

The CMA Transition Team on behalf of the CMA
(c/o Easha Lam)
Department for Business, Innovation and Skills
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Dear Ms Lam

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

Energy UK is the trade association for the energy industry. Energy UK has over 80 companies as members that together cover the broad range of energy providers and supplies and include companies of all sizes working in all forms of gas and electricity supply and energy networks. Energy UK members generate more than 90% of UK electricity, provide light and heat to some 26 million homes and last year invested £10billion in the British economy.

Energy UK is pleased to respond to the Competition and Markets Authority (CMA) Transition Team's consultation on its draft guidance on concurrent application of competition law to regulated industries. This submission represents a high-level industry position; our members may have different views on particular issues.

It is important for businesses operating in regulated sectors, including energy, to understand how the CMA will behave with respect to the market(s) in which they operate. For this reason, Energy UK feels that it is useful for the CMA to provide guidance on how it and our sectoral regulator Ofgem will apply concurrent competition law powers.

Whilst the guidance is fairly extensive, Energy UK notes that seems to be no high-level vision provided for the balance of power that the CMA and sectoral regulators are expected to strike. It would be interesting to know whether this is deliberate, and if so whether the CMA expects the balance to be different for each sector, and if so why. We note that the regulator may have to balance other statutory duties besides competition. For example, security of supply and fuel poverty issues may well have an impact on the competitive market. Energy UK would observe that, in absence of such a vision, it might become more difficult for regulated businesses to interpret where they stand in relation to any

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proceeding, since there will be uncertainty as to where the CMA and Ofgem stand in relation to each other. Such unpredictability is not an attractive proposition for firms. It would be helpful if the guidance clarified some principles behind the CMA's decision making process outlined in 3.21 on page 16.

Energy UK notes that a test of when to use Competition Act powers over regulatory ones is introduced in line with the Enterprise and Regulatory Reform Act provisions: "where a regulator considers that it would be more appropriate to proceed under CA98". Energy UK believes that the CMA should consider providing further guidance on the basis on which that decision will be taken. It would be helpful to understand the type of factors which might be relevant to considering which route is more appropriate.

Energy UK welcomes the fact that the CMA and each regulator will agree a Memorandum of Understanding for the way they work together. Energy UK would like the drafting process to be undertaken as transparently as possible, ideally via a public consultation process. We are also a little confused as to the level of detail such memoranda are likely to go into. We consider that, to the extent possible, the memoranda should give as much detail as possible about the framework for cooperation that the parties will use. Since the CMA is invited to comment on "its view on the nature and quality of such cooperation" (3.58 p29) it would be useful for the CMA to provide some further indication of the criteria it expects to use to judge the quality of cooperation against.

Energy UK does not believe that regulatory and competition investigations should be carried out into the same issue at the same time, and believe that the guidance should include procedures for preventing this kind of "double jeopardy", which can only serve to create uncertainty and undermine investor confidence. There is also a question as to whether the regulator should exercise its regulatory powers and CMA its competition powers for the same or similar set of facts, either consecutively or at the same time. We believe that the CMA should clarify its position on this matter.

Energy UK is concerned that the guidance to an extent may represent a missed opportunity on the part of the CMA to promote not only best decisional practice, but also best procedural practice. For example, the UKCN may be a suitable venue in which to discuss procedure in the conduct of competition cases in order to promote not only best practice, but also consistency of approach. This is a very important issue in ensuring the just and expeditious conduct of cases. This could also be promoted in the manner in which the CMA and regulators conduct cooperative working more generally.

While we note the CMAs discussion of the rights to review Statements of Objection and Decisions (discussed at para 3.48ff), the guidance also appears to miss the opportunity to make a clear statement that the CMA will actively use these procedures to review and ensure high quality competition enforcement. In this regard, we would prefer it if the CMA would undertake to use these opportunities to review these documents actively to pursue this goal.

We hope that you find these comments useful. If you have any questions, please do not hesitate to contact me on 020 7747 2962 or alun.rees@energy-uk.org.uk.

Yours sincerely

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