

DTI/HMT REPORT ON CONCURRENT COMPETITION POWERS IN SECTORAL REGULATION

Response of the Concurrency Working Party

1. In May 2006, the Department of Trade and Industry and HM Treasury published the report *Concurrent Competition Powers in Sectoral Regulation* ("the report"). This paper sets out the Concurrency Working Party ("CWP")'s response to the report. It complements the replies that any individual CWP members may wish to make to the report.

Summary of CWP recommendations in the Concurrency Report

2. The report makes the following recommendations with respect to the CWP:

Recommendation 1: Under the direction of the Joint Regulators Group, the Concurrency Working Party should:

- (a) undertake a programme of work to determine the precise differences in the practical approaches taken by sectoral regulators and the OFT in competition investigations; and
- (b) set out the steps necessary to ensure that best practice and expertise is shared between regulators and the OFT and that a consistent approach is followed.

Recommendation 2: The regulators are currently working well together in allocating responsibility for dealing with particular complaints. The CWP should, however, coordinate all concurrent functions of the regulators and the OFT with a view to ensuring that the application of all of these functions is consistent and reflects best practice.

Although not addressed at CWP itself, the report also recommends joint working between the OFT and the sectoral regulators:

Recommendation 7: Sectoral regulators and the OFT should consider whether inquiries undertaken under general competition law would be best conducted by a joint team drawn from both the sectoral regulator and the OFT in relevant cases. Decisions on which body would lead the case would, of course, need to be taken on a case-by-case basis.

Summary of response

3. Having considered recommendations 1 and 2, CWP members have agreed to take the following measures:

Use of working groups: the CWP will set up working groups to consider areas of common interest with a view to stimulating discussion, cross learning and identifying best practice. The working groups of CWP members' staff will primarily consider procedural issues such as confidentiality, information gathering, and consultation processes. The groups will present their reports to the full CWP for approval, and subsequent release to CWP members. Recommendations of the working groups will not be binding on individual CWP members, but each CWP member will undertake to assess their own procedures in light of the recommendations of the working group.

In addition, a revitalised CWP website will have a secure members-only section which will allow for the voluntary posting of information about cases and case documents by CWP members.

Focused peer review: there will also be a voluntary system of non-binding peer review, conducted by a CWP working group. CWP members will voluntarily submit particular issues arising in cases for consideration and discussion. The regulator submitting the issue for review will be free to take on comments or suggestions as it sees fit.

Case seminars: the CWP will organise a rolling programme of case seminars at which a regulator will present a recent case (or particular aspect of a case) of interest to other CWP members. The seminars will provide an informal forum for learning and discussion.

4. With respect to Recommendation 7, CWP members agree that case specific co-operation may be worthwhile in appropriate situations. This will be most appropriately addressed on a case by case basis. One means of achieving such case specific co-operation may be staff secondments between CWP members.

RESPONSE

Existing situation

5. In the United Kingdom, specified sectoral regulators¹ ("concurrent regulators") have the power along with the OFT to enforce the

¹ I.e. OFCOM (Office of Communications), OFREG (Office for the Regulation of Electricity and Gas, Northern Ireland), OFGEM (Office of Gas and Electricity Markets), OFWAT (Water

Competition Act 1998 and Articles 81 and 82 EC Treaty in their sectors. Before a concurrent regulator can exercise formal powers under the Competition Act in respect of a case, it must agree with the OFT or another concurrent regulator that may also have jurisdiction which of them will take the case forward. Once agreement has been reached, no other regulator can exercise formal powers in respect of that case unless that case is formally transferred to it.

6. The OFT and the concurrent regulators, along with Postcomm are members of the Concurrency Working Party ("CWP").² The CWP was formed in 1997 to facilitate a consistent approach by the concurrent regulators and the OFT in the exercise of their powers under the Competition Act, to consider the practical working arrangements between them, to provide a vehicle for discussion of matters of common interest and the sharing of information where appropriate and where legally permitted and to co-ordinate the provision of advice and information, by way, for example, of published guidelines on the application of Articles 81 and 82 EC Treaty and on the Competition Act, to the public and business.
7. Outside of CWP meetings, there are frequent informal exchanges between the OFT and the regulators about specific cases. These occur in particular when the regulator considers that the OFT may have experience with an issue that the regulator is currently addressing. Both the OFT and the regulators find such exchanges to be helpful. They usually take place on an ad hoc basis (such as via e-mail or telephone) and do not occur through a centralised medium. Currently, the details of such exchanges are not usually captured and disseminated throughout CWP more broadly.
8. The Enterprise Act 2002 imposes strict confidentiality requirements on the concurrent regulators and the OFT with respect to information they have received in their functions under the Competition Act, among other enactments. There are provisions in the Concurrency Regulations which allow such information to be exchanged for the purposes of agreeing who should take a case forward. In some cases, there may also be gateways under the Enterprise Act that allow this kind of information to be exchanged between CWP members.

Strengths of the current system

9. As noted above, and indeed, as recognised in the report case allocation has gone smoothly between the concurrent regulators and the OFT. Furthermore, the informal exchanges mentioned above work well in practice and have allowed productive working relationships to develop.

Services Regulation Authority) ORR (Office of the Rail Regulator), and the CAA (the Civil Aviation Authority, which has concurrent jurisdiction with regard to air traffic control services).

² Although it is not a concurrent regulator, Postcomm sits as an observer.

Opportunities for development

10. Whilst the current system works well, the CWP recognises that there are areas that can be improved upon. In particular, there would be benefits from a greater degree of interaction amongst the OFT and the regulators over and above that which currently occurs at CWP meetings. The proposal below seeks to capitalise upon the strengths in the existing concurrency system in order to address the recommendations in the Concurrency Report.

Use of working groups

11. Noting this opportunity for development, the CWP is setting up working groups that will consider key areas of common interest with a view to stimulating discussion, cross learning and identifying best practice (for example information gathering powers, confidentiality, consultation process appeals and economic issues). A working group will be subsidiary to CWP and will be comprised of staff from the various CWP members. The groups will review approaches taken by different regulators in specific areas and, where appropriate, consider whether there might be any benefits from adopting a common approach to a particular issue. The groups will be given reasonable time-frames in which to conduct their work, but will focus on one or two key issues in their areas at a time.
12. The groups will present papers to the full CWP for approval. Where such papers do not contain confidential or otherwise sensitive information and they are approved by the CWP, they may be published on the public parts of the CWP website (see below). Recommendations of the working groups will not be binding on individual CWP members, but each CWP member will undertake to assess their own procedures in light of the recommendations of the working group. CWP will keep the number of such groups and how often they meet under review to balance the benefits of the groups' work with the burden on CWP members' resources. It is unlikely that the groups would meet any more than once per month and possibly less frequently than that, considering that many of the discussions can take place electronically.
13. CWP has already agreed in principle to form one working group on procedural issues and another one dealing with appeal litigation issues. Those groups will commence work shortly. An additional working group focusing on economic issues is likely to be created as well.
14. In addition, there will be a secure CWP website allowing for the exchange of documents and views between members. CWP members will be able voluntarily to post key documents arising from their cases, including their statements of objections. Parts of the website will be accessible to the public as well. Those parts of the website will contain documents and publications relating to concurrency that may be of interest to the public. These will include guidelines, public versions of

decisions of the regulators and documents arising from working groups that CWP members agree should be made available more widely.

15. The secure parts of the website will also include folders containing the work of the various working groups. These folders will be accessible by all CWP members. CWP members will also be able to make available other documents of general interest to other CWP members. It will also be appropriate to use the secure CWP website to share information and documents relating to market studies/market investigations.

Focused peer review

16. There will also be a voluntary system of focused peer review of particular issues arising in cases.
17. Focusing on a particular issue may be of particular use where the member is aware that another CWP member has previously encountered the issue and can therefore offer an insight into how to deal with it.
18. The peer review process will likely involve a sub-group of the CWP which will be formed to act as a review panel for the documents in question. Members of the sub-group will then provide their comments to the CWP member. That member will not necessarily have to take on board the comments of the sub-group, but it would likely be appropriate for it to discuss the comments with the sub-group members. The membership of the sub-group will vary from case to case. Each regulator might nevertheless have a “pool” of panellists who have agreed to be reviewers.
19. Given the nature of market investigations, it is unlikely that a peer review would be appropriate. However, key market studies/market investigation information and documents may be shared using the secure CWP website.

Case seminars

20. The CWP will also facilitate a voluntary programme of case seminars at which the relevant regulator will present to the other regulators the key elements (or particular aspects) of a recent case, focusing on potential areas of interest to the OFT and other regulators. The seminars will provide an informal forum for learning and discussion. In a similar vein, the CWP has already held a seminar at which various members discussed procedural and related issues.

Advantages of the proposals

21. Since participation in the above process is voluntary, there no need for extensive amendment to current legislation. We will however ensure that CWP members have the ability to exchange case specific information without being in breach of the disclosure prohibition under the Enterprise Act 2002.

Joint working

22. OFT and the regulators will, in appropriate cases, consider pooling their resources for the purposes of investigations/enquiries under general competition law building on the co-operation that already occurs. Under the current Concurrency Regulations a joint investigation using Competition Act 1998 powers is not possible.³ However, regulators and the OFT will consider, in appropriate cases, providing on-going assistance to each other. This could include, where appropriate, the secondments provided for under the Concurrency Regulations.⁴ Such assistance and arrangements that are necessary will be determined on a case-by-case basis.

Conclusion

23. The CWP considers that in taking forward the recommendations in the DTI/HMT report, it is appropriate to leverage its existing strengths, one of which is good informal co-operation between its members. Accordingly, the CWP proposes to take the following steps:
 - The CWP will set up working groups to consider procedural issues of common interest and make recommendations regarding best practice.
 - A secure CWP website will facilitate greater information sharing between members.
 - CWP members will have the opportunity to have their approach to specific issues considered in a peer review by other CWP members.
 - The CWP will organise informal seminars where recent cases will be presented and key issues discussed.
 - Finally, CWP members will consider opportunities for case-specific co-operative working on a case by case basis. This may include secondments between members in appropriate cases.

³ This is because Regulation 6(2) of the Concurrency Regulations prohibits any other competent person from exercising formal powers, once a case has been assigned to a competent person under the regulations.

⁴ See Regulation 8(1).

Signed by

Nick Fincham

Director of Economic Regulation

Civil Aviation Authority

Sean Williams

Executive Board Member and
Partner, Competition Group

Office of Communications

Vincent Smith

Senior Director for Competition

Office of Fair Trading

Maxine Frerk

Director, Governance, Consumer and
Social Affairs

Office of Gas and Electricity Markets

JP Irvine

Head of Legal Services

Office for the Regulation of Electricity
and Gas (NI)

Sarah Straight

Director, Rail Markets Passengers
and Freight

Office of Rail Regulation

Keith Mason - Director of Regulatory
Finance and Competition Water
Services Regulation Authority (Ofwat)