

COMPETITION COMMISSION



**WHICH COMPETITION POLICY FOR
REGULATED INDUSTRIES?**

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**ROUNDTABLE 3: “The interaction between regulation
and competition law in regulated industries”**

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Introduction

- The Competition Commission (‘CC’) – our role
- Interaction between competition and regulation
 - CC’s regulatory functions
 - CC using competition powers to investigate regulated industries
 - CC using regulatory-type remedies



The Competition Commission

- CC together with the Office of Fair Trading ('OFT') are the two independent specialist competition authorities in the UK
- CC is a purely second stage authority which conducts, on reference from the OFT or the Sectoral Regulators, in-depth inquiries into:
 - Mergers
 - Markets
 - The regulation of the major regulated industries



The Enterprise Act 2002: A Key Moment

- Current regime dates from the Enterprise Act 2002
- CC became "determinative" in merger and market investigations – making and enforcing its own decisions
- The substantive test changed from being based on the public interest to one solely based on competition



Merger control

- In merger cases CC functions as a Phase II authority
- Jurisdiction test – merger qualifies if:
 - the UK turnover of the enterprise being acquired is £70m;
OR
 - a share of supply of 25% will be created by the merged enterprises
- Anticipated and *also* completed mergers are referred
- CC decides whether a merger gives rise to a substantial lessening of competition (SLC)



Market investigations

- Allows consideration of a whole market not working effectively
- Test - CC decides whether there are any features of the market which give rise to an Adverse Effect on Competition, ('AEC')
- Features can include both the structure of the market and the conduct of participants on the market
- Complements the provisions of Article 81/82 EC or their UK equivalents



Remedies

- Where a SLC or AEC is found CC is required to identify an effective remedy which may include structural or behavioural remedies eg:
 - Divestment
 - Imposition of price controls
 - Recommendations to others (e.g. Government or Sectoral Regulators) to take action
- Undertakings or orders



Regulatory inquiries

- CC carrying out its pure regulatory function including:
 - Licence modifications
 - Price determination references
 - Airport references
 - References under the financial services and broadcasting legislation
- Eg – Airports and Mobile Termination Charges
- Dual role is not unusual in the UK system:
 - Sectoral Regulators have both regulatory and competition powers:
 - OfCom for media and telecom regulations
 - ORR for rail regulations



Merger and market investigations in regulated industries

- Need to understand the regulatory framework of the industry when assessing competition
- Mergers:
 - South East Water and Mid Kent Water (2007)
 - Scotrail/First Group
 - Arqiva and NGW
- Market Investigations:
 - BAA Airport Investigation
 - ROSCOS



Case study: ROSCOS

- Referred to CC by a Sector Regulator, ORR
- Much of the railway industry is regulated, but not the leasing of rolling stock
 - therefore, ORR had no regulatory power to use
- CC found an AEC – franchising system was part of the problem
- Currently working on potential remedies



Remedies and Regulation

- Preference for structural remedies
- Some cases behavioural remedies are adopted eg Scotrail /First Group
- Similar to regulation



Case study: Arqiva/NGW

- *Are we giving up on competition and opting for regulation instead?*
 - Arqiva/NGW: A rare exception
 - On the balance the outcome was right
 - In this instance, the behavioural undertakings gave immediate and significant price cuts to existing customers enabling them to share the merger synergies
- *CC: A fully engaged to competition authority which accepts the realities of regulated sectors*