The Brave New World of UK Competition Law –
the Concurrency Regime

Background to concurrency

The sector regulators - Ofcom (communications), Ofgem (electricity and gas), Ofwat (water and sewerage), CAA (aviation), ORR (rail), Monitor (healthcare in respect of England only) and the Northern Ireland combined utilities regulator, NIAUR – have concurrent powers with the OFT (so from 1 April 2014 with the CMA) to apply both UK and EU competition law. From 1 April 2015 they will be joined by the Financial Conduct Authority, which currently works closely with the OFT and CMA to enforce the competition rules.

Each of the CMA, Ofcom, Ofgem, Ofwat, CAA, ORR and NIAUR has a statutory duty to promote competition in the interests of consumers. Monitor has a different duty to prevent anti-competitive behaviour.

There is a general consensus that the sector regulators have not put their competition law powers to best use, relying more on their sector-specific regulatory powers. The reform of the UK competition regime therefore includes a focus on how the sector regulators can be persuaded to turn first to the competition rules when faced with market issues.

Concurrency in the Government’s Strategic Steer

The Government’s Strategic Steer for the CMA for 2014-17 includes a priority to assess specific sectors where enhanced competition could contribute to faster growth (for example, knowledge intensive sectors, financial services and infrastructure sectors including energy) – working with the responsible regulator where appropriate.

The main themes

The new regime obliges concurrent regulators to consider using their competition law powers, rather than regulatory powers, to address issues of concern in their sector.

The main themes may be summarised as:

- The sector regulators (with the exception of Monitor) will be obliged to give primacy to competition enforcement powers ahead of their regulatory enforcement powers. A balanced assessment of the appropriateness of the type of enforcement action - whether competition or regulation - will be necessary in each case;

- The CMA will have the leading role in coordinating competition policy between itself and the sector regulators;

- The CMA has the overall power to remove a competition case from a sector regulator and advance the case itself up to the point at which a Statement of Objections has been issued;

- The CMA will publish an annual report on the effectiveness of the concurrency regime, and the application of competition powers in the regulated sectors;

- The Secretary of State has the power to remove competition powers (either under the Competition Act 1998 or the Enterprise Act 2002, or both) from sector regulators (with the exception of Monitor).

New Regulations, guidance and networks have been established to bring these principles into effect.
The Competition Act 1998 (Concurrency) Regulations 2014

The new Regulations come into effect on 1 April 2014.

The Regulations set out how the sector regulators and the CMA decide which is competent to handle a case, including the CMA’s power to allocate in case of disagreement and the transfer from one regulator to another. Specific allocation provisions relate to cases involving Monitor.

An important concept is the sharing of information, staff and best practice. The Regulations establish how the regulators share information about concurrent cases and how staff from one sector may work for another regulator when required.

Market studies and market investigations; super complaints

An important area of competence is the ability under the Enterprise Act 2002 for the sector regulators as well as the OFT (now CMA) to undertake market studies and to make market investigation references to the CMA. The CMA has issued Supplemental Guidance on how it will approach market-wide issues in the regulated sectors. (The guidance also explains procedural changes.)

Sector regulators also have a duty to respond to super-complaints in their sectors. The guidance on this aspect has not changed.

New Guidance

The CMA published the final version of new Guidance on concurrent application of competition law to regulated industries on 12 March 2014. It replaces the previous OFT guidance.

Key features of the guidance reflect the rules set out in the Regulations and the interplay between competition and regulatory powers. They cover:

- the extent of the regulators’ concurrency powers, and the general exercise of those powers;
- the operation of concurrency in practice, including issues such as the content of the memoranda of understanding between the CMA and the sector regulators, the general principles of case allocation and the procedures for transferring cases between authorities;
- how the concurrency rules interact with sector-specific regulatory powers, including an explanation of the concurrent powers in relation to market studies and market investigation references, the principles of information-sharing between the regulators and the CMA, and guidance on ensuring consistency of decision-making.

The new Guidance includes some examples of concurrency in practice. These include the situation where, if it considers that it is itself best placed to make a decision that sets an appropriate precedent, the CMA might exercise its powers to take a case over from one of the sector regulators. This could be where similar issues arise across different sectors or where a regulator lacks the necessary resources.

The CMA notes that it may be possible to develop more detailed, practical guidance once the regulators have accumulated some experience in exercising their powers under the new regime.

New networks

A UK Competition Network (UKCN) has been established to provide the sector regulators and the CMA with a forum for the exchange of information and best practice. Its Statement of Intent of December 2013 listed its areas of focus as strategic dialogue, enforcement cooperation, enhancing capabilities, sharing best practice, advocacy and the presentation of an annual concurrency report. In terms of collaboration and the development of pro-competition regulatory frameworks, the creation of the UKCN has been described as “an international first”.

The sector regulators have also more recently launched a UK Regulators Network (UKRN) tasked with improving coordination across regulated sectors to enhance investment and efficiency for the benefit of consumers. Some of its objectives will likely have implications also for the sector regulators’ use of their competition powers, as they work together on better understanding of areas such as customer engagement.
Implications for business

What is changing here is not the competition rules which businesses must follow, but the way in which they will be enforced in regulated sectors. Where sector regulators make use of competition powers, the remedies available to them are the competition law remedies—up to 10% of worldwide turnover in fines, with the spectre of criminal prosecution (made easier in the new regime) for senior individuals suspected of promoting hard core cartel activity. We may well see more market studies and market investigations in the regulated sectors.

Businesses in these industries should review their competition law compliance procedures, with an eye to developing effective practices for engaging with the sector regulators in relation to competition matters, and for dealing with competition investigations, whether market studies, market investigations or specific compliance issues under the Competition Act 1998 and the European competition rules.

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