Law Society of Scotland

Consultation response

Draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers (CMA2 and CMA56)

December 2020

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 Committee welcomes the opportunity to respond to the UK Government's consultation on *Updates to the CMA's mergers procedural guidelines (CMA2 and CMA56)*.[1] We have the following comments to put forward for consideration.

General remarks

The Law Society of Scotland welcomes the CMA's draft revised Guidance on its procedures and on its approach to its jurisdiction in (CMA2 and CMA56). It is essential that the CMA's guidance helps in creating as much certainty and predictability as is reasonably possible. Uncertainty and unpredictability create costs for business and investment. It is important for all stakeholders that the CMA's guidance clearly and accurately reflects its current practices. There have been numerous and significant developments in the CMA's approach and practices since the last iteration of its Guidance in 2014. Our comments are on the clarity of the Guidance rather than the CMA's procedures themselves (CMA2con and CMA56con).

Comments on the draft guidance

Jurisdiction and relevant merger situations

Enterprises

We believe it would be helpful to give greater detail on the circumstances in which the acquisition of assets would be regarded as the acquisition of an enterprise. Paragraphs 4.13 and 4.18 CMA2con set out when the CMA will consider that a transfer of assets constitutes an enterprise:

[1] https://www.gov.uk/government/consultations/updates-to-the-cmas-mergers-procedural-guidelines-cma2-and-cma56

"An enterprise would generally require something more than bare assets, related to the fact that the assets being transferred were previously employed in combination in the activities of the business being acquired" (para 4.13)

This description potentially muddies the test given by the Supreme Court in Eurotunnel that for an enterprise to be comprised in the acquisition of assets:[2]

"*they must give him more than he might have acquired by going into the market and buying factors of production, and (ii) the extra must be attributable to the fact that the assets were previously employed in combination in the "activities" of the target enterprise…*"

There is a risk that the description set out by the CMA, in changing the formulation of the Supreme Court, is not likely to be regarded as a faithful representation.

The share of supply test

Paragraph 4.63(b) discusses the goods or services, which the CMA will have regard to in determining whether the share of supply test is met, stating that it will have regard to any "reasonable description" recognising "commercial reality". The Draft states that "*competitive interactions between firms may not be reduced to overlaps in directly-marketed products or services but can result, for example, from overlaps involving pipeline products or services"* thus following *Roche Holdings/ Spark Therapeutics*. We are concerned that "*overlaps involving pipeline products or services*" is insufficiently clear are leaves businesses uncertain as to the intended scope.

It would be helpful if the CMA guidance could give some additional clarity as to how wide-ranging its scope could reasonably be. For example, it would be helpful to understand what constitutes a pipeline; how definite the product or service needs to be; and how that aligns with future intentions or plans - for example, to enter a market.

Pre-notification process

The description of the Pre-notification Phase does not sufficiently reflect the significant front-loading which is often involved in this aspect of the process.

Significant volumes of data can often be required at this stage and Paragraphs 6.17 to 6.19 CMA2con may not clearly enough pre-warn business of the volume of information the CMA regularly requests in pre-notification. In practice, in many cases most of the information required for the Phase 1 decision is ingathered at this stage.

[2] *Société Cooperative de Production Seafrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)* [2015] UKSC 75, paragraph 39.

As regards its duration the CMA notes on page 43 that the duration of the pre-notification process will differ on a case-by-case basis, but that pre-notification ought to take a minimum of two weeks. We think it would be fairer to point out - especially for businesses and practitioners who may not regularly deal with merger control, and may be relying more heavily on the Guidance - that the potential duration of pre-notification, can run to three months even in cases that are not particularly complex. We understand the average in 2020 was more than 40 working days.

The guidance should better reflect these realities by providing indicative timeframes for anticipated mergers.

Fast track processes

We welcome the flexibility around fast-track possibilities and would suggest the CMA states how it will treat an application which has been declined, and in particular the acceptance that the test for reference is met, in its decision-making. This is essential if the fast-track procedure is to be used in anything other than in clear-cut cases.

Phase 2 assessment process

Parties' submissions

We would wish to ensure that merger parties are able to have relevant evidence presented and considered in a way that is efficient for the CMA's process but which is relevant for concerns the CMA may have as regards the merger during the Phase 2 process. In particular the CMA clearly commits to review submissions made by the parties at three stages during the Phase 2 process: response to the issues statement, response to the annotated issues statement (and any working papers disclosed) and in response to the provisional findings. Submissions provided outside these stages may not be taken into account.[3] Fewer working papers will be disclosed to the parties – the draft revised guidance confines this to "key" working papers, the number and nature of which will vary on a case by case basis.[4]

Clarity would be helpful on when submissions will be taken into account outside of the three main stages. There must have been instances where errors or misunderstandings have been avoided with a responsive or receptive regime and the ability to consider working papers "on the go".

Final report

We note the CMA has changed the standard of what will be published from "*as is necessary to facilitate a proper understanding*" to a standard of "*reasons and information the CMA considers appropriate*" (Paragraph

[3] CMA2con, paragraphs 11.12 and 11.13.

[4] CMA2con, paragraphs 12.2 and 12.3.

13.22). A clear understanding of the CMA's decisions is essential, especially given the CMA's practice of treating its own decisions as precedent (which can be useful).

IEOs

It will be no surprise to the CMA that parties in receipt of IEOs may find them to be highly restrictive of parts of their business, which have no impact on the businesses merging and no realistic impact on any remedy the CMA might contemplate. These wide ranging IEOs can be highly restrictive, putting companies and their executives in a difficult position with a strong possibility, even for a short period, of unintentional breach. Relying on CMA discretion not to enforce against such breaches is not as satisfactory as starting with IEOs which are tailored to a degree from the outset. That is preferable from the business certainty perspective and may be better from CMA resource point of view. More detail on initial communication around this would be helpful.

Multi-jurisdictional mergers

The CMA may take into account merger control processes in other jurisdictions and, if remedies imposed or agreed would be likely to address competition concerns in the UK, decide not to open an investigation. Under paragraph 8.4, before expiry of the four-month statutory period the CMA may still consider whether to open a formal investigation. The lingering possibility of the CMA opening an investigation could cause avoidable uncertainty and/or delay. Some more detail on how this might play out would be welcome.

Public interest mergers

We consider it would be helpful for the Guidance to reflect the major change taking place as regards the national security aspects of the public interest merger regime to the effect that national security issues will be dealt with by the review procedures outlined in the National Security and Investment Bill (the Bill) - all the more so given the fact that the review mechanism dates from 12 November 2020 although the legislation has yet to be finalised. In the interim parties will be seeking informal contact with the Office for Investment. Although it would be better if the CMA2 fully reflected at least the potential interface with those procedures, it should address the fact that for a period we will have the "retrospective" application of the Bill but also the current procedures in the Enterprise Act.[5]

Edinburgh

Given the CMA's increasing an active presence in Edinburgh, we believe it should be made clear in the Guidance that where the CMA requires a witness to give oral evidence (para 11.23) that attendance could equally be in Edinburgh or London, irrespective of the location of the witness. Clearly, it would be reasonable to have attendance at convenience to the CMA Inquiry Group but the convenience of witnesses perhaps

[5] Clause 31 National Security and Investment Bill (210 2019-21, as introduced) and *Memorandum from the Department for Business, Energy and Industrial Strategy to the Delegated Powers and Regulatory Reform Committee*, 10 November 2020, paragraphs 44-48.

should not be ignored. Presumably Inquiry Group could sit in Edinburgh where the parties or the markets affected might make that appropriate.

Devolved Governmental Entities

The UK devolved entities namely the Scottish Government, Welsh Government and the Northern Ireland administration may have legitimate and important views on particular mergers and whilst, no doubt, the CMA does seek their views, we believe it would be helpful to at least include these important entities in the list of entities which the CMA would contemplate seeking views from in para 9.21. Consumer Scotland would be an additional organisation whose views might actively be sought.

On this point it would be helpful for the CMA2 to indicate any particular considerations arising from the status of Northern Ireland and its markets though admittedly that is likely to be a matter primarily for the merger assessment guidelines.

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