



Making a positive difference
for energy consumers

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Dear Ms Lam,

Consultation: Competition and Markets Authority Guidance (Part 2)

Thank you for the opportunity to comment on the second part of the consultation on the Competition and Markets Authority ("CMA") guidance.

The Office of Gas and Electricity Markets ("Ofgem") has concurrent powers with the Office of Fair Trading ("OFT"), soon to be replaced by the CMA as a result of changes introduced by the Enterprise and Regulatory Reform Act 2013 ("ERRA13"), under the Competition Act 1998 ("CA98") and Enterprise Act 2002 ("EA02"). These powers are an important part of our enforcement toolkit for protecting the interests of energy consumers. As a member of the United Kingdom Competition Network ("UKCN"), the Concurrence Working Party and the Consumer Concurrence Group ("CCG"), we work with the OFT and the other sectoral regulators with concurrent competition and consumer protection powers to share best practice. Our comments on the consultation are provided in this context.

Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998

We have previously offered comments on earlier drafts of the CMA's Rules of Procedure and Guidance. As highlighted by the CMA, the Guidance does not cover the procedures used by sectoral regulators in their CA98 investigations¹. Ofgem is currently reviewing its enforcement processes and procedures and is considering the CMA Guidance in the course of that review². The Rules in their final form will be binding on Ofgem when undertaking future CA98 investigations.

Delegation of functions: We think that the Rules could provide greater clarity as to what is meant by "separate"³. While we note that Rule 6(6) requires that the person chairing the oral hearing must not have been "otherwise involved" in the investigation, Rule 3(2) provides that the person who decides whether to make an infringement decision, and whether to impose a penalty, need only not have overseen the investigation or made the

¹ For details of Ofgem's procedures, please refer to our "Enforcement Guidelines on Complaints and Investigations": <https://www.ofgem.gov.uk/ofgem-publications/37567/enforcement-guidelines-2012.pdf>.

² We expect to consult on our revised Guidelines in 2014.

³ In Rules 3(2), 6(6) and 8(2)

decision to issue the notice of a proposed infringement decision: on the wording of the Rules, there is no requirement that the decision-maker has not been directly involved in the investigation of the case. Although this does not impact on Ofgem's new decision-making structure⁴, it would be helpful for the sake of clarity to have a full understanding of the CMA's position.

Notices, access to file and representations: We also think that the wording of Rule 6(6) gives rise to ambiguity and we suggest that this could be made clearer, e.g. "The chairperson must not have been directly involved in the conduct of the investigation in respect of which notice has been given, other than as a Procedural Officer." Without this additional clarity, there may be arguments that this provision has been breached by only very limited involvement in the case (such as involvement in decisions on resourcing or strategic priorities in investigating, which is the type of involvement which senior staff might be expected to have from a managerial perspective). We believe that the wording proposed above would be consistent with the policy intent, which aims to address concerns around the same person taking a decision to issue a Statement of Objections and make the final decision on infringement (and the perceived confirmation bias from those dual roles), rather than seeking to introduce complete isolation. We appreciate that this would amount to a slight departure from ERA13 but we believe that this would be permissible, given the wording in that Act merely refers to particular areas which may be covered off by the CMA's Rules with some scope to expand/explain further.

Procedural complaints: For the reasons set out above, we suggest that there is similarly a need for clarification of the wording of Rule 8(2), i.e. "The Procedural Officer must not be directly involved in the conduct of the investigation in question."

Regulated industries: Guidance on concurrent application of competition law to regulated industries

We have commented on previous drafts of the Guidance (and on the Competition Act 1998 (Concurrency) Regulations 2014, which are included in the parallel consultation⁵).

We understand that the Guidance sets out general principles and that Memoranda of Understanding, which the CMA will negotiate with the sectoral regulators (albeit with scope for shared drafting across common areas), are intended to deal in detail with the way in which the CMA will work with the regulators individually.

Information sharing: Paragraph 3.49 of the Guidance sets out information which the CMA and the Regulators may share during an investigation, which includes "a regular summary of the progress of any investigation...beginning in the month immediately after the month in which the CMA or a Regulator commenced an investigation". It is not clear to us why the Guidance specifies the month from which updates on progress are to begin; we intend to make sure that the CMA is updated regularly on the progress of investigations.

Annual Concurrency Report: We suggest that paragraph 3.58 of the Guidance should be amended to make clear that the Report will not "include any information that the CMA or sectoral regulators consider could jeopardise ongoing cases under Part 1 of the CA98, or the effectiveness of actual or proposed regulatory activity in any of the concurrent sectors." We acknowledge that paragraph 3.61 states that the draft Report will be prepared by the CMA in consultation with the sectoral regulators; that the regulators will be given the opportunity to comment on the draft Report and that any comments so provided will be considered by the CMA, and, further, that the final version of the Report will take account of the consultation with the regulators "as appropriate". However, as there may be occasions in which the sectoral regulators are better placed than the CMA to assess

⁴ As set out in Ofgem's "Consultation Decision – Review of Ofgem's Enforcement Activities - Strategic Vision, Objectives and Decision Makers", published on 19 November 2013

⁵ "Competition regime: draft secondary legislation – part two"

whether the inclusion of specific information in the Report could jeopardise, in particular, the effectiveness of regulatory activity, we think the position of regulators to veto its inclusion should be strengthened in the manner suggested.

Consumer protection: Guidance on the CMA's approach to use of its consumer powers

The Guidance provides a helpful overview of how the CMA envisages using its powers, its vision of how the new consumer landscape will operate and how it intends to work with its enforcement partners to promote consumer protection. However, there are areas of the Guidance where we feel greater clarity would be helpful.

Introduction: Paragraph 1.6 of the Guidance states that the CMA will apply its prioritisation principles in deciding which cases to pursue and the consultation document additionally lists⁶ three factors to which the CMA is likely to give particular weight in making its decision. We would like to understand whether the CMA will have regard to any enforcement action which is already being taken by other bodies (under consumer protection legislation or otherwise) in deciding which cases to take on; for example, if a regulator was taking action against alleged mis-selling by a licensee using its sectoral powers, would this bear on the CMA's decision either to take or not to take enforcement action under consumer protection legislation for mis-selling against the same company? (We note that the CMA's prioritisation criteria are yet to be published.)

In paragraph 1.14 of the Guidance, the CMA states that it intends to monitor the new arrangements outlined in the Guidance and discuss with partners, in the light of experience, whether any improvements to the new arrangements have become necessary; we assume that the scope of this assessment will extend to reviewing the operation of the Memoranda of Understanding and, if appropriate, their subsequent amendment.

Consumer Protection Partnership ("CPP"): We are engaging proactively with CMA and CCG in relation to matters of consumer protection as attendees at the working group meetings. However, we would like further clarification about how the intended role of the CMA as the conduit between the sectoral regulators and the CPP will work in practice. The CMA's role as conduit is not mentioned in the Guidance itself; we would be grateful for greater clarity regarding the interface between the sectoral regulators and the CPP, and the way in which the sectoral regulators will be able to contribute to CPP discussions, particularly where these relate to the prioritisation of work⁷ across the consumer landscape. We acknowledge that there has been discussion at the CCG regarding the possible circulation of the CPP agenda and minutes to CCG members, and the need for the sectoral regulators to be made aware of any topics of interest which are to be discussed at CPP. We are keen to ensure that we are able to feed in to CPP discussions (via the CMA) and think that mention might be made in the Guidance of the CMA's role as conduit between the sectoral regulators and the CPP.

Consumer Protection Cooperation ("CPC") Enforcement Forum: We note the CMA's role as the UK's Single Liaison Officer under the CPC Regulation⁸. Although Ofgem is not a CPC enforcer, we hope that the CMA, in the context of its liaison role, will ensure that Ofgem is made aware of any issue which impacts on the energy sector.

Finally, it is unclear how section 214 of the EA02 is to be amended and whether enforcers will be required to consult with the CMA before applying for an enforcement order. We note that the existing OFT Guidance on Part 8 of the EA02 is to be adopted by the CMA Board⁹.

⁶ At paragraph 3.11 of the consultation document

⁷ Paragraph 4.4 of the Guidance states that 'agree priorities for work to resolve or mitigate [issues which are likely to adversely affect consumers]' is one of the group's functions.

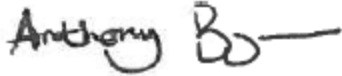
⁸ Paragraph 4.18 of the Guidance

⁹ "Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission guidance: consultation document", Annex B, page 18

However, in order to help us to understand our obligations and the role of the CMA in coordinating enforcement action by other bodies, we would welcome clarification of the position.

We would be happy to discuss further any of the points raised in this response. We do not consider this response to be confidential and we are content for it to be published in full.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Anthony Pygram', followed by a horizontal line.

Anthony Pygram
Partner, Enforcement and Competition Policy