

The CMA Transition Team on behalf of the CMA (c/o Easha Lam)
Department for Business, Innovation and Skills
3rd Floor, Orchard 2
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11 November 2013

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

EDF Energy is one of the UK's largest energy companies with activities throughout the energy chain. Our interests include nuclear, coal and gas-fired electricity generation, renewables, and energy supply to end users. We have over five million electricity and gas customer accounts in the UK, including residential and business users.

EDF Energy generally supports the changes made in the Enterprise and Regulatory Reform Act 2013. In general terms the approach taken by the transition team is a sensible one. Assessing problems from a competition perspective has a number of advantages. The principle benefit of which is that using competition policy as the default intervention means regulated parties have an understanding of both UK and EU case law which has developed over the last sixty five years.

We agree that cooperation between the CMA and Regulators is central to the effective operation of the concurrency regime. However, it is important that the concurrency arrangements must clarify for regulated parties the regime in which issues are to be processed. In some cases it might be that either regulatory or competition based solutions could work and others where they purely focus on competition matters. Furthermore, regulators duties are wider than purely competition concerns. In energy this could include considering security of supply or fuel poverty. From the perspective of a regulated participant it is uncertain how trading off competition with regulatory duties will take place. It would therefore be helpful if the guidelines clarify some principles behind the decision making process in such instances in addition to those set out paragraph 3.21 on page 16.

We note that the CMA only has to have regard to the concurrency guidance. In order to provide a greater degree of certainty for undertakings, the CMA should act consistent with such guidance unless it has clearly and robustly demonstrated good reason to adopt an alternative approach in respect of individual cases.

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Our detailed responses are set out in the attachment to this letter. Should you wish to discuss any of the issues raised in our response or have any queries, please contact Ravi Baga on 020 7752 2143, or myself.

I confirm that this letter and its attachment may be published on BIS's website.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Angela Pearce".

Angela Pearce
Corporate Policy and Regulation Director

Attachment

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EDF Energy's response to your questions

Q1. 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.

EDF Energy generally supports the changes made in the Enterprise and Regulatory Reform Act 2013. In general terms the approach taken by the transition team is a sensible one.

Q2. 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

As we have highlighted, we agree with the principle on the grounds that it gives us greater policy certainty than regulatory intervention. However on the issue of how useful the guidelines are will be the extent to which regulated parties can have an idea of the likely outcome. The guidelines would be further improved if additional clarity was provided as to the principles behind their decision making process outlined in 3.21 page 16.

Table 1

Principle	Comment
<ul style="list-style-type: none"> • "the sectoral knowledge of a Regulator and the CMA" 	Agree. However, knowledge will be split between-knowledge of the sector and knowledge of competition policy. It is important that consideration is given as to which is most relevant in each case.
<ul style="list-style-type: none"> • whether the case affects more than one regulated sector and/or non-regulated sectors not subject to concurrent competition law 	If there is cross sectoral issue it would make sense for the CMA to lead on the investigation?
<ul style="list-style-type: none"> • previous contacts between the parties or complainants and a Regulator or the CMA 	It is not clear how this would definitively lead to a rational case assignment if the context of the complaint has evolved? What counts as "previous contacts" should be to be more clearly defined.

<ul style="list-style-type: none"> • experience in dealing with any of the undertakings which may be involved in the proceedings 	<p>We would want continuity if a case was being progressed by a regulator or the CMA. In addition, any consideration of experience with dealing with undertakings should be in respect of competition policy.</p>
<ul style="list-style-type: none"> • experience in dealing with any similar issues which may be involved in the proceedings 	<p>Seems rational. It may be that both authorities have no experience of the issues so we assume the default is the CMA?</p>
<ul style="list-style-type: none"> • whether the CMA considers it necessary to exercise Part 1 functions in relation to a case in order to develop United Kingdom competition policy or to provide greater deterrent and precedent effect for the benefit of competition and consumers, either within the relevant regulated sector, or more widely 	<p>Agree.</p>
<ul style="list-style-type: none"> • whether the case being allocated to the CMA and supported by the relevant Regulator (or vice versa) will provide the best combination of competition and sector-specific expertise 	

Q3. 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

We agree in principle, however, we acknowledge that there are risks as well as benefits to such an approach. We note that the impact of secondment policy could have a bearing on case selection, or even outcome, if the original investigatory officials were seconded to the CMA.

Q4. 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.

We agree with the Transition teams approach. For an effective competition regime information will have to be shared. There are however, different types of information the authorities may wish to discuss-

- a) information on the likelihood of an investigation or the progress of a case

- b) confidential information about the industry as a whole (e.g. switching data)
- c) the commercially confidential information supplied by a particular industry participant (e.g. future investment plans).

EDF Energy is less comfortable with any form of information sharing of highly commercially confidential information of a specific firm if it is not used *directly* as part of the investigation of the case.

Q5. 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

As above, we support the principles of information sharing to facilitate a consistent approach by the regulators and CMA.

Q6 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.

We agree. The report is concisely defined in the guidance. Since the CMA is invited to comment on "its view on the nature and quality of such cooperation" (3.58 p29) it would have been useful for some further indication of the quality parameters expected of them. Otherwise the report is highly descriptive as it simply records the numbers of decisions made.

Q7. 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

Yes. We would hope that the report would evolve over time.

Q8. 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 ERR13? Please give reasons for your view

Yes.

**EDF Energy
November 2013**