



Energy for  
generations

# ESB GT's response to the Competition and Market Authorities' Call for Inputs: Review of the Competition Currency Arrangements

20/10/2023



## 1. INTRODUCTION

This submission presents ESB Generation and Trading's ("ESB GT") response to the Scottish Parliament's Net-Zero, Energy and Transport Committee Consultation: **Scotland's electricity infrastructure: inhibitor or enabler of our energy ambitions?**

ESB GT welcomes this opportunity to discuss this important topic. ESB's portfolio in Great Britain includes a combined-cycle gas turbine plant in the northwest, offshore wind farm interests in Scotland, and a growing onshore wind presence. A central feature of ESB's business is to deliver benefits to consumers by investing in the most efficient renewable assets, particularly offshore and onshore wind at locations where the wind resource is highest. Naturally, it is important for the rules to facilitate investments at locations where the energy yield is economically viable for these renewable assets.

By way of an introduction, ESB is Ireland's foremost energy company, with around 7,000 employees. Established in 1927 by the Irish Government, and remaining 95% state owned, ESB created the first fully integrated electricity system in the world. ESB owns the transmission and distribution systems in Ireland and Northern Ireland. ESB have been present in Great Britain since market liberalisation and for 25 years has powered homes and businesses across the country, investing around £2 billion. ESB was one of the first IPPs in the UK with our investment in Corby Power Station (350 MW) in the early 1990's.

ESB is supporting Britain's transition to a low carbon future by investing in flexible and renewable generation assets, including combined-cycle gas turbine, wind, and biomass technologies. ESB opened Carrington Power Station (880 MW) in 2016, one of the most flexible and efficient plants in the market on the site of an old coal plant near Manchester. This was the first large-scale gas-fired station to come on stream in Great Britain since 2013. Carrington is owned by ESB's 100% subsidiary Carrington Power Limited. ESB also owns 125 MW of onshore wind generation capacity (with over 1,400 MW in the development pipeline across the UK), a 7 MW battery storage project in Lincolnshire, and has also invested in the 353 MW Galloper offshore wind project.

## 2. KEY POINTS

- i) **A stable Policy and Regulatory Framework should be maintained and the regulatory burden on companies should be reduced** – The GB energy market has proved to be an attractive area for investment since privatisation in the early 1990s. This has been due to a policy and regulatory regime where the licensing regime and industry codes have provided a stable governance framework. The sector regulators should only regulate where necessary to protect consumers’ interests and they should carefully consider whether any regulatory requirement is proportionate. They should carry out investigations into company behaviour when they believe a company may have breached a condition of its licence, or the requirements of consumer protection, or competition legislation. The concurrency powers, introduced in 2014, where the Competition and Markets Authority has worked closely with sector regulators such as Ofgem, have contributed to a stable governance framework.
- ii) **The CMA has played a leading role to promote and coordinate the effective application of competition law in the regulated sectors** - Cooperation between the CMA and the Regulators has been central to the effective operation of the concurrency regime. We believe that the CMA’s leadership role facilitates the efficient allocation of resources and the appropriate sharing of information between the Regulators and the CMA.
- iii) **The current concurrent powers are working well.** We do not believe that major changes are required. There may well be improvements to the framework for exercising concurrent powers in terms of resourcing and/or funding. There is an argument that scale efficiencies could be achieved if the resources currently employed across regulators for the purposes of concurrency were concentrated in a single body. However, it is difficult to assess this fully without a breakdown of the costs incurred by both the CMA and the sector regulators in delivering their concurrent functions.
- iv) **The CMA has played a leading role in promoting and coordinating the effective application of competition law in the regulated sectors.** Cooperation between the CMA and the Regulators has been central to the effective operation of the concurrency regime. We believe that the CMA’s leadership role facilitates the efficient allocation of resources and the appropriate sharing of information between the Regulators and the CMA.
- v) **The arrangements for multilateral cooperation between the sector regulators and the CMA are working well, as evidenced by the continued high level of collaboration through initiatives such as the UK Competition Network (UKCN).** We note the assistance and advice given to Ofgem by the Financial Conducts Authority (FCA) and the Northern Ireland Authority for Utility Regulation (NIAUR) as it considered how best to deal with the energy supply issues caused by the war in Ukraine.

## Concurrency as part of sector regulation

***Q1: Have the concurrent Competition Act 1998 enforcement powers proven to be effective tools to remedy specific cases of anti-competitive harms in the regulated sectors? As part of this issue, how do sector regulators evaluate whether competition law enforcement would be a more appropriate course than either: (i) enforcing an existing ex ante rule (ii) setting a new ex ante rule, and are the choices that sector regulators make effective?***

The CMA has played a leading role to promote and coordinate the effective application of competition law in the regulated sectors. Cooperation between the CMA and the Regulators has been central to the effective operation of the concurrency regime. We believe that the CMA's leadership role facilitates the efficient allocation of resources and the appropriate sharing of information between the Regulators and the CMA. On balance, we would agree that the concurrent Competition Act 1998 enforcement powers have proven to be effective tools to remedy specific cases of anti-competitive harms in the regulated sectors.

In terms of how sector regulators evaluate whether competition law enforcement is a more appropriate course than either enforcing an existing ex ante rule or setting a new ex ante rule, regulators should pay heed to the provisions set out in the **'Smarter Regulation to grow the economy policy paper'**<sup>1</sup>. This paper states that *"regulation should be applied proportionately, and there must be sufficient evidence that any identified risk is credible and real. The new framework will provide us with the right system to ensure the future regulation of our changing economy is streamlined, recognises dynamic factors not just immediate compliance costs, and puts smart, forward-looking regulation at the heart of government decisions"*. This would seem to indicate a more light-touch regulation.

The regulatory burden placed on companies should be reduced wherever possible. The UK government's new approach to regulation is designed to deliver rules that are proportionate to the outcomes they are trying to achieve. Some of the regulatory standards introduced when the U.K. was an EU member were based on an overly restrictive and often disproportionate interpretation of the precautionary principle – this has the potential to restrict innovation.

---

<sup>1</sup> *'Smarter Regulation to grow the economy policy paper'*, Department of Business and Trade (May 2023)

***Q2: Does the ability for sector regulators to conduct market studies under the Enterprise Act 2002 help them achieve their objectives?***

The sector regulators should only regulate where necessary to protect consumers' interests and they should carefully consider whether any regulatory requirement is proportionate. They carry out investigations into company behaviour when they believe a company may have breached a condition of its licence, or the requirements of consumer protection, or competition legislation.

Sector regulators have the power to require disclosure of information, and to impose fines and enforcement orders on companies where they find that a breach has occurred, apart from breaches of consumer law where penalties cannot be imposed. We would agree that the ability for sector regulators to conduct market studies under the Enterprise Act 2002 can help them achieve their objectives. However, it may be more appropriate in some circumstances for the CMA to carry out an investigation where there may have been a serious breach or there has been a significant market failure.

***Q3: Does the ability for sector regulators to refer markets to the CMA for a market investigation help them achieve their objectives?***

We believe that in some cases it may be appropriate for sector regulators to refer markets to the CMA for a market investigation. These cases may be complex and require expertise and resource allocation that the CMA can provide better than a sector regulator acting independently.

***Q4: Sector regulators also carry out market reviews under sectoral legislation. Does concurrency have an impact on how sector regulators carry out these reviews? For example, does it affect the extent to which competition issues are a focus in these reviews?***

Sector regulators already have significant powers under the Electricity Act 1989, the Competition Act 1998 and the Enterprise Act 2002 to carry out investigations into company behaviour when they believe a company may have breached a condition of its licence, or the requirements of consumer protection, or competition legislation. There have been a number of instances where, for instance, Ofgem has imposed fines on electricity and gas companies where it has identified a licence breach. Where a potential market defect has been identified, then the CMA has carried out a market investigation. This escalation process has seemed to work well, and we do not believe that concurrency has affected a sector regulator's focus on competition issues in market reviews.

***Question 5: Does concurrency have an impact on how sector regulators carry out their wider regulatory functions, particularly in terms of the promotion of competition in the regulated sectors?***

We do not believe that concurrency negatively impacts the ability of sector regulators to carry out their wider regulatory functions. Sector regulators can conduct market studies under Part 4 of the Enterprise Act 2002, and if appropriate, make a market investigation reference requiring the CMA to conduct an in-depth investigation into whether “*any feature, or combination of features, of a market in the UK for goods or services prevents, restricts, or distorts competition*”. It could be argued that the concurrency powers strengthen the power of sector regulators to enforce competition as they have the ability to initiate a market investigation.

***Question 6: What impact, if any, does maintaining the skills and expertise to exercise the concurrent powers have in terms of costs to sector regulators?***

This is difficult to answer without access to the specific costs incurred by sector regulators in providing the skills and expertise to exercise the concurrent powers. It is likely that the regulators will buy in some of the specific skills needed to exercise concurrent powers as required. Of course, there is an argument for removing concurrent powers and using the specialist staff employed by the CMA to provide these functions. However, the current system seems to work well and does not need to change.

We do have some concerns, however, that Ofgem may not have the resources to deliver its future role, for instance in providing regulatory and other necessary support to implement the *Trade and Cooperation Agreement (TCA)*, and also in developing the administrative relationships required for EU-UK regulatory cooperation in the energy related matters set out in the TCA. Maintaining effective relationships with the *European Agency for the Cooperation of Energy Regulators (ACER)* and other national regulatory authorities will be key, especially in the design and implementation of alternative, more efficient electricity trading arrangements to lower energy costs (associated with the inefficiencies of explicit trading) and ensure Net Zero is reached in the most cost-effective way. Concurrency and co-operation with other sector regulators and the CMA may be required to help Ofgem deliver its objectives.

## Concurrency within the competition regime

***Q7: Are existing mechanisms to coordinate between the CMA and sector regulators sufficient to ensure consistent outcomes and coherence in the competition regime?***

Yes.

***Q8: To what extent does the cooperation between the CMA and the sector regulators that results from the concurrency arrangements give rise to: (i) more effective competition law enforcement; and (ii) benefits that extend beyond more effective competition law enforcement?***

The CMA has played a leading role to promote and coordinate the effective application of competition law in the regulated sectors. Cooperation between the CMA and the Regulators has been central to the effective operation of the concurrency regime. We believe that the CMA's leadership role facilitates the efficient allocation of resources and the appropriate sharing of information between the Regulators and the CMA.

The Energy Market Investigation, initiated in June 2014, is a good example of where sector regulators such as the Gas and Electricity Markets Authority (GEMA) can leverage the expertise and skills of the CMA where a possible '***Adverse Effect on Competition (AEC)***' is suspected. GEMA made a reference to the CMA to look at any competition issue connected with the supply or acquisition of gas and electricity in Great Britain, including both retail (households and microbusinesses only) and wholesale markets. The investigation sought to decide whether 'any feature, or combination of features', of each relevant market prevented, restricted or distorted competition in connection with the supply or acquisition of any goods or services in the U.K.

Where the CMA identifies an AEC, it has a duty to decide whether to take action itself and/or whether it should recommend others to take action to '*remedy, mitigate or prevent the AEC or any resulting detrimental effects on customers*'. In deciding these questions, the CMA has a duty to achieve as comprehensive a solution as is reasonable and practicable to the AEC and any resulting detrimental effects on customers. Hence, the concurrency arrangements confer a degree of flexibility in how potential breaches in competition law are managed.

***Q9: To what extent does concurrency enable the leveraging of the different expertise and experience of the CMA and sector regulators in competition law enforcement?***

The sector regulators will have specific knowledge, experience and expertise relating to their individual sectors. They are unlikely to have the level of knowledge on the application of competition law that the CMA has. The ability to leverage this knowledge and expertise and legal firepower gives the sector regulators increased ability to enforce compliance.

***Q10: To what extent does concurrency improve overall deterrence for breaching competition law both (i) across the economy and (ii) within the regulated sectors specifically?***

The ability of sector regulators to use concurrent powers does, in our opinion, strengthens their capacity to enforce competition law. The threat of a market investigation and the possibility of a fine of up to 10% of turnover is a considerable deterrent. This threat is perhaps more real in the regulated sectors as the regulators have specific powers in these sectors, with prescribed targets on market pricing, environmental protection and security of supply.

***Q11: Does concurrency have an impact on the overall number of Competition Act 1998 investigations, market studies and/or market investigation references, compared to if these powers were reserved solely to the CMA?***

This is a difficult question to answer as more investigation of the counterfactual would be required to answer this definitively. However, it could be argued that the specialist resources, knowledge, expertise and focus of sector regulators would allow them to be able to spot potential breaches of competition law earlier than the CMA that has a broader scope. The important point to make is that licence breaches should be dealt with effectively and timely but within the Better Regulation guidelines.

***Question 12: To what extent does the sharing of concurrent powers result in efficiencies or inefficiencies in the use of public resources across the competition regime? For instance, would the resources currently employed across regulators for the purposes of concurrency be used more or less effectively if concentrated in a single body?***

There is an argument that scale efficiencies could be achieved if the resources currently employed across regulators for the purposes of concurrency were concentrated in a single body. However, some specialist sector expertise may be lost, and this could lead to inefficiencies in the way that market investigations are carried out. The CMA's annual reports should clearly demonstrate how general competition law is being applied in the regulated sectors, and how the sector regulators and the CMA are working together to improve the operation of the competition



regime. These reports should help ensure that the U.K. Parliament can hold the CMA and regulators to account. These annual reports should provide the main evidence on how effectively the concurrency powers are being applied and whether they need amending.

***Question 13: What impact, if any, does having multiple enforcers of competition law have on the costs associated with ensuring compliance with competition law from the perspective of businesses?***

There is little doubt that the costs of ensuring compliance are higher due to having multiple enforcers of competition law. These costs should be minimised as far as possible, and the processes should comply with the Better Regulation principles. However, it is not clear to us that significant efficiency savings will be achieved if the current concurrency powers are removed and one body (the CMA) takes on full responsibility for ensuring compliance with competition law across a number of sectors. It would be good to see a financial evaluation so that a more rounded view could be taken.

***Q14: What benefits does the ability for sector regulators to conduct market studies and refer markets to the CMA for market investigations have for the operation of the markets regime? Are there any downsides in the sector regulators having concurrent powers to conduct market studies and make market investigation references?***

As discussed above in our answer to Question 9, we believe that the sector regulators have specific knowledge, experience and expertise relating to their individual sectors. They are unlikely to have the level of knowledge on the application of competition law that the CMA has. The ability to leverage this knowledge and expertise and legal firepower gives the sector regulators increased ability to enforce compliance. The downside of the current concurrency arrangements is that they may increase the time it takes to carry out a market investigation if the CMA has to wait for a sector regulator to make a request for a market investigation.

## **Improvements to concurrency**

***Q15: Are there improvements which could be made to how the sector regulators exercise their concurrent powers?***

We believe that the current arrangements work reasonably well in the energy sector – we do not have the evidence or knowledge to say how well they work in other sectors. The only significant improvement that we suggest is the time taken to undertake a market investigation: the Energy Market Investigation initiated in 2014, took around 2 years to complete. We understand the

complexity of such an investigation but the prolonged timescale increased investment uncertainty and risk.

***Q16: Are there improvements which could be made to the framework in which the sector regulators exercise their concurrent powers e.g. resourcing or funding for the concurrent functions, or the scope of the concurrent jurisdictions?***

We believe that the current concurrent powers are working well. We do not believe that major changes are required. There may well be improvements to the framework for exercising concurrent powers in terms of resourcing and/or funding. However, it is difficult to assess this fully without a breakdown of the costs incurred by both the CAM and the sector regulators in delivering their concurrent functions.

***Q17: Are there improvements which could be made to the way in which the CMA exercises its leadership role in the concurrency arrangements, including, for instance, its preparation of the annual concurrency report?***

We are unaware of any improvements.

***Q18: Are there improvements which could be made to the arrangements for cooperation (including both those arrangements with a statutory basis and those set out in guidance and the memorandums of understanding)?***

We are unaware of any improvements.

***Q19: Are there improvements which could be made to the arrangements for multilateral cooperation, particularly through the UKCN?***

We believe that the arrangements for multilateral cooperation between the sector regulators and the CMA are working well, as evidenced by the continued high level of collaboration through initiatives such as the UK Competition Network (UKCN). We note the assistance and advice given to Ofgem by the Financial Conducts Authority (FCA) and the Northern Ireland Authority for Utility Regulation (NIAUR) as it considered how best to deal with the energy supply issues caused by the war in Ukraine. In addition, the CMA worked with Ofgem to ensure that the supplier of last resort process was managed in such a way as to limit the impact on competition as far as possible.

## Other issues

***Q20: Are there other issues which the CMA has not identified and should consider when assessing the effectiveness of concurrency? If so, please explain further.***

None.