From: Griffiths Paul (CCP)
Sent: 11 November 2013 17:47
To: Competition Secondary Legislation Consultation
Subject: FW: BIS consultation on secondary legislation and CMA guidance - OFWAT
Forwarding to the consultation inbox so all the responses are available in one place

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From: Steven Preece [mailto:Steven.Preece@oft.gsi.gov.uk]
Sent: 11 November 2013 16:54
To: Griffiths Paul (CCP)
Cc: Kiedrowski Tom (CCP); Andrea GomesDa Silva
Subject: FW: BIS consultation on secondary legislation and CMA guidance

Paul – to see Ofwat's consultation comments, including on the Concurrency Regulations.

Regards

Steve

From: Ricardo Araujo [mailto:ricardo.araujo@ofwat.gsi.gov.uk]
Sent: 11 November 2013 16:29
To: Steven Preece
Cc: Kalpesh Brahmbhatt; Noel Beale; Mala Shetty; Rosalind Bolton
Subject: BIS consultation on secondary legislation and CMA guidance

Dear Steven,

As agreed at the last CWP meeting, following the public consultation on the 2nd tranche of CMA Guidance and secondary legislation , we take the opportunity to raise the following points:

1. **The Concurrency Regulations**

- We welcome the fact that this version of the Concurrency Regulations include, at Regulation 10 (3), the provision which we sought for the purposes of allowing secondees to (e.g.) make decisions on our cases.

- One outstanding issue from our earlier comments is that of the Prescribed functions/Part 1 functions definitions. We have previously suggested that the use of two different terms in these Regulations adds an unnecessary layer of complication. In one of the drafts that BIS sent round, a note on the document read: "Under the current Concurrency Regulations, the focus is on determining which competent person (CP) is to exercise the "prescribed functions" with the implication that all other Part 1 functions are still exercisable potentially by any other CP with concurrent jurisdiction.
  It remains unclear whether even after a case has been allocated there are circumstances where another CP would need to be able to exercise Part 1 functions (other than the prescribed functions) in relation to that same case (without a transfer being needed)". We previously indicated that we are not aware of circumstances where another CP would need to be able to exercise Part 1 functions (other than the prescribed functions) in relation to that same case (without a transfer of the case).
  Therefore, we take the view that it would be clearer not to retain this distinction.

2. The Concurrency Guidance

- One of the questions in the consultation is "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?"
  Considering that the competition primacy duty can ultimately lead to the CMA taking over a case where a sectoral regulator fails to comply with the requirement, we believe that it would be adequate to introduce more granularity as to the way in which the CMA will go about this procedure. Consultation, robust engagement between the concurrent parties and certainty in the applicable framework are paramount in order to ensure the effectiveness of the concurrency regime.

- Previous drafts of the Concurrency Guidance included as an Annexe the status of guidance relevant to the regulated sectors (including the March 2010 Guidance on the Application of Competition Law to the Water and Sewerage Sectors), but that is no longer there. Nor is it in the list of guidance that it is proposed that the CMA should adopt which is annexed to the consultation on proposed treatment of existing OFT/CC guidance.
  We contend that it is necessary to assert that the Guidance on the Application of Competition Law to the Water and Sewerage Sectors will be adopted although it may be subject to revision.

- Paragraph 3.3 of the guidance reads that "The Concurrency Regulations set out the procedure that the CMA will follow when determining that it is to exercise Part 1 functions in relation to a case where concurrent powers apply". We have noted before that this is not an accurate description of what the Concurrency Regulations do.

- Paragraphs 3.17 and 3.49 refer to sharing of information about "CA98 complaints received". We previously asked for additional clarity as to whether this only refers to complaints in respect of which the CMA/Regulators consider that the section 25 threshold has been met. We suspect that this is the intention but some assurance would be useful for the sake of clarity and completeness.

- Paragraph 3.38. We sought clarification of what is meant by "the CMA or a Regulator will only deal with a complaint where there exists a *material link* between the infringement and the UK". We suspect that this this supposed to be akin to the requirement in Chapter I and Chapter II requiring that an infringement may affect trade in the UK. It that is the case, then we suggest the use of those established terms rather than introduce new terms in the guidance.

- Paragraph 3.48. We suggested that the period between sharing a proposed decision or notice (i.e. commitments, infringement, no grounds for action, closure on admin priority grounds) and issuing it should be 10 working days (it is still 15).

- Paragraph 3.49. Provides that at any stage in the investigation and in a timely manner the CMA and Regulators may share "information in relation to any CA98 complaint received or investigation undertaken at the CMA/Regulator's own initiative". We take the view that it is crucial to introduce a time limit for the CMA to provide comments. The rationale of our proposal is to avoid situations where: a) the CMA/regulators receive comments at a point in time where they do not have time to take any comments on board; b) the CMA/regulators await indefinitely for comments/suggestions.

3. The CA98 Rules

- We previously asserted that the requirement to appoint Procedural Officer in every case, and the requirement to have a chairperson and chairperson's report for each oral hearing, was potentially disproportionate for smaller regulators and goes beyond what was required by ERRA 13 (we requested that this go in the guidance so as to allow more flexibility). We welcome the fact that It has become clear (from paragraph 3.28 of the consultation document) that *the concurrent regulators will also be able to refer procedural complaints to the CMA's Procedural Officer"*, so we will not be required to have a designated person in that role ourselves.

4. The CMA CA98 Guidance

- To note that the guidance no longer includes the Short-Form Opinion guidance which was originally circulated with the CMA 98 Rules and Guidance. The consultation document alludes to this and stresses that the intention is that revised or new procedures and practices will be set out in further detail closer to, or shortly after, 1 April 2014.
  Therefore, we intend to reiterate the point we previously made about short-forms (i.e. that information should be shared in advance with regulators as standard practice if a short form opinion has the potential to read across directly to their sector) when the new guidance is consulted on (if the new guidance does not contemplate any sort of consultation).

Kind Regards,

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