The UK government has tabled reforms to UK competition law which could allow the removal of the “concurrent” powers of sector regulators to apply competition law. The changes extend to the energy sector and beyond, raising important issues concerning the proper allocation of functions between the competition authority and sector regulators in the context of the ongoing overhaul of UK competition law.

**Concurrent application of competition law in the UK – A brief reminder**

Companies operating in the regulated industries in the UK will be familiar with the “concurrent” application of competition by the competition authority – currently the Office of Fair Trading (OFT) – and the various sector regulators. The sector regulators for these purposes are:

- The Gas and Electricity Markets Authority (electricity and gas);
- The Office of Communications (communications and media);
- The Water Services Regulation Authority (water and sewerage);
- The Office of Rail Regulation (safety and economic regulator – railways);
- The Northern Ireland Authority for Utility Regulation (electricity, gas, water and sewerage – Northern Ireland);
- The Civil Aviation Authority (aviation); and
- Monitor (healthcare).

The sector regulators share, broadly, the same powers as the OFT to enforce UK and EU competition law in their respective sectors. The sector regulators may also make market investigation references to the UK’s second stage competition authority (i.e., the Competition Commission (CC)) and may handle super complaints from designated bodies, as does the OFT. The concurrent powers of the sector regulators extend not only to the application and enforcement of the substantive competition laws but also to concurrent exercise of the OFT’s powers of investigation and review of the sector regulators’ decisions under the UK Competition Act 1998 by the Competition Appeal Tribunal (CAT).

When concurrency was introduced, arguments were made both for and against the system. In favour of concurrency it was argued that: (i) sector regulators had developed specialist expertise and knowledge of their sectors that could be applied effectively in competition cases; (ii) there was overlap between the sector licensing regimes and competition law; and (iii) concurrency would encourage sector regulators to move away from reliance on ex ante regulation to using ex post competition law.

Against concurrency it was argued that: (i) concurrency is rare in other jurisdictions including in the EU; (ii) the sector regulators lacked expertise in EU competition law analysis and investigations experience; (iii) there
would be less efficient use of regulatory resources given the number of bodies that could potentially apply competition powers; (iv) there was a risk of inconsistency in decision making; and (v) there was a risk of “double jeopardy” where companies operating in more than one sector might face multiple investigations.

It was initially expected that reliance on regulatory powers would be lessened in favour of a more general application of competition law. However, in general, and with some exceptions, sector regulators have tended to favour use of sector regulatory powers.

Energy sector experience application of competition law

A few case examples will serve to illustrate Ofgem’s mixed experience in using competition law interventions.

A case involving National Grid plc provides a useful insight into some of the challenges that the energy regulator has had in using its competition law powers. In 2008, Ofgem announced that it had fined National Grid £41.6 million (approximately USD 65.7 million) for abusing its dominant position in the market for the supply of domestic gas meters in Great Britain, in breach of the Chapter II prohibition of the Competition Act 1998 and Article 82 of the EC Treaty (now Article 102 Treaty on the Functioning of the EU (TFEU)). The abuse related to market foreclosure caused by long term contracts that restricted the ability of efficient meter operators to enter or expand on the market. This action was Ofgem’s first competition law infringement decision and it was probably not surprising that National Grid appealed the decision to the CAT. The CAT upheld Ofgem’s findings on dominance and abuse, but reduced the fine to £30 million (approximately USD 47.4 million). National Grid then appealed to the Court of Appeal which on 23 February 2010 upheld the CAT in relation to abuse of dominance but reduced the fine to £15 million (approximately USD 23.7 million). This reduction was on the grounds that the CAT did not give sufficient weight to Ofgem’s involvement in the procedure that led to National Grid’s agreements in relation to metering. National Grid had effectively sought approval from Ofgem as to the terms of the underlying agreements and the fact that Ofgem had not said that the agreements would breach competition law was considered to justify a further reduced fine. National Grid sought permission to appeal further to the Supreme Court but this was refused. Although this was an early case, it is a reminder that the use by the sector regulator of its competition and regulatory powers should not operate in isolation of one another. Regulated companies should alert the regulator of potential competition issues in the course of their interactions with the regulator. However, it appears that compliance with regulatory responsibilities will not, of itself, immunise against competition law risk.

Ofgem has used the prospect of competition law intervention as a tool to secure behavioural commitments from investigated companies. On 20 January 2009, Ofgem announced an investigation into alleged breaches of the Chapter II prohibition of the Competition Act 1998/ Article 102 TFEU on abuse of dominance by electricity company Electricity North West Limited (ENW). Ofgem considered that the terms imposed by ENW on rival networks connecting to the ENW network could result in an abusive margin squeeze. Rather than Ofgem issuing an infringement decision, ENW revised its charging methodology to address Ofgem’s concerns. On 24 May 2012, Ofgem announced that it had accepted binding commitments whereby ENW assumed responsibility for the costs differences between the charges paid under the previous methodology and what would be due under the new methodology.

Ofgem has not always considered that using competition powers would be an effective tool. Ofgem began an investigation in 2008 against Scottish Power Limited and Scottish and Southern Energy plc, alleging that they had abused their dominant positions in breach of the Chapter II prohibition/ Article 102 TFEU. Ofgem had concerns that their output was more expensive than that of comparable generators with the resultant costs being borne by consumers and competitors. Moreover, it had concerns that the companies’ conduct may have heightened capacity constraints on the network. However, Ofgem decided to close the investigation as it considered that the chances of making an infringement decision under competition law were small. It believed that there were other regulatory mechanisms (including licence conditions) that could be pursued which would be more effective in addressing the problem.

Background to the reforms

Over the years, various bodies have put forward suggestions as to how the perceived difficulties with the current concurrency regime might be addressed.

A report by the Department of Trade and Industry and HM Treasury in 2006 proposed procedural improvements for resource sharing between the OFT and the sector regulators. In 2007 a House of Lords Select Committee on Regulators made similar recommendations. In 2010, the National Audit Office proposed that the incentives for sector regulators to apply competition law should be examined to see whether they were
appropriate.

The wider reshaping of UK competition law provided a platform for overhaul of the concurrent role of the sector regulators.

On 15 March 2012, the UK government issued its response to a consultation on the reform of UK competition law. The planned reform package contained in the Enterprise and Regulatory Reform Bill (the "Bill") is wide-ranging. In particular, a new "Competition and Markets Authority" (CMA) will be formed and will merge the current functions of the OFT and the CC. It is expected that the CMA will be operational by April 2014. The aim is that the merger will lead to more streamlined decision making. The CMA (and sector regulators) will be subject to a "performance framework" to monitor their effectiveness.

The Bill completed its passage through the House of Commons on 17 October 2012 and is currently undergoing scrutiny by the House of Lords.

Proposed amendments on concurrency

The Bill includes provisions to streamline the concurrency regime and address concerns that the sector regulators are not making effective use of their competition powers. It gives the CMA stronger power to coordinate competition cases. Sector regulators are under more explicit duties to consider using their general competition law powers in place of sector powers.

On 14 February 2013 details of further amendments were published.

The government has proposed a new provision which would allow the Secretary of State by order to remove from a sector regulator all or any of their concurrent competition powers discussed above.

Any such order may provide for amendments to other legislation, for example, removing or modifying the duty on the regulator to have regard to competition law enforcement in exercising its regulatory functions.

Prior to making an order, the Secretary of State would be required to conduct a two stage consultation process. The first stage would be with the relevant regulator, CMA and relevant devolved institutions in Scotland, Northern Ireland and Wales as applicable. The second stage of consultation would take place with first stage consultees, regulated providers, interested customers and any other such persons as the Secretary of State deems appropriate.

Potential implications in practice

The concurrent powers of the sector regulators have come under criticism ever since they were introduced. Ofgem has generally shown a tendency to use regulatory interventions rather than competition law powers, albeit in recent years it has been more inclined to use or consider competition law. The case for shifting concurrent powers to the competition authority has been put by proponents of a more streamlined enforcement regime.

Assuming that the proposed amendments become law, Ofgem and other sector regulators will have an added incentive to consider competition law instead of introducing additional and even unwarranted regulation, lest their competition law enforcement powers be removed completely. The reform proposals might be seen as laying down the gauntlet to sector regulators that if greater use of competition law powers is not made there could be grounds for removing those powers from the sector regulator's remit entirely. At a time when it is imperative to encourage investment in energy markets, many would argue that the most effective way to do this would be to intervene less and use regulatory powers only where ex post use of competition law would not be effective. Others, however, maintain that the case remains for more targeted use of market interventions in appropriate cases, if for example competition law cannot deliver a sufficiently timely or effective solution.

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