

Decision-Making Powers and Institutional Design in Competition Cases: The Application of Competition Rules by Sectoral Regulators in the United Kingdom

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In the United Kingdom various sectoral regulators have concurrent power to apply EU and U.K. competition law alongside the national competition agency, the Competition and Markets Authority (“CMA”). It is a somewhat unusual system and there has been much debate over past years about whether this system works effectively or whether it results in the underuse of competition law powers in regulated sectors. Recent reforms in the United Kingdom have sought to reinforce competition law enforcement by sectoral regulators. Moreover, concurrency is on the increase with additional regulators having been given concurrent powers over recent years and the CMA indicating that it will also focus its attention on competition in regulated sectors.

It remains to be seen what these developments mean in practice for the regulated sectors, but we can expect increased efforts to apply competition law in these sectors, both by the CMA and the regulators themselves. The success of these efforts will depend on the institutional design and decision-making structures within sectoral regulators and how well these promote the use of competition law powers, where appropriate, in a consistent and effective manner—something which will need to be worked out by the regulators and CMA on the ground.

In this paper, we focus on the topics of institutional design and decision-making within sectoral regulators in relation to competition cases. We start by considering why there has been so much focus on ensuring that the competition rules are applied in the regulated sectors in the United Kingdom. We then review alternative models for applying competition rules in regulated sectors used in different jurisdictions and consider the internal institutional design factors that might influence the sectoral regulators’ focus on competition cases in the U.K. context.

I. INTRODUCTION

In the United Kingdom various sectoral regulators² have concurrent power to apply EU and U.K. competition law alongside the national competition agency, the Competition and Markets Authority (“CMA”).³ It is a somewhat unusual system and there has been much debate over past years about whether this system works effectively or whether it results in the underuse of competition law powers in regulated sectors.

For the time being at least, the concurrency regime is here to stay with the Department for Business Innovation and Skills (“BIS”) choosing to maintain the concurrency regime during the recent reform of U.K. competition law, while providing a power to remove concurrent powers from a regulator in certain circumstances. With the aim of incentivizing sectoral regulators to use their competition powers instead of their regulatory powers, a primacy duty was placed on the concurrent regulators, obliging them to consider the use of their competition powers first before taking action under their regulatory powers.⁴

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In fact, concurrency is on the increase with additional regulators having been given concurrent powers over recent years, including Monitor (the U.K. healthcare regulator), whose powers came into effect on April 1, 2013, and the Financial Conduct Authority (“FCA”), whose powers vest on April 1, 2015. In the meantime, the Strategic Steer for the CMA issued

by BIS in October 2013,⁵ and the CMA’s Annual Plan published in April 2014,⁶ also indicate an intention for the CMA itself to focus its attention on competition in regulated sectors.

It remains to be seen what this means in practice for the regulated sectors, but we can expect increased efforts to apply competition law in these sectors both by the CMA and the regulators themselves. The success of these efforts will depend on the institutional design and decision-making structures within sectoral regulators and how well these promote the use of competition law powers, where appropriate, in a consistent and effective manner—something which will need to be worked out by the regulators and CMA on the ground.

In this paper, we therefore focus on the topics of institutional design and decision-making within sectoral regulators in relation to competition cases. We start by considering why there has been so much focus on ensuring that the competition rules are applied in the regulated sectors in the United Kingdom. We then review alternative models for applying competition rules in regulated sectors used in different jurisdictions and consider the internal institutional design factors that might influence the sectoral regulators’ focus on competition cases in the U.K. context.

II. BACKGROUND—WHY IS THE APPLICATION OF COMPETITION RULES IN THE REGULATED SECTORS IMPORTANT?

A. *Competition Enforcement in Regulated Sectors in the United Kingdom*

As is common in many countries, widespread sectoral regulation came into being with the privatization of state monopolies in areas such as utilities and telecoms in the 1980s and 1990s. The conventional philosophy has been that sectoral regulation is a necessary step to protect consumers in previously monopolistic markets, with the idea that regulation would eventually “wither away” in favor of open competition supported by competition law enforcement:

The original principle at the time of privatisation of many of the utilities was that sectoral regulation would be withdrawn over time as effective competition was introduced into the market. [...] Competition would replace the role of price control regulation [...].⁷

The United Kingdom is relatively unusual within Europe in having a concurrency regime whereby both the competition authorities and sectoral regulators have competition enforcement powers. This means

that the sectoral regulators have the power to apply competition law in order to deal with anticompetitive agreements or abuses of a dominant position that relate to activities in their respective sectors, concurrently with the CMA.⁸ The concurrent regulators also have the power to initiate market investigations in sectors where competition is considered not to be working effectively under the UK Enterprise Act 2002.

The perceived benefits of a concurrency system are that it: (a) leverages the regulators' industry expertise, enabling them to use their sector-specific knowledge when bringing cases in their sectors; (b) maximizes the enforcement of competition law through working in partnership, enabling more cases to be brought in aggregate; and (c) encourages regulators to rely on their general competition law powers instead of sector-specific regulatory powers where appropriate (absent concurrent competition powers, regulators may be reluctant to pass an issue on to be dealt with by the national competition agency and so may use their sectoral regulation powers instead). There may also be a further potential advantage in terms of stimulating competition among the various regulators, leading to enhanced performance.⁹

The potential disadvantages include: (a) the complexity of the system; (b) the scope for conflict and inconsistency in application of competition rules by a number of independent bodies; and (c) the inefficiencies caused by the duplication of effort and resources; for example, through each regulator needing to recruit and train specialized staff.

However, rather than issues arising from a proliferation of conflicting decisions from different sectoral regulators, there has been little enforcement of competition law in the regulated sectors in the United Kingdom.¹⁰ Since 2000, when the majority of the sectoral regulators were given concurrent powers, there have been only two competition law infringement decisions by regulators in the United Kingdom and three phase

HOWEVER, RATHER THAN ISSUES ARISING FROM A PROLIFERATION OF CONFLICTING DECISIONS FROM DIFFERENT SECTORAL REGULATORS, THERE HAS BEEN LITTLE ENFORCEMENT OF COMPETITION LAW IN THE REGULATED SECTORS IN THE UNITED KINGDOM

II market investigation references (and one other case, where undertakings were accepted in lieu of a market investigation reference).¹¹ The concurrency arrangements in the United Kingdom have been reviewed several times by different institutions and, in each case, the lack of competition enforcement by sectoral regulators was noted and questioned.¹² Most recently in the consultation document paving the way for the current reforms it was noted by BIS that:

Given that regulated sectors contain many of the most dominant companies and uncompetitive market structures and cover services of considerable consumer interest, this comparative lack of activity in the regulated sectors seems surprising.¹³

Part of the reason for the concern may well have been a comparison with the portfolio of work undertaken by the European Commission, where high profile precedent cases in various regulated sectors have been relatively commonplace.¹⁴

The reasons put forward for the paucity of competition enforcement in the regulated sectors in the United Kingdom have been varied, including: (a) the difficulty of bringing lengthy competition law cases,

particularly in complex areas such as abuse of dominance; (b) the overly close relationship with the relevant sector, perhaps resulting in regulatory capture; and/or (c) that regulation may be the more effective and immediate tool in some regulated markets.¹⁵

There was also a perceived reluctance by the Office of Fair Trading (“OFT”), the predecessor to the CMA, to engage actively in regulated markets. It has been observed that in part this may have been a result of the resources available to the OFT (which had a much smaller budget than the budgets available to sectoral regulators). This may have led the OFT to focus on investigating concerns in relation to non-regulated industries, leaving the sectoral regulators to lead on issues in their own sectors.¹⁶ This would not be surprising given the presence of regulators dedicated to covering these markets with the ability to bring competition cases where appropriate.

For these reasons, there has been substantial focus on the enforcement of competition rules in regulated sectors in the United Kingdom and the concurrency model itself. Regulated markets account for a reported 25 percent of the U.K. Gross Domestic Product, covering key areas such as utilities, telecoms, transport, and financial services.¹⁷ Their proper functioning is therefore critical to the U.K. economy as a whole.

INDEED, THE CONTINUATION OF THE CONCURRENCY MODEL WAS QUESTIONED DURING THE RECENT REFORMS IN THE UNITED KINGDOM.

B. What are the Alternatives?

It is a valid question whether, despite the good intentions in implementing the concurrency regime in the United Kingdom initially, and the recent reforms to strengthen the system, such a regime would be contemplated if a system of competition law enforcement in regulated sectors were being put into place *ab initio* in today’s world. Indeed, the continuation of the concurrency model was questioned during the recent reforms in the United Kingdom.

There are other models that offer some of the benefits of concurrency but also avoid some of the pitfalls (such as inconsistency, duplication, and the inefficient allocation of cases). Two of the most prevalent are:

- *Separation of Powers*: A clear division between competition authorities (with exclusive competition law enforcement powers) and sectoral regulators (with only regulatory powers); and
- *Combination of Powers*: The combination of competition and regulatory authorities (or some regulators or regulatory powers) into a single regulatory body.

The first is the more common system in the rest of Europe. This system has the benefits of: (a) consistency of outcome, with one body exercising competition powers across the entire economy and possibly spotting cross-industry trends more easily; (b) a clear focus and remit for the different bodies; and (c) avoiding

regulatory capture. However, absent robust mechanisms to share industry expertise with the competition agency, this system may fail to capitalize upon the industry expertise of sectoral regulators. It also places a high burden on the national competition authority (with often limited resources) to manage competition law compliance across all sectors, which could result in under- or no enforcement in certain regulated sectors if the issues arising in those sectors were not prioritized for investigation.

The second model has been recently adopted, for example, in Spain and the Netherlands. In 2013 the Spanish national competition authority was combined with the regulators for railways, energy, telecoms, airports, postal services, and broadcast media as a single “super-regulator” that both enforces competition rules and directly regulates economic sectors.¹⁸ The rationale was reportedly to gain efficiencies from integrating several institutions with common objectives and complementary activities.¹⁹

IT IS ALSO OPEN TO QUESTION WHETHER A SINGLE BODY CAN MAINTAIN AND DEVELOP THE INDUSTRY-SPECIFIC EXPERTISE OF DEDICATED SECTORAL REGULATORS.

While this model offers potential benefits in terms of consistency and efficiency, since competition and regulatory enforcement are in the hands of a single body, questions arise as to whether competition law enforcement in specific regulated sectors could be undermined by being subsumed within the wider priorities of a single super-regulator (compared to having a dedicated competition agency focusing on the use of competition powers).²⁰ It is also open to question whether a single body can maintain and develop the industry-specific expertise of dedicated sectoral regulators.

In the Spanish system, this appears to have been addressed through internal structures by maintaining distinct investigative directorates for each regulated sector (energy, communications, transport) as well as a directorate for the promotion of competition, all of which are under the supervision of, and report to, a council which will form the decision-making body. The council will have separate competition and regulatory chambers, each of which can opine on cases of the other chamber.

C. The Recent Reforms in the United Kingdom

Ultimately, the recent U.K. reforms sought to reinforce the concurrency regime, develop further the relationship between the CMA and the sectoral regulators, and enhance the “emphasis on early and proper consideration of the use of anti-trust powers (under Part 1 of the Competition Act 1998 (“CA98”) by the sector regulators.” The Chairman of the CMA has recently noted:

Co-operation between the competition authority and the regulator is, we believe, the best way forward. In collaboration, the regulators bring their deep knowledge of the sector; while the CMA brings the competition expertise that the regulators, particularly the smaller ones, may lack, as well the consistency of approach across sectors, both regulated and unregulated. And given the resourcing disparity noted above, collaboration is the only realistic way forward if we are to have good portfolio of competition cases in the regulated sectors.²²

The reforms sought to address some of the perceived weaknesses in the system by increasing the incentives for sectoral regulators to use their competition powers. These include both positive and negative incentives. Positive incentives (carrots) include: (a) the primacy duty for the regulators to consider using their competition law powers before using their regulatory powers²³; (b) enhanced support in the form of sharing expertise, knowledge, and resources between the CMA and the regulators to assist regulators in bringing competition cases; and (c) the requirement for the CMA to produce an annual report on the effectiveness of the concurrency regime and the application of competition powers in the regulated sectors, which may encourage regulators to consider what action under their competition powers they will be able to report at the end of the year and hence incentivize action.

Negative incentives (sticks) include the threats that the CMA can in certain circumstances, up to the point when the Statement of Objections (“SO”) has been issued, take over a case being brought by a regulator, and that the Secretary of State can make an order to remove the concurrent powers from the regulator altogether in certain circumstances.

There have also been wider questions around the appropriate balance between competition law enforcement and regulation in these sectors—the detail of which is beyond the scope of this article. Recent thinking has recognized increasingly the likely on-going role of regulation in these sectors (there is less focus on the idea that sectoral regulation would “wither away” and competition would take over). It has been

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recognized that competition law enforcement is not always sufficient to ensure well-functioning markets where market forces alone are inadequate to ensure competitive outcomes.²⁴ The current reforms do not address this issue in detail but note that “regulators should have the freedom to choose the best tools to achieve their desired outcomes.”²⁵ This is a relevant factor for designing effective decision-making processes, as

discussed further below.

Against this background, we consider below how the concurrency system is organized in the United Kingdom, and give consideration to how regulators may organize themselves to meet their obligations most effectively under the revised concurrency regime.

III. CONCURRENCY IN PRACTICE

A. *The Relationship Between Different Regulatory Bodies*

The Enterprise and Regulatory Reform Act 2013 (“ERRA”) sought to reinvigorate many of the systems that were put in place to support the concurrency model. In particular, the ERRA looked to promote efficient allocation of competition cases and consistency in decision-making between the regulatory bodies, two factors which are critical to the success of a concurrency model. Specifically:

- The CMA's Concurrency Guidance²⁶ sets out principles according to which the CMA and regulators must inform each other when they propose to exercise competition functions and believe there may be concurrent jurisdiction.
- There are a number of general principles to determine who will be responsible for a case, including: (a) whether the CMA or regulator has experience with dealing with the undertakings/complainants involved, similar issues, or the relevant sector; (b) whether the case affects more than one sector; and (c) whether the CMA considers it necessary to take jurisdiction for policy reasons. These principles are not new, but place greater emphasis on the role of the CMA. Where previously it was the norm that the regulator whose sector was concerned by the case would lead the investigation, under the new guidelines the norm is that either the regulator or the CMA will lead the case, "depending on which of them is better or best placed to do so."²⁷
- There is an obligation—based on similar provisions in the EU Regulation on the implementation of rules laid down in Articles 101 and 102 TFEU²⁸—to share a Statement of Objections ("SO") with the CMA (or the regulator if the CMA wants to issue a SO) no later than 15 days before issuing the SO. The same obligation applies to any provisional or final findings, decisions, or notices. This is designed to provide an opportunity for the CMA or regulator to comment on the approach being taken and to raise any concerns in advance of the formal document being issued to the parties, and it therefore can play a role in achieving a consistency of approach.
- A coordinating body—the UK Competition Network ("UKCN")—operates as a forum for developing practical working arrangements, discussing matters of common interest, and coordinating the provision of advice and information on the application of the law to the public. The UKCN will share information on strategic options to use competition or regulatory powers to promote market mechanisms and competition law developments, as well as cooperating on enforcement work including sharing know-how and resources.
- There are provisions for sharing expertise between bodies—for example secondments of staff, regular meetings at all levels, providing training and answering specific queries from time to time, and providing information or advice on a specific sector or market or an area of competition law policy.
- Some consistency of procedures is achieved since the CMA Rules that set out procedures for competition cases²⁹ also apply to the sectoral regulators (albeit these are relatively high level).
- Consistency of substantive outcome is supported through section 60 CA98³⁰ and by the role of the Competition Appeals Tribunal, which hears appeals of competition law decisions made by the CMA and all the sectoral regulators.

OF PARTICULAR NOTE IN OUR VIEW IS WHETHER THE UKCN WILL ACHIEVE THE DESIRED AIM OF RE-INVIGORATING WORKING PARTNERSHIPS BETWEEN THE REGULATORY BODIES

These basic mechanisms are not new, but it will be interesting to see whether in their revised form they will serve to shore up competition enforcement in regulated sectors when combined with the new primacy duty, the power for the CMA to take over cases, and the threat of the removal of concurrent powers, as referred to above.

Of particular note in our view is whether the UKCN—essentially building on the work of the previous Concurrency Working Party³¹—will achieve the desired aim of re-invigorating working partnerships between the regulatory bodies. The UKCN’s Statement of Intent makes it clear that regulatory heads should involve themselves personally in the establishment and supervision of an appropriate program of work and to manage the delivery of agreed actions.³² The requirement for senior level staff to be involved in the UKCN suggests a desire to ensure that suitable focus is given to this initiative.

Another key element is the opportunity to share expertise between bodies. Staffing and resources are likely to remain practical obstacles for the running of CA98 cases at the CMA and within the sectoral regulators. While secondments have been in place between regulators for some time, the proposal to increase secondments could be particularly useful to share expertise on particular aspects of competition law enforcement procedures, such as the conduct of dawn raids and oral hearings, and, where the CMA is carrying out an investigation in a regulated sector, by providing staff with specialized industry knowledge. Short-term secondments may play a significant role in minimizing disruption for the seconding body, while lending key expertise to the sectoral regulator or CMA in areas of competition law investigations that are critical to the enforcement process.

One of the disadvantages of the concurrency regime is that the CMA and sectoral regulators may end up fighting to secure the services of the relatively limited pool of experienced competition lawyers and economists who are willing to work on the agency side of the house. In the past year, the CMA and the FCA in particular have carried out large-scale recruitment exercises. While some new talent has been attracted into the agencies, many posts are filled from recruits from one of the other U.K. competition agencies. This can be

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very valuable in terms of sharing and building on know-how of how cases are run in other agencies, but it can also be disruptive to the agency that has lost staff. A radical alternative would involve having a central pool of resources capable of running CA98 cases in any sector, perhaps based at the CMA but seconded out to work on specific cases at the regulators.

In practice, it will be interesting to see whether the CMA seeks to take on CA98 cases in regulated sectors itself or whether instead it operates an enhanced partnership working model, supporting and encouraging the regulators to take CA98 cases.

B. The Conflict of Powers Within Regulatory Bodies—Decision-Making Processes

In addition to establishing systems that ensure smooth operation of concurrent powers between regulators, a concurrency model must support effective decision-making processes *within* regulatory bodies, to promote appropriate competition law enforcement.

There are a number of different ways in which regulators can accommodate their competition law enforcement obligations within their institutional structure. They may choose to have a specific competition division separate from their regulatory enforcement work or they may choose to have an enforcement division covering both competition and regulatory enforcement work.

The FCA provides one example. It was established on April 1, 2013 and set up a specialist Competition Department, headed by former senior OFT personnel, with a view to ensuring the implementation of the FCA's objectives to promote competition.³³ This is housed within the Policy, Risk and Research Division separate from its Enforcement and Financial Crime Division, which is responsible for regulatory enforcement. Having announced in 2013 that it would employ market studies as its preferred tool to examine competition issues,³⁴ the FCA has since launched four such studies,³⁵ with plans to launch at least one further investigation in 2014.³⁶ No guidance on its approach to concurrency has yet been published, but this should be expected when its concurrent powers come into force in 2015. It is therefore not yet clear whether competition investigations will be run by the Competition Department or, together with regulatory enforcement, by the Enforcement and Financial Crime Division.

THE ORGANIZATIONAL CULTURE, BUDGET ALLOCATION, AND DECISION-MAKING PROCESSES WITHIN THE REGULATOR MAY WELL HAVE A SIGNIFICANT IMPACT ON THE TYPE OF CA98 CASES THAT ARE PURSUED, AND POTENTIALLY ON THEIR OUTCOME

This model can be contrasted with Ofgem, which operates through four different sub-groups: (i) Smarter Grids and Governance: Transmission—regulating gas and electricity transmission networks, (ii) Smarter Grids and Governance: Distribution—regulating gas and electricity distribution, (iii) Sustainable Development, and (iv) Markets—regulating wholesale and retail gas and electricity markets. Ofgem operates under a published enforcement vision “to achieve a culture where businesses put energy consumers first and act in line with their obligations” and seeks to achieve its objectives by using “a range of enforcement tools.”³⁷ Ofgem's draft guidance notes that it will consider “at an early stage in the process” whether it is more appropriate to use competition law or regulatory powers.³⁸ Under its new system, the Enforcement Oversight Body (“EOB”) reviews strategic priorities and may also make decisions on opening cases and whether to use competition law powers. The members of the EOB are usually senior civil servants from across Ofgem. It is chaired by the senior partner with responsibility for enforcement, who is a member of the sustainable development sub-group.

It will be interesting to evaluate in the future whether the choice of internal structure has an impact on

the level of competition law enforcement undertaken.

The institutional arrangements provide the setting for the implementation of competition enforcement, but the organizational culture, budget allocation, and decision-making processes within the regulator may well have a significant impact on the type of CA98 cases that are pursued, and potentially on their outcome. The questions that may be relevant include:

- What are the organization's core objectives for CA98 enforcement; for example, is the organization focused on the speed of delivery, the number of cases completed, or the robustness of the final decision if the case is appealed?
- Does the organization have a preference for (i) "quick interventions" designed to resolve issues as quickly as possible (e.g. through informal commitments from the parties), (ii) robust final decisions having precedent value and providing a strong deterrent effect, or (iii) a mix of both?
- Has a budget been specifically allocated to a team dedicated to CA98 enforcement, who will then be actively seeking CA98 investigations to pursue? Or does no such specific budget exist, with the effect that pipeline CA98 cases will have to "fight" with other types of potential pipeline cases for staffing and resources?
- Is the organization culturally content with pipeline cases being opened at an early stage and then closed if the original concerns turn out to be unfounded or is the organization reluctant to be perceived to be making a U-turn in such circumstances?

These are all questions, which it is suggested, that regulatory bodies will need to consider in establishing an internal structure that can effectively implement competition law powers.

IV. DESIGN OF DECISION-MAKING PROCESSES FOR REGULATORY BODIES

IN PRACTICE, THIS MEANS THAT THE REGULATORS MAY CHOOSE TO INTERPRET THE CMA RULES DIFFERENTLY AND SO THEIR PROCEDURES MAY VARY FROM THE CMA'S IN SOME RESPECTS

For CA98 cases, there are several key stages at which decisions need to be made, each of which could have an impact on the success of the concurrency regime: (i) the Pipeline/Case Opening Stage—deciding which cases to investigate, which tool(s) to use, and which body (European Commission, CMA, or regulator) is best placed to investigate the case; (ii) the Investigation Stage—investigating the issues, ultimately resulting in a decision on whether or not to issue a SO; and (iii) the Final Decision Stage—making the final decision on whether or not there has been an infringement or not and, if so, on the imposition of financial penalties and/or directions.³⁹ We consider below some of the key considerations that may be relevant in constructing an effective decision-making process for concurrent competition law enforcement.

While the CMA Rules apply to sectoral regulators, they are relatively high level, with much detail being included in the CMA's Procedural Guidance for CA98 Cases.⁴⁰ In practice, this means that the regulators may choose to interpret the CMA Rules differently and so their procedures may vary from the CMA's in some respects.

A. *Pipeline / Case Opening Stage*

At the Pipeline/Case Opening Stage, the regulator or the CMA may have received a complaint or leniency application about an alleged anticompetitive practice, or they may have identified the potential issue themselves from horizon scanning. In any agency there are likely to be a number of competing pipeline cases and it is unlikely that the agency will have resources to investigate them all. In the United Kingdom, the competition agencies do not have a duty to investigate all CA98 complaints or allegations and are free to close investigations on administrative priority grounds. For a sectoral regulator, the pipeline cases may include alleged breaches of license conditions as well as CA98 issues and, given the new primacy duty on regulators to consider the use of CA98 powers first, tool selection may become a particularly challenging issue.

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For the concurrency regime to be successful, the following questions should be considered:

- What are the prioritization principles used to decide whether to investigate a case? For example, would a sectoral regulator take into account the fact that the practice in question was prevalent in a number of regulated industries and so the decision could provide an important precedent?
- What factors will the regulator take into account when deciding whether to use its CA98 or regulatory powers? In many cases the quickest and easiest enforcement route may be to use their sectoral regulation powers, resolving consumer detriment more quickly and efficiently. In what circumstances should the regulator choose, nevertheless, to use its CA98 powers, which may involve greater costs of investigation and an uncertain outcome?

There are no easy answers to these questions. Ultimately the answer will depend on the desired outcome for the regime—is the key driver to solve issues in the most efficient way possible or to ensure that CA98 cases are brought in the regulated sectors? The new primacy duty and annual reporting on activity in the regulated sectors suggests a clear desire that the CA98 tool be used to address issues in regulated sectors, partly due to the deterrent impact that such decisions may have for businesses in the sector in question but also more

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widely across the economy. But how will this work in practice if the relevant decision-maker in a regulator is presented with two alternatives—a relatively more certain regulatory route which will be quicker and easier to follow or a more complex, risky,

and costly CA98 route? Human nature would suggest that some would choose the easier regulatory option on rational value for money grounds alone, and is this such a bad outcome?

B. Investigation Stage

Once the case has been opened and allocated to a regulator, the new “claw back provision” comes into play—allowing the CMA to take the case back at any point until the SO has been issued. Will this have an impact on the way the regulators run the case? Will they be incentivized to liaise more closely with the CMA to ensure that they are content with the progress of the investigation? Will CMA representatives sit on the steering committees of regulator cases as has sometimes happened in the past? If so, this must be welcome news. Some of the regulators, especially the smaller ones, may not have much experience of running competition cases. History has shown that there can be considerable challenges in running such cases and the sharing of expertise and know-how between the CMA and sectoral regulators (in both directions) should be routine.

An interesting question is whether we will see an even greater convergence of investigation procedures between the CMA and regulators. For example, for parties to investigations and their lawyers, there is

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limited value to the regulators pursuing different investigation procedures. We would hope that the renewed efforts of the UKCN to develop common know-how, share best practice, and enhance process handling should aim to ensure that minimum standards and common procedures are followed where possible;

for example, rolling out the CMA’s commitment to hold a state-of-play meeting with the parties to the investigation before the decision is taken to issue an SO, in order to provide access to the relevant decision-maker and/or the Procedural Officer role.

C. The Decision Stage

The CMA Rules provide that the person who makes the final decision in a case must be different from the person who conducted the investigation and issued the SO.⁴¹ This provision was included to address a perceived confirmation bias in that the decision-maker(s) who previously decided to issue a SO could then also decide, following the parties’ written and oral representations, whether an infringement had taken place.

Once an SO has been issued, building on the procedural reforms made by the OFT, the CMA appoints a Case Decision Group whose members have not been involved with the case previously to review the parties’ written representations, attend the oral hearings with the parties, and then reach a decision on whether or not there is an infringement decision. This is an important way of providing access for the parties to the decision-makers on the case.

Some of the regulators may consider that their existing procedures for CA98 cases already meet this requirement. Others have taken the opportunity to change them. For example, Ofgem has set up an

Enforcement Decision Panel that will take important decisions in contested enforcement cases and is staffed by external specialists (including competition lawyers and economists). For regulatory decisions, the FCA has a distinct decision-making panel (the Regulatory Decisions Committee) that makes final decisions on contested cases (after a decision is taken as to which powers to use in the investigation). It will be interesting to see whether the FCA adopts a similar or different model for its CA98 cases when it receives its concurrent powers in 2015.

A PARTICULARLY KEY DECISION TO BE MADE UNDER THE NEW REGIME WILL BE THE “PRIMACY DUTY DECISION” ON WHETHER OR NOT TO USE THE CA98 POWERS FOR A SPECIFIC ISSUE

One particular concern is the need to ensure consistency between CA98 decisions, whether taken by the CMA or a regulator. It is critical, in order to assist businesses seeking to comply with the law, that CA98 decisions demonstrate a consistent and clear approach to defining what types of behavior breach the law, which will also provide an important deterrent effect. As mentioned above, the new concurrency arrangements provide for the regulators to send the CMA a copy of their draft decision 15 days before it is adopted.

But does this really provide a suitable mechanism for achieving consistency of approach? Certainly by this stage it would be difficult and cause significant time delays if the CMA were to require fundamental changes in the way the case was being argued and these may even require the issuing of a Supplementary SO to the parties. This seems like a mechanism of last resort, with the CMA and regulators more wisely spending time discussing the case at earlier stages of the case. But what if they cannot agree on the way the case should be argued? How will such disputes be resolved? It would seem an unsatisfactory outcome if cases end up being closed on administrative priority grounds along the way due to a lack of agreement on the handling of the case. The UKCN should seek to guard against such outcomes.

D. How To Evaluate Decision-Making Options

The choice of decision-making model will depend on the regulator’s objectives. The regulator is likely to have a number of objectives, some of which may naturally conflict with one another, such as:

- Speed/Efficiency—ensuring that cases are completed as quickly and efficiently as possible, including capitalizing on know-how rather than reinventing the wheel each time;
- Robustness/Quality—ensuring that the final decision is robust, so that it can be defended successfully on appeal;
- Procedural Fairness—ensuring that parties under investigation are treated fairly and given the opportunity to exercise their rights of defense fully;
- Consumer outcome—ensuring that any consumer detriment is addressed;

- Transparency—ensuring that the decision is made public to deter other businesses from engaging in the practice in question and also to help businesses seeking to comply;
- Consistency—ensuring that the decision is consistent with other decisions of the regulator and other regulators/the CMA so as to provide clear guidance to business as to what is and is not acceptable under competition law; and
- Policy/precedent—taking a decision that will act as a precedent for the industry or the wider U.K. economy on an important issue.

The relative importance of some of these objectives varies according to the stage the case is at. For example, robustness may become increasingly important as the case progresses, whereas speed and efficiency may be equally important throughout the case. Transparency is important at specific stages—primarily at the complaint stage (so that others with relevant information are aware that an investigation is underway so that they can come forward) and the final decision stage (to provide a deterrent and also guidance for businesses seeking to comply). Procedural rights are of course important at all stages. It is particularly important to ensure that the parties know the identity of the relevant decision-maker at each stage of proceedings and have access to that decision-maker before key decisions are taken.

Any final decision-making model is likely to be a compromise between some of the objectives; for example, there may be trade-offs between achieving both speed and robustness of decision-making. A particularly key decision to be made under the new regime will be the “primacy duty decision” on whether or not to use the CA98 powers for a specific issue, and this will be one area where the regulator will need to put an appropriate system in place to weigh the conflicting objectives. In some cases this may involve a complex consideration of the best way to address the potential consumer detriment in terms of speed/efficiency as against the opportunity to create a precedent competition law decision to the benefit of the wider economy. These are not easy decisions to take.

V. CONCLUSIONS

WE WILL NOT NEED TO WAIT LONG
FOR A FURTHER REVIEW OF THE
CONCURRENCY REGIME.

The changes to the U.K. competition landscape have been designed to beef up the use of competition law enforcement powers in the regulated sectors by the sectoral regulators and/or the CMA. In the past, regulators had the ability to use competition law enforcement, but there was a perception that there was under-enforcement in these sectors, with greater reliance being placed on sector-specific regulatory powers to fix issues arising. The changes have been principally designed to increase the regulators’ incentives to use competition law tools in preference to their regulatory powers.

But will this have any effect in practice? Much will depend on how the regulators organize themselves

internally—the focus and importance they give to competition law enforcement compared to regulatory enforcement and their internal decision-making processes. It remains to be seen whether there are a raft of cases waiting to be tackled under competition law by the CMA or the regulators, or whether it will turn out that regulatory enforcement may be an efficient way to tackle such issues. Whatever the outcome, the enhanced co-operation between the CMA and the regulators must be a positive move. Ensuring that expertise is shared across organizations enforcing the same law will ensure that efficiencies are gained cross-organization in all directions. There is plenty of scope for the CMA to learn from the practice of the sectoral regulators, as well as the other way round.

We will not need to wait long for a further review of the concurrency regime. The ERRA 2013 requires BIS to review the operation of the antitrust provisions of CA98 and produce a report on the outcome of the review by April 1, 2019. No doubt the success, or otherwise, of the enhanced concurrency arrangements will feature heavily in this review.

By then there should be a richer evidence base available in the form of the CMA's annual reports on concurrency, which may prove to be livelier reading than one might have expected, with the regulators and the CMA keen to show that they are using their powers effectively. We hope, however, that BIS will not be overly focused on the number and speed of cases, but will instead look at the outcomes for consumers and whether these were best achieved through the use of competition or regulatory powers. It may also be wise for BIS to consider the different internal structures and decision-making processes followed to see whether any lessons can be learned as to which models operate most effectively to encourage the use of competition law powers where appropriate. ▲

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² As at June 30, 2014 these were the Office of Communications (“Ofcom”), the Office of the Gas and Electricity Markets (“Ofgem”), the Water Services Regulation Authority (“Ofwat”), the Office of Rail Regulation (“ORR”), the Civil Aviation Authority (“CAA”), the Northern Ireland Authority for Utility Regulation (“NIAUR”), and Monitor (the UK health regulator). From April 1, 2015, the Financial Conduct Authority (“FCA”) will also have concurrent powers.

³ The Enterprise and Regulatory Reform Act 2013 (“ERRA 2013”) abolished the Office of Fair Trading (“OFT”) and Competition Commission (“CC”), the previous national competition authorities in the U.K., and established the CMA. The CMA has taken over the competition (and some consumer) functions of the OFT and all the functions of the CC. The CMA began its role as the new U.K. national competition agency on April 1, 2014.

⁴ The primacy duty for Monitor will not be commenced until a later date.

⁵ BIS, *Response to Consultation on Statement of Strategic Priorities for the CMA*, (1 October 2014).

⁶ CMA, *Competition and Markets Authority Annual Plan 2014/15* (CMA 15), (1 April 2014).

HM Treasury and Department of Trade and Industry, *Concurrent Competition Powers in Sectoral Regulation*, May 2006 (the “HMT/DTI Report”), ¶1.4.

⁸ Both Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”) and the Chapter I and Chapter II prohibitions of CA98.

⁹ See William E Kovacic and David A Hyman *Competition Agency Design: What’s on the Menu?* 8(3) EURO CJ 527-538 (2012).

¹⁰ It should be noted, however, that the evidence points only to a small number of infringement decisions. It does not confirm whether or not there has been under-enforcement of competition law; that is whether there have been cases which should have resulted in an infringement decision but which have not been pursued by a regulator or the OFT/CMA.

¹¹ The infringement decisions were: ORR decision of 17 November 2006 *English, Welsh and Scottish Railway Limited*, [2007] UKCLR 937; and Ofgem decision of 21 February 2008 *Investigation into National Grid* [2008] UKCLR 171. The market investigation references were: ORR decision of 26 April 2007 *Leasing of rolling stock for franchised passenger services*; Ofcom decision of 4 August 2010 *Premium pay TV movies* and, more recently under the new regime which came into force on April 1, 2014, Ofgem decision of 26 June 2014 *Supply and acquisition of energy in Great Britain*. The undertakings in lieu of a market investigation reference were accepted by Ofcom in its decision of 22 September 2005 *Strategic Review of Telecommunications*. These numbers do not include a larger number of no grounds for action or case closure decisions. For the full figures, please refer to the CMA, “*Baseline*” *annual report on concurrency—2014* (1 April 2014).

¹² See the HMT/DTI Report, ¶11; House of Lords Select Committee on Regulators, UK Economic Regulators ¶6.24 (November 2007); National Audit Office (“NAO”), *Review of the UK’s Competition Landscape*, (the “NAO Report 2010”), ¶4.11 (March 2010).

¹³ BIS, *A competition Regime for growth: a consultation on options for reform* (the “BIS Consultation”), ¶7.7 (March 2011).

¹⁴ See, for example, the following decisions in the period from 2010: Commission decision of 18 December 2013 *Deutsche Bahn I/III*, Case AT.39678/AT.39731, OJ 2014 C86; Commission decision of 10 April 2013 *CEZ*, Case AT.39727, OJ 2013 C251; Commission decision of 22 June 2011 *Telekomunikacja Polska*, Case AT.39525, OJ 2011 C324; Commission decision of 4 May 2010 *E.On gas foreclosure*, Case AT.39317, OJ 2010 C278; Commission decision of 14 April 2010 *Svenska Kraftnat*, Case AT.39351, OJ 2010 C142; and Commission decision of 17 March 2010 *EDF: Long Term Electricity Contracts in France*, Case AT.39386, OJ 2010 C133.

¹⁵ See for example the NAO Report, ¶3.8; and the BIS Consultation, ¶¶5.10-5.12 and footnote 4.

¹⁶ See for example the speech by Lord Currie, Chairman of the CMA, *The new Competition and Markets Authority: how will it promote competition?*, Beesley Lectures, (7 November 2013).

¹⁸ Speech by Lord Currie, Chairman of the CMA, *Preventing and reducing anti-competitive activities—a UK perspective*, Chatham House conference, (24 July 2013).

¹⁸ The Comisión Nacional de los Mercados y la Competencia (“CNMC”) was established in October 2013 and involved a merger of the National Energy Commission, the Telecommunications Market

Commission, the Railway Regulatory Committee, the National Commission for the Postal Sector, the Commission for Economic Regulation of Airports, the National Gaming Commission, and the State Council for Audiovisual Media with the Competition authority. The newly formed CNMC absorbed all the powers of the other regulators, while some powers transferred to the Ministers for Industry. A similar approach has been taken in the Netherlands, where the Consumer and Markets Authority was created in April 2013 through the merger of the Consumer Authority, the Competition Authority, and the Post and Telecommunications Authority.

¹⁹ CNMC, *Strategic plan of Spain's national authority for markets and competition: Competition, market supervision and efficient economic regulation* (13 May 2014).

¹⁰ Criticism has been leveled, including by Neelie Kroes (European Commission Vice-President), at the new system due to a perceived lack of independence of the CNMC, concern that the combination of roles will undermine competition law enforcement, and the ability of just ten council members to cope with all the cases coming from one competition authority and seven regulatory agencies (*see* Edurne Navarro Varona & Luis Moscoso, *Merger of competition authority and regulators in Spain: creation of the National Markets and Competition Commission*, 34(1) ECLR 518-522 (2013)).

²¹ ERRA 2013, Explanatory Notes, ¶370.

²³ Speech by Lord Currie, Chairman of the CMA, *The new Competition and Markets Authority: how will it promote competition?*, the Beesley Lectures (7 November 2013).

²³ Prior to these reforms certain regulators, such as Ofcom, ORR, and Ofgem, already held obligations to consider the use of their competition law powers before exercising some of their regulatory powers, see for example, section 317(2) Communications Act 2003, section 55(5A) Railways Act 1993, section 28(5) Gas Act 1986 and section 25(5) Electricity Act 1989.

²⁴ See for example: the speech by Richard Price, Chairman of ORR, *Experience across the regulators: The use of regulatory and competition powers for promoting consumer welfare*, UK Regulators' Network, (31 March 2014); and the speech by Amelia Fletcher, *Privatisation, economic regulation and competition in the utilities: Have we got the balance right?*, Beesley Lectures, (14 November 2013).

²⁵ BIS, *Growth, Competition and the Competition Regime: Government Response to Consultation* ¶8.5 (15 March 2012).

²⁶ CMA, *Regulated Industries: Guidance on concurrent application of competition law to regulated industries* (12 March 2014) (the "CMA's Concurrency Guidance"). This replaces previous guidance from the OFT and sets out information about which regulated sectors are affected by the concurrency provisions and the scope of the concurrent powers. It also explains the way in which the concurrent application and enforcement of competition law works in practice.

²⁷ *Id.* ¶3.22.

²⁸ Council Regulation (EC) No 1/2003 of 16 December 2002; Article 11(4) states that a Member State's competition authority shall provide its envisaged decision to the EU Commission 30 days before the decision is to be adopted.

²⁹ Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014, SI 2014/458.

³⁰ Section 60 CA98 requires that competition matters in the United Kingdom should be dealt with in a manner that is consistent with EU competition law.

³¹ The UKCN replaced the Concurrency Working Party (“CWP”) which was a forum for regulators and the OFT to co-ordinate on the application of concurrent competition law powers. The CWP was formed in 1997 to, among other things, facilitate a consistent approach by the sectoral regulators and the OFT in the exercise of their functions and powers under the CA98. The UKCN brings together the CMA with the CAA, the FCA, Ofcom, Ofgem, Ofwat, the ORR, and the NIAUR (Monitor attends with observer status).

³² UKCN, *Statement of Intent*, §A.6 (December 2013).

³³ Once the FCA has full concurrent powers, its remit will become more aligned with the other sector regulators. However, it is already conducting competition work under its existing mandate (it has a statutory objective to promote competition in the interest of consumers and a duty to promote competition when discharging general functions), in particular via the use of market studies.

³⁴ FCA, *The FCA’s approach to advancing its objectives*, 37 (July 2013).

³⁵ The markets under investigation are the cash savings market, the retirement income market, the SME banking market, and the market for general insurance add-ons.

³⁶ After taking over responsibility for Consumer Credit from the OFT in April 2014, the FCA announced that it was planning to conduct a market study into the credit card market (FCA press release, *FCA announces competition review into credit cards—particular focus on how industry works with those in difficult financial circumstances*, (3 April 2014)). In addition, on July 9, 2014 the FCA launched a Call for Inputs to inform its review of competition in the wholesale banking sector to identify any areas that might merit investigation through a market study.

³⁷ Ofgem, *Draft Enforcement Guidelines*, ¶¶1.10 and 1.12 (28 March 2014).

³⁸ *Id.* ¶2.26.

³⁹ There are of course many other potential outcomes in a CA98 case, e.g. informal assurances, commitments, no grounds for action, or administrative priority closure decisions. Only the process to infringement decision is illustrated for simplicity purposes.

⁴⁰ *CMA Competition Act 1998: Guidance on the CMA’s investigation procedures in Competition Act 1998 cases*, 12 March 2014.

⁴¹ CMA Rules, Rule 3. Note that Rule 3(3) of the CMA Rules provides that the final decision must be a collective decision taken by at least two persons.