



THE LAW SOCIETY
of SCOTLAND
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Consultation Response

Sunset clauses in market investigation remedies: updated guidance

**The Law Society of Scotland's response
July 2015**

Introduction

The Law Society of Scotland (the Society) aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes. To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors to ensure we benefit from knowledge and expertise from both within and out with the solicitor profession.

The Society's Competition Law Sub-committee welcomes the opportunity to consider and respond to the Competition and Markets Authority consultation: Sunset clauses in market investigation remedies: updated guidance. The committee has the following responses to put forward:

Comments

Q1. In your view, does the updated text of the Guidelines in Appendix 1 give effect to the CMA's intentions as described above?

Yes, we agree that the language gives effect to the intentions as described. In our view, it provides a clear preference for active review of market investigation remedies as well as some indication of timeframes, while preserving flexibility.

Q2. Is the updated text of the Guidelines sufficiently clear? If there are particular aspects of the amended text where you feel greater clarity is necessary, please be specific about the aspects concerned and the changes that you would propose to improve them.

The language is clear and easy to follow in most places. We welcome the specific and detailed guidance in paragraph 6 on factors to be considered in assessing the duration of sunset clauses. We note the references to specific cases (e.g. footnote 20) and these are very helpful.

We suggest that paragraph 8, setting out the approach to remedies review, might helpfully clarify whether third parties are entitled to seek a review and their wider role in the review process. In many cases third parties may have a strong interest in the remedies and their

role in providing information in the remedies review can be critical (not least to help prevent regulatory capture by the regulated parties). A role for third parties seems already to be implied by some of the discretions outlined in the document but there is perhaps some scope helpfully to clarify how the procedure would address affected third parties.

Q3. Do the factors set out in paragraph 6 (of Amendment 1 to Appendix 1) identify the key considerations the CMA should have regard to when considering the duration of remedies and the use of sunset clauses? Are there other factors to which the CMA should have regard?

We note the considerations, as set out in paragraph 6, which it is suggested may be relevant to the CMA's decision whether to specify a finite duration for a measure and the duration of any such 'sunset clause':

- (a) AEC duration and the nature of the particular commitment in question,
- (b) its role in restoring competition, and
- (c) potential obsolescence

In our view, these are clearly central factors and are well identified.

The option in (b) to have a sunset clause operating with reference to results, rather than a timeframe, seems sensible but care may be needed in drafting this to ensure that the threshold involved is clear. If, for instance, the results-based sunset clauses are to turn on lowered barriers to entry, some examples (ideally from cases) might be helpful to those drafting a results-based clause to encourage its being as clear as possible.

As drafted, (a), (b) and (c) consider many important factors. There may be an argument from an economic perspective to consider as an additional factor the costs involved in running remedies as an additional factor, and to balance these against the benefits derived (i.e. netting off net social costs and social benefits from the intervention). Some express consideration of the costs involved in running the remedies (e.g. specialist monitors) should be included, as part of a balanced analysis. This may already be implied to a degree by 6(b) (nature of commitments) but the point could perhaps be helpfully clarified.

Q4. Is the CMA's ability to achieve this objective enhanced by setting an expectation when introducing new remedies without a sunset clause (or with a long sunset

clause), that the CMA will initiate a review of the continuing need for such remedies within ten years? Do you consider that ten years is a suitable long-stop date for a review, bearing in mind that if the parties to a remedy identify a change of circumstance earlier they can request a review?

We believe that the use of a ten year long-stop date will play an important role in active review of remedies and may help prevent issues arising with questions over the effectiveness of very old remedies. Spontaneous review by the CMA in the absence of a request from the parties is very sensible, in order to catch outdated remedies the parties may no longer feel burdened by and so might not spontaneously raise. The proposal to allow earlier review for cause seems to strike a sensible balance between enforcement in the wake of problems identified, and the need for longer term monitoring.

Q5. Do you have any other comments about the proposed amendments to the Guidelines?

The proposed amendments take a sensible approach balancing the needs of flexibility and the needs of enforcement.

For further information and alternative formats, please contact:

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