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Concurrency: Is it the dawn of a new day?

Angelene Duke (Sidley Austin LLP) · Monday, January 13th, 2014

The UK competition regime is somewhat unusual in operating a concurrent competition regime with a range of sector regulators. The UK's seven sector regulators (covering communications and post, water, rail, gas and electricity, air traffic and airport operations, and healthcare) can launch competition related investigations if they have reasonable grounds to suspect an infringement of competition law. These concurrent competition powers have long been considered to be used ineffectively. However, with the forthcoming reforms to the UK competition regime, this could be set to change.

If there is a suspected infringement of competition law in a regulated area, currently the Office of Fair Trading ("OFT") and the relevant sector regulator need to agree which of them is in the most appropriate position to handle the investigation and then the chosen authority would be given exclusive jurisdiction. Investigations falling within the scope of a regulated sector have been commonly dealt with by the relevant sector regulator and the OFT tends to refrain from intervening.

Concurrent competition powers are intended to take advantage of a regulator's sector knowledge, its ability to identify potential competition issues before they arise, and its ability to decide which form of regulation is most appropriate in the given circumstances. However, the fact that only two competition infringement decisions have ever been taken by sector regulators casts a shadow over the effectiveness of these concurrent powers.[1] The UK Government itself has identified this lack of activity as particularly striking because "*the regulated sectors contain many of the most dominant companies and uncompetitive market structures and offer services of considerable consumer interest*".[2] The lack of activity is equally striking in light of the fact that these regulated sectors account for almost a quarter of the UK's economy.

A number of factors may have contributed to this dearth of infringement decisions. First, the sector regulators tend to have a close working relationship with the companies they regulate, which may diminish their incentives both to investigate and to find against them. Second, the sector regulators are subject to intense lobbying by stakeholders and it is likely that they find this difficult to ignore. Furthermore, the sector regulators seem to have a preference for resolving cases by utilising their regulatory (rather than competition) powers. This is to some extent understandable given their familiarity with their regulatory powers and the fact that they may have

other responsibilities, such as ensuring safety or protecting the environment.

These criticisms have clearly influenced the reforms to the concurrency regime, which form part of the broader reforms of the UK competition enforcement regime.[3] Once the reforms of the competition enforcement regime are implemented, the sector regulators will be explicitly required to consider use of their competition powers over their sector regulatory powers. Furthermore, the Competition and Markets Authority ("CMA"), to which the competition powers of the OFT and the Competition Commission ("CC") will transfer in April 2014, will have a leading role in coordinating enforcement and promoting effective competition in the regulated sectors. The CMA will have the power, in certain circumstances, to take cases back from the sector regulators. The CMA will also need to publish an annual report – the first of which will be issued in April this year – on the use of concurrent powers in the regulated sectors and the effectiveness of the concurrency regime.

It remains to be seen, however, whether the concurrency reforms will actually lead to an improvement in, or indeed an increase of, competition enforcement in the regulated sectors. It is presumably hoped that the threat of the CMA taking cases back from the sector regulators will push the sector regulators diligently to pursue competition cases. However, the threat will only be effective if the CMA does actually take cases back where it is merited. It is also doubtful whether the obligation on the sector regulators to consider the use of their competition powers over their regulatory powers is sufficient; indeed, the obligation is not particularly compelling and may ultimately become something to which the sector regulators merely pay lip service. Hopefully, the annual concurrency report that the CMA will be required to publish will enhance transparency and put pressure on it and the sector regulators to perform.

It may not be fair to lay all of the blame on the sector regulators. As Lord David Currie (the Chairman elect of the CMA) recently pointed out, the OFT has itself been reluctant to take on cases in the regulated sectors. He says that the OFT's reluctance is in part because of its lack of resource and he quotes some telling statistics to back up his point: "*Sectoral regulation in total costs some £850m a year, whereas the combined budget of the OFT and CC was less than £60m and the CMA budget in 2014/15 will be £52m, some 6% of the regulatory budget*".[4] With the statistics laid out so expressly, the problems are evident: the authorities that have the greatest competition expertise have significant budget constraints, while the authorities with large budgets have limited competition expertise. The CMA's budget is not likely to increase dramatically in the near future and so the most obvious option for improving the lack of competition enforcement in regulated sectors is to increase the effective enforcement of competition powers by the sector regulators. Last month, the UK Government launched the UK Competition Network, an alliance of UK sector regulators and the CMA. The Network is aimed at encouraging the various regulators to work together more effectively and may go some way towards improving sector enforcement. However, as recently noted by Alex Chisholm (the Chief Executive of the CMA), "*there is an element of creative tension between the CMA and the sector regulators*", which may affect their relationship.[5]

Another significant development is the proposed extension of concurrent competition

powers to the Financial Conduct Authority ("FCA"), and also to the payments regulator that is due to be established under it. In recent years, the OFT has undertaken a significant amount of work in the financial services sector (e.g. reviews of cash ISAs, payday lending, personal current accounts, SME banking market, and motor insurance, and a consultation on the regulation of payments systems). The financial services sector accounts for a major portion of UK Gross Domestic Product. If financial services regulation and competition enforcement is left in the hands of the FCA, what will be left for the CMA? Of course, the CMA will have the power to take cases back in certain circumstances, but politics and resource issues may well prevent it from doing so.

It can be questioned whether it is appropriate to be extending the concurrency regime at a time that it is being significantly overhauled. It would perhaps be prudent to grant other sector regulators concurrent powers only if and when it can be shown that the reforms to the concurrency regime will improve competition enforcement in the regulated sectors. Having said that, the FCA already has a statutory objective and duty to promote competition, is equipping itself with a significant and experienced competition team, and has already shown itself prepared to pursue competition issues (having launched a market study into cash savings and announced its plans to review retirement products and wholesale banking markets).

There may also be an enforcement gap. The CMA is due to become fully operational in April 2014, but the FCA will not be granted its concurrent competition powers until 2015. The delay in implementation may cause a regulatory void as the incentive for the CMA to bring competition infringement cases in the financial services sector might be lacking if it is aware that such cases will ultimately be handled by the FCA.

The concurrency regime is set to change, but it is not clear whether the proposed reforms will have the desired effect of increasing competition enforcement in the regulated sectors. The proposed reforms have been billed as significant, though it is not inevitable that they will actually have a significant practical impact and it may just be business as usual for the sector regulators. The FCA seems to be vigorously promoting competition in the financial services sector and making best use of the powers that are already available to it. We can hope that some of the FCA's energy motivates the other sector regulators and that the CMA will take proper steps to coordinate competition enforcement in the regulated sectors, if and when required.

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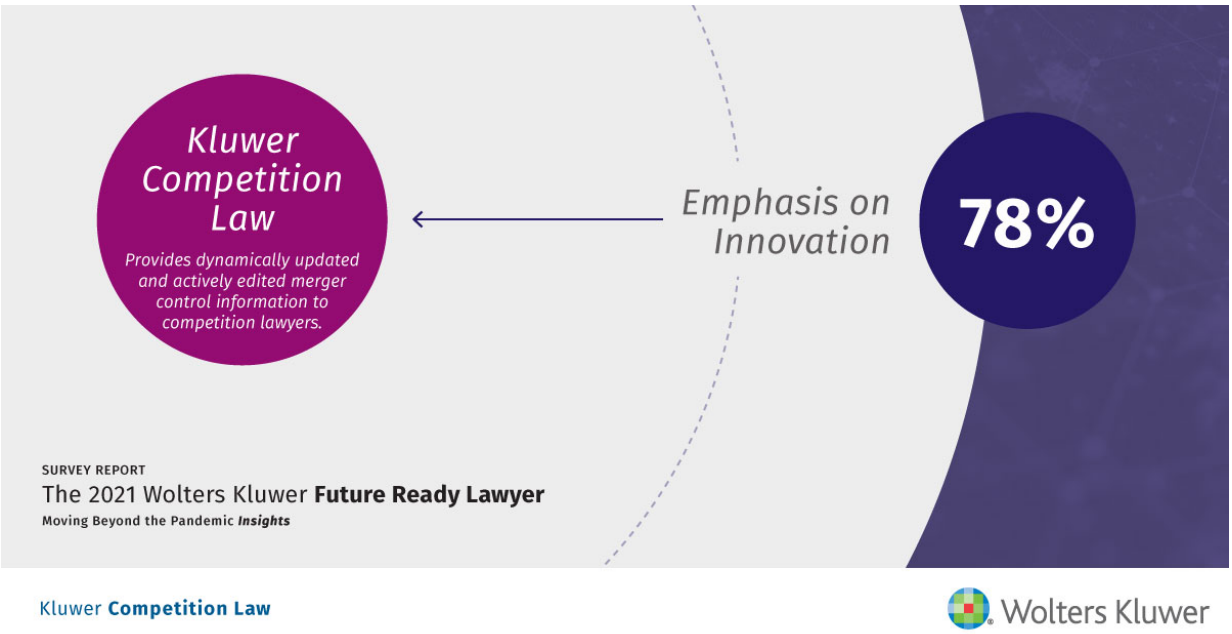

References[+]

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