9 analysis in answer to the next question where we suggest possible areas where the guidance could be expanded on.

Purchasing agreements

The guidance relating to purchasing agreements is generally clear. However, the section that relates to market power in selling markets would benefit from clarification. In paragraph 6.18 the guidance says that joint purchasing arrangements are less likely to give rise to competition concerns when the parties do not have market power on the selling market or markets. Paragraphs 6.21 and 6.23 explain that the selling markets are those downstream where the parties to the joint purchasing arrangement are active as sellers, as well as other related markets. In defining a selling market, regard should be had to the methodology described in the CMA's Guidance on Market Definition.

The guidance goes on to say in paragraph 6.24 that it is unlikely that market power would exist if the parties to the joint purchasing arrangement have a combined market share not exceeding 15% on the purchasing market or markets as well as a combined market share not exceeding 15% on the downstream selling market or markets.

In a scenario where there are multiple downstream relevant selling markets, we assume that the guidance means that market power is unlikely where the parties have a combined market share not exceeding 15% on **each** the downstream selling market or markets. It would be helpful to make that clear.

Information exchange

We welcome the CMA's updates to the sections that relate to information exchange to reflect developments in technology. In particular, it is helpful to understand the CMA's view on pricing algorithms and algorithmic collusion. However, there are some places that we consider additional clarity would be helpful.

In paragraph 8.22, the guidance says that the use of algorithms by competitors may, for example, increase the risk of a collusive outcome in the market. It goes on to explain the theory of harm at a very high level and concludes by saying "some structural market conditions are generally required" for such collusion to be possible. The paragraph lists three examples of such structural conditions (high frequency of interactions, limited buyers, and the presence of homogenous products/services). It is implied that this list is non-exhaustive, but it would be helpful if that could be made clear.

In paragraph 8.52, the guidance explains that introducing a pricing rule in a shared algorithmic tool is also likely to be caught by the Chapter I prohibition, even in the absence of an explicit agreement to align future pricing. It is not clear how introducing a pricing rule in a shared algorithmic tool where a competitor may or

may not have access to that rule could be caught by the Chapter I prohibition. We consider that it would be helpful if that could be clarified.

2. Do you have any other comments on the Draft Guidance?

The CMA in our view should expand out the guidance on the criteria for exemption of agreements not coming within the scope of a BEO in particular (although not exclusively): by addressing the following:

- Does the CMA see any need to consider divergence at this point in time on the approach taken to economic efficiencies, particularly with regard to section 60A(7)(b) and (c)?
- Perhaps reflecting on lessons learned from cases such as Reims and the MasterCard/Visa if cases would be welcome, in terms of: what is the ideal methodologies by which a fair share of pricing for consumers should be calculated?
- As regards the hardcore restrictions in the R&D BEO and the SABEO, are there any circumstances (very rare as they doubtless will be) where the CMA could envisage hardcore restrictions being exempt? We appreciate that the CMA may not wish to get drawn into this, but as a matter of principle hardcore restrictions may be capable of exemption so the question is a fair one.

Again, without wishing to just highlight one example, it seems that there is one hardcore restriction in the SABEO that merits such explanation. In the joint production context (in the SABEO sense), where the parties jointly sell the jointly produced goods, agreeing the price or the production quantity is not seen as hardcore. Yet an agreement on who to sell to would be a hardcore restriction. Can the CMA explain why this would be problematic and in what situations it might not be a problem. It strikes us that where one sells is just as much a necessary part of a selling strategy as setting the price or the quantity of goods produced.

For further information, please contact:

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