



Regulated Industries: Guidance on concurrent application of competition law to regulated industries (CMA10con)

Response of Herbert Smith Freehills LLP

Introduction

We welcome the opportunity to comment on the Draft Guidance on concurrent application of competition law to regulated industries (the Draft Guidance). The Enterprise and Regulatory Reform Act (ERRA) makes a number of changes to the current concurrency regime, by strengthening the role of the CMA and imposing an express requirement on the sector regulators to consider their Competition Act (CA98) powers before using their sector powers.

The Draft Guidance contains helpful detail as to how the new powers and procedures will be implemented. There are a few areas where the Draft Guidance would benefit from more detailed guidance on the new practices:

- The new requirement for the regulators to exercise competition powers in favour of their sectoral powers represents one of the key changes to the current regime, but the Draft Guidance contains very little detail as to how this will operate in practice, i.e. the factors to be taken into account by the regulators in making the assessment of the test, the timing and the information to be provided to the interested parties.
- Guidance on the approach to case allocation should place greater emphasis on the CMA's leadership role in the concurrency arrangements.
- In respect of information sharing there should be greater emphasis on the protection of information obtained under CA98 powers so that it is not used by the Regulators in the exercise of their sector-specific regulatory powers.

The comments contained in this response are those of Herbert Smith Freehills and do not represent the views of our individual clients.

1. QUESTION 1

Do you consider that the Transition Team's proposed approach to dealing with the revised requirement that Regulators exercise competition powers in favour of sectoral powers is clear and appropriate? Please give reasons for your view

- 1.1 The requirement for the Regulators to exercise their competition powers in favour of their sectoral powers is one of the key changes made by ERRA to the concurrency regime and Schedule 14 ERRRA amends the relevant Acts for each of the Regulators to that effect.



- 1.2 The Draft Guidance contains very little detail as to how this requirement will operate in practice. Paragraph 4.4 of the Draft Guidance simply provides that: "each Regulator will determine whether it may be more appropriate to proceed under the CA98 on a case-by-case basis" and "in order to ensure the efficient and effective allocation of resources, a Regulator will consider which potential investigations and enforcement route would be most appropriate in a particular case when it commences an investigation in its sector". There is no guidance as to the level of detail/reasoning the Regulator will be expected to provide. This paragraph also places very little emphasis on the requirement for the Regulators to make greater use of their CA98 powers, it simply requires them to consider the CA98 route.
- 1.3 It would be helpful if the Draft Guidance would first of all expand on the rationale for the focus on the use of CA98 powers by the Regulators by way of background and summarise the key features of both routes. The Draft Guidance should set out the criteria the Regulators will be expected to take into account in deciding between applying their competition or sector specific powers (e.g. deterrent effect of competition intervention, possibility of redress for third parties affected by anti-competitive conduct, sector-specific regulation may be better targeted to the activity concerned, may provide greater flexibility etc.). The Draft Guidance should also expand on the process for informing the parties and where relevant the complainant(s) of the approach that will be taken by the Regulator in a particular case, and the rationale for the selected course of action.
- 1.4 Practical examples of the type of issues best dealt with by each of the sets of enforcement powers should also be added. This will assist the Regulators with their decision making and will also increase transparency and consistency of the process in general.

2. QUESTION 2

Do you consider that the Transition Team's proposed approach to allocation of cases between the CMA and Regulators, or between Regulators, is clear and appropriate? Please give reasons for your view

- 2.1 The Draft Guidance is more detailed in respect of the principles on case allocation and is, on the whole, sufficiently clear. We have a few suggestions as to how this section of the Draft Guidance could be further improved.
- 2.2 On the whole, paragraph 3.21 should assert the authority of the CMA more clearly. The introductory section of paragraph 3.21 should make it clear that, although there is to be consultation between the CMA and the Regulators, it will ultimately be up to the CMA to decide which regulator is best placed to deal with a particular case, based on the



assessment as to who will ultimately be best placed to look after the interests of consumers and other third parties affected by the matters under investigation.

- 2.3 A further bullet could be added to paragraph 3.21 which provides that "the CMA may be best placed to handle a case where the activity of the regulated business under investigation is not regulated or is tangential to the regulated business".
- 2.4 The Draft Guidance could also usefully specify that, in the context of case allocation, when reaching an agreement or making a decision, the CMA and the Regulators may seek and take into account representations from interested and 'affected' parties. Their views require consideration as they are directly affected by the decision.

3. **QUESTION 3**

***Do you consider that the Transition Team's proposed approach to secondments and cooperative working between the CMA and Regulators is clear and appropriate?
Please give reasons for your view***

- 3.1 We support the proposed approach to secondments and cooperative working between the CMA and the Regulators as set out in Regulation 10 and paragraphs 3.32 to 3.35 of the Draft Guidance and note that further detail will be outlined in the Memoranda of Understanding between the CMA and each Regulator.
- 3.2 Greater sharing of expertise between the Regulators and the CMA will improve coordination, assist with avoiding unnecessary duplication and make for better and speedier enforcement. It will also ensure that best practice and a consistent approach are adopted in all sectors.

4. **QUESTION 4**

Do you consider that the Transition Team's proposed approach to information sharing between the CMA and Regulators, or between Regulators, is clear and appropriate? Please give reasons for your view.

- 4.1 Again, the detailed arrangements for the sharing of information will be outlined in the individual Memoranda of Understanding between the CMA and each of the Regulators which are at this stage not available.
- 4.2 The information to be exchanged between the CMA and the Regulators is wide ranging and relates to "any information in their possession that Article 101, Article 102, the Chapter I prohibition and/or the Chapter II prohibition may have been infringed



- 4.3 Paragraph 5.7 of the Draft Guidance clarifies that where information has been obtained under Part I of the CA98 or under the EA02, its disclosure by a Regulator for sector-specific purposes is subject to the restrictions of Part 9 of the EA02.
- 4.4 It would nevertheless be useful if the section of the Draft Guidance on information sharing would expressly provide that information obtained by the Regulators under their CA98 powers will not be used in the exercise of their sector-specific regulatory functions, unless it can also be obtained under the sector-specific regulatory regime. This wording should also be reflected in the text of Regulation 9.

5. **QUESTION 5**

Do you consider that the CMA and the Regulators should share additional categories of information, or share information of the type outlined in the Draft CMA Concurrency Guidance at different times? Please give reasons for your view

- 5.1 We have no further comments on the information sharing process.

6. **QUESTION 6**

Do you consider that the Transition Team's proposed approach to the annual concurrency report is clear and appropriate? Please give reasons for your view

- 6.1 An annual report setting out the activities of the CMA and the Regulators in relation to the exercise of their concurrent functions will provide a useful overview of concurrency arrangements for that period and will ensure greater visibility as to whether or not the sectoral regulators are indeed making use of their competition powers.

7. **QUESTION 7**

Do you consider that the annual concurrency report should contain categories of information that is not envisaged in the Draft CMA Concurrency Guidance? Please give reasons for your view

- 7.1 We have no further comments on the annual concurrency report.

8. **QUESTION 8**

Do you agree with the Transition Team's proposed approach to transitional arrangements to account for the changes to competition concurrency introduced by Chapter 5 of Part 4 of the ERA13? Please give reasons for your view



- 8.1 The transitional arrangements in the draft Regulations and Draft Guidance provide for the new regime to apply to all ongoing and future cases from 1 April 2014.
- 8.2 In respect of ongoing cases there should be more detailed guidance as to what the position will be depending on the stage reached in the ongoing case. For example, if a Regulator had initiated proceedings before 1 April 2014, will the case allocation rules still apply?

Herbert Smith Freehills LLP

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