The City of London Law Society

Competition Law Committee

Concurrency and regulated sectors

Response to:

- CMA September 2013 consultation on draft guidance, *Regulated Industries: Guidance on concurrent application of competition law to regulated industries*
- BIS September 2013 consultation on draft of The Competition Act 1998 (Concurrency) Regulations 2014

Introduction

This paper is submitted by the City of London Law Society (the CLLS) both to the Competition and Markets Authority and to the Department of Business, Innovation and Skills in response to the consultations referred to above, which were published on 17 September 2013.

- **Section A**, which is addressed primarily to the CMA, responds to the consultation questions on the draft Guidance
- **Section B**, which is addressed primarily to BIS, comments on the draft Concurrency Regulations

The CLLS represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government Departments, often in relation to complex, multijurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

The CLLS Competition Law Committee has prepared this paper. The Competition Law Committee is made up of solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who advise and act for UK and international businesses, financial institutions and regulatory and governmental bodies on competition law matters.

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We are grateful for the contributions of colleagues on the Committee.

Section A:

CMA September 2013 consultation on draft guidance, *Regulated Industries: Guidance on concurrent application of competition law to regulated industries*

Questions for consultation

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 This is the issue on which guidance would be most helpful – i.e. on what basis the regulators are to decide that it is (in the words of Schedule 14 to the Enterprise and Regulatory Reform Act 2013) "more appropriate" to exercise competition powers rather than sectorial regulatory powers.

1.2 It seems to us that there are three principal issues here.

1.3 First, on the basis of what criteria or principles should a sector regulator decide between applying its competition law or its sector regulation powers?

- The draft Guidance provides very little in the way of substantive guidance on this, saying in paragraph 4.4 only that the regulator will determine this "on a case-by-case basis" and will consider which route "would be most appropriate in a particular case".

- We think that the regulators, and the wider public, should be able to see some clear criteria and principles on which this hugely important decision is to be based. Indeed, since the decision is by its nature susceptible to judicial review, it will need to be a reasoned decision, and any reasoning (in the interest of transparency, consistency, rationality and good practice) be made by reference to published criteria or principles.

1.4 Second, there is the question of when the decision should be made.

- The legislation (Schedule 14 to the 2013 Act) provides that a regulator's consideration of this matter should occur "before making a final order or making or confirming a provisional order".

- The draft Guidance suggests (very sensibly) that the regulator's consideration of this matter should be at a much earlier stage in the process – "when it commences an investigation in its sector" (paragraph 4.4) – and then that the decision should be reviewed during the course of the investigation (paragraphs 4.4 and 4.5).

- Clearly the timing of the decision is important, and we would recommend that it be given more emphasis in the Guidance document, along with more specific provisions about informing complainants and the parties themselves of the approach that is to be taken (i.e. how, and when, will they be informed).

1.5 Third, in the spirit of the legislation, it would be helpful if this Guidance actually argued the case for <u>why</u> the competition law might be more appropriate in cases handled by sector regulators – for example: because competition law gives victims of the particular practice the possibility of

civil remedies such as compensatory damages; because the use of competition law encourages the industry (including the parties and the complainants) to think in terms of effects on competition, rather than merely being directed by the "black letter" of the licence terms; because it creates a body of competition law precedent; because competition law is more flexible and sensitive to the economic reality of the situation than an *ex ante* set of prescribed rules written down in a licence; and so on.

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 list of criteria on the proposed allocation of cases, in paragraph 3.21 of the draft Guidance, generally seems sensible. However, there are a number of points that we would urge the CMA to consider, and to reflect in the Guidance.

2.2 First - reflecting the principle underlying regulations 5(4) and 8(1) of the draft Concurrency Regulations published by BIS – it should be made explicit on the face of the Guidance that, while there is to be consultation between the CMA and the sector regulators, it is primarily for the CMA to decide who is best placed to handle the case, i.e. which authority is more likely to "further the promotion of competition, within any market or markets in the United Kingdom, for the benefit of consumers".

2.3 In this connection, it might be sensible for the CMA to give some illustrations of this. For example, if the subject matter were the pricing or terms and conditions of regulated services, the sector regulator is likely to be better placed; but in other circumstances it is probably more important that regulated businesses are subject to the same regime as other UK businesses and that UK competition law is applied consistently across all economic sectors (which would lend itself to enforcement by the CMA).

2.4 Second, whereas the sector regulators' concurrent competition law powers apply to a much wider range of activities in the particular industry sector than those that are directly regulated (e.g. in the Railways Act 1993, section 67 provides that the ORR's concurrent powers apply to all "services related to railways", which include unregulated rolling stock provision and maintenance activities), in practice it is doubtful that the sector regulator will be best placed to apply competition law to those unregulated activities, given that it is likely to have limited experience of those aspects of the sector. For example, we are aware of Ofcom having sought to apply competition law to practices concerned with selling telephone equipment for consumers through retail outlets, where the OFT have considerable recent experience of retail outlets and their business approach. Accordingly, we would **recommend** adding to the list in paragraph 3.21 of the draft Guidance the following factor:

- "whether the activity of the regulated business under investigation is not a regulated activity or is an activity tangential to the regulated business".

2.5 Third, we would propose adding an additional factor that recognises the importance of giving effect to the spirit of the legislation that regulators should be more "competition-minded", so as to introduce more of a competition culture while ensuring that this does not add to the detriment of the interests of the parties affected by the conduct. We would therefore **recommend** adding a further factor to the list of factors in paragraph 3.21, along the following lines:

- "having regard to the need for the regulator to be more involved in competition law so as to develop a competition culture in the sector concerned, provided that this will not prejudice parties affected by the conduct under investigation".

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 The proposals on secondments, in regulation 10 of the draft Concurrency Regulations, and in paragraphs 3.2 to 3.5 of the draft Guidance, all seem to us very sensible.

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 We have a concern that the information obtained by the CMA or the sector regulators in the context of their Competition Act powers – for example, information obtained as a result of a leniency application, or under section 26 or the new section 26A of Competition Act – might be used by sector regulators in the exercise of their other functions and powers, such as licence enforcement action, price determinations, and so on.

4.2 That would be, in effect, a "back door" way of giving the regulators, in exercising *regulatory* functions, the benefits of the strong powers of investigation (dawn raids, leniency process, etc) that are required to detect competition law infringements.

4.3 It would be inappropriate if the information-sharing provision in regulation 9 of the draft Concurrency Regulations, and paragraphs 3.40 to 3.46 of the draft Guidance - which are designed to facilitate co-operation in *competition* cases – were abused so as to give the regulators such extraordinarily enhanced powers in respect of their ordinary regulatory functions.

4.4 We would therefore **recommend** that:

- it be made clear, in the draft Concurrency Regulations (regulation 9) and in the draft Guidance (paragraphs 3.40 to 3.46) that, notwithstanding Part 9 of the Enterprise Act, information obtained by the CMA or the regulators in the context of their extraordinarily strong investigatory powers under the Competition Act should not be used by the sector regulators in the exercise of any other powers.

- consideration be given to establishing appropriate information barriers within the sector regulators – i.e. as between the competition officials and the licence enforcement officials – to ensure this.

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 The proposals on sharing additional categories of information, in regulation 9 of the draft Concurrency Regulations and in paragraphs 3.47 to 3.49 of the draft Guidance, seem sensible and we have no further comments.

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 The categories of information for the annual concurrency report, as set out in paragraphs 3.56 to 3.59 of the draft Guidance, seem sensible. The statistics in particular will be useful for all involved in the competition process – the CMA, sector regulators and parties.

6.2 Our one concern – which we would urge the CMA to consider carefully – is that the production of the annual concurrency report should not be too burdensome on the CMA. The report should not be too lengthy (e.g. with case descriptions, etc) and should not involve too much additional work on the part of CMA officials – for example, we should have thought that the case descriptions could broadly be "cut and pasted" from press releases etc that have already been issued. It would be unfortunate if a considerable amount of time and resources were to be diverted into production of the annual concurrency report from actual case work.

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 See our comments on question 6 above, particularly in point 6.1 above.

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 ERRA13? Please give reasons for your view

8.1 The proposals about the transitional arrangements, as described in the introduction to the consultation document on the draft Guidance (points 3.18 and 3.19) should clarify the position as regards cases in progress as 1 April 2014 - for example, the position where:

- a complaint was made before 1 April
- a regulator started examining a case before 1 April but did not initiate formal proceedings before 1 April
- a regulator initiated formal proceedings before 1 April.

9 Draft CMA Rules

9.1 **Rule 1(4):** We strongly endorse the application of the CMA rules to the sector regulators exercising their concurrent powers. It is essential that sectoral regulators have effective procedural rules that are consistent with those of the CMA; this is necessary to protect the rights of the parties and facilitate the exercise by the sector regulators of their competition law powers, which is the objective of the legislation.

Section B:

BIS September 2013 consultation on draft of The Competition Act 1998 (Concurrency) Regulations 2014

10 We also have a number of comments on the BIS draft of the Concurrency Regulations.

11 **Regulation 4(3) - the views of affected parties in case allocation:** It strikes us as surprising that, as currently drafted, the Concurrency Regulations make no provision for the views of affected parties to be taken into account. We would **recommend** that there should be a provision that any determination of the exercise of Part 1 functions under regulation 4 must have regard to any representations from interested parties that are relevant to the duties of a competent person in connection with regulation 4.

12 **Regulation 9 - information sharing:** The points that we have made about information-sharing in the context of the CMA's draft Guidance (see our answers to questions 4 and 5 above) apply also to regulation 9 of the draft Concurrency Regulations. We **recommend** that provision be made in regulation 9 to give effect to these points – in particular, that, notwithstanding Part 9 of the Enterprise Act, no competent person shall use information obtained through information sharing provisions for the exercise of any function of a regulator other than its Part 1 functions where such information could not have been obtained other than through such information-sharing or the direct use of Part 1 powers.

The City of London Law Society Competition Law Committee

11 November 2013