

Agenda

Advancing economics in business

Concurrent competition powers for UK economic regulators

What is ‘concurrency’? Jon Stern, City University, London, sets out the concepts of formal and informal concurrency, which show the degree of cooperation between sectoral economic regulators and competition agencies in the UK and elsewhere. He surveys the arguments for and against formal concurrency, and considers its outlook under the arrangements established in the UK Enterprise and Regulatory Reform Act 2013 (ERRA13)

The term ‘concurrency’ refers to the position under which sectoral economic regulators share the role of enforcing competition policy with the designated competition authority. During the utility privatisations of the 1980s in the UK, most infrastructure industry sector regulators were given ex post competition powers as well as ex ante regulatory powers in their founding legislation.

Current UK concurrency arrangements derive from the Competition Act 1998 (CA98) and the Enterprise Act 2002 (EA02), and were updated in ERRA13. Under CA98, regulators can take action against (a) anticompetitive behaviour in the industry for which they are responsible (price-fixing, cartels, etc., as set out in EU TFEU Article 101); and (b) abuse of dominance (as set out in EU TFEU Article 102). In addition, under EA02, economic regulators can instigate market studies that can lead to Phase 2 market inquiries. Until 2014, market inquiries were carried out by the Competition Commission (CC) and are now carried out by Competition and Markets Authority (CMA) Phase 2 Panels.

The powers set out above refer to the ‘formal’ legally defined concurrency powers. All the main UK economic regulators, originally in the infrastructure industries and now also in the finance and (to a lesser extent) health service industries, have such powers. It is sometimes claimed that they are unique to the UK. This is not quite true. Formal concurrency powers also exist in Ireland (for telecoms) and in a few other countries. We also find ‘super-concurrency’ where ex ante regulation and ex post competition policy are carried out by the same agency; Estonia, the Netherlands and Spain are the main examples of this.

There is also ‘informal’ concurrency. Some UK regulators did not originally have formal concurrency powers—Ofgas (the economic regulator for gas, and one of the predecessor

bodies to Ofgem, the energy regulator for Great Britain) did not have them in the 1980s; nor did the Civil Aviation Authority until 2012. However, in both cases the regulators worked closely with the Office of Fair Trading (OFT) using informal concurrency cooperation, resulting in major Phase 2 competition cases. Informal concurrency remains important in the UK today.

Informal concurrency is far from unique to the UK. A number of other EU countries have arrangements whereby economic regulators and competition agencies cooperate more or less systematically. There are countries (such as Germany and the USA) where there is almost total separation. However, this is not the norm. Think in terms of a spectrum with full separation of regulation and competition at one end and combined agency ‘super-concurrency’ at the other. The UK concurrency arrangements are towards the latter end, and show regular and formalised cooperation in excess of most EU countries, but a lot less (particularly in legal terms) than Estonia, the Netherlands and Spain. However, Austria, Belgium, France and Italy, as well as several Central European countries, seem to have some degree of systematised informal concurrency-style cooperation between infrastructure regulators and competition authorities.¹

The historical development of UK concurrency

Concurrency in the UK began with the privatisation of British Telecom in 1984. It arose almost by accident.

The original intention of the government was that the OFT would be the economic regulator for telecoms services. That was rejected in favour of creating a sector-specific regulator—Ofotel (the UK telecommunications regulator

prior to the creation of Ofcom, the current UK communications regulator). However, it was then proposed that Oftel would take over all competition responsibilities for telecoms. This was strongly opposed by Lord Cockfield, the Minister responsible for competition policy, and, as a compromise, Oftel was given concurrent competition powers with the OFT under the provisions of the Fair Trading Act 1973.

Under the Telecommunications Act 1984, Oftel was also given the obligation to maintain and promote effective competition, with a particular emphasis on promoting the interests of users. In addition, complaints and licence appeals were dealt with by the Monopolies and Mergers Commission (MMC), and not by the courts, as in almost all other countries. Hence, *both* the sector regulator *and* the competition regulator were given direct powers to promote competition.

The pre-1986 arrangements in the gas sector strongly demonstrate the practical importance of informal concurrency powers in the absence of formal concurrency. Ofgas was not originally given formal powers to use competition policy tools—i.e. it was not able to refer competition law cases directly to the MMC under the Fair Trading Act. Ofgas's competition role generally focused on cooperating with the competition authority (the OFT) to provide it with sector-specific information and advice on market reviews. Nevertheless, cooperation between Ofgas and the OFT led to two major MMC inquiries within ten years. These, in turn, led to major increases in wholesale and retail gas competition and to the vertical unbundling of British Gas.

The distinction between informal and formal concurrency powers—and their coexistence—has remained present in the UK. However, competition-oriented critics of the arrangements have pointed to the relatively small number of cases brought by the regulator—particularly CA98 cases—and the difficulties with such cases.

In general, regulators have had more success with market studies leading to market inquiries. Ofcom has made extensive use of market studies since 2005, following EU telecoms legislation. The break-up of BAA (the British Airports Authority) in 2013 also followed a CC market inquiry, but one arising from informal concurrency between the OFT and the Civil Aviation Authority (CAA, the UK regulator of designated airports and National Air Traffic Services).

The criticisms of regulators for not much using their competition powers was a key factor in the deliberate enhancement of concurrency arrangements under ERRA13, and the creation of the UK Competition Network (UKCN). I discuss this below.

The case for and against concurrency

Concurrency has long been controversial. Lawyers have frequently expressed reservations about it.² A particular

issue in the UK concerns how regulators can maintain their practical independence when they share concurrency powers with the competition authority. Other countries rely on private competition actions (e.g. Germany) or the use of an ombudsman (e.g. Denmark) rather than formal concurrency to handle cases where regulatory and competition issues overlap.

The critics of concurrency worry about:

- who has institutional primacy—the regulatory agency or the competition authority;
- whether concurrency leads to too cosy a system and the suppression of multiple viewpoints;
- whether regulators see competition issues too much through a public service objectives lens.

Supporters of concurrency point to:

- its ability to promote consistency across regulators, particularly in the application of competition economics across regulated industries;
- the promotion of competition in the supply of public service obligations (and their efficiency);
- its support for sector regulators against political intervention.

However, ERRA13 has not only renewed concurrency in the UK but also significantly strengthened it, so that it should be more effective than previously in practical terms. In consequence, the UK debate about whether to maintain formal concurrency has now been settled for the foreseeable future, and the main question is whether—and to what extent—the new arrangements will reflect the hopes of those responsible for ERRA13 or the fears of the critics of formal concurrency.

The Enterprise and Regulatory Reform Act 2013

The aspects of ERRA13 dealing with concurrency were intended to encourage the CAA, Monitor (the sector regulator for health services in England), Ofcom, Ofwat (the economic regulator of the water industry in England and Wales), Ofgem, the Office of Rail and Road, and the Northern Ireland Authority for Utility Regulation to use their powers under CA98 and EA02.³

The main provisions in ERRA13 concerning the concurrency regime, along with secondary legislation and related arrangements, include the following:

- regulators must consider whether the use of competition powers is more appropriate than the use of their licence enforcement powers;

- the CMA has to report annually on the use of concurrent powers in the regulated sectors;
- the creation of the UKCN. This facilitates communication and cooperation between the regulators and with the CMA, and coordinates the use of competition powers and concurrency. The UKCN is chaired by the CMA;
- the emphasis is on coordination of cases and exchanges of specialist CMA and regulator staff on a case-by-case basis, by bilateral coordination and via the UKCN. However, the CMA has the ultimate legal power to take over a competition case from a sectoral regulator, even if the sectoral regulator is already investigating that case;
- as a backstop legal power (e.g. to promote concurrency if it can be shown that regulators are not making sufficient use of competition policy tools), the Secretary of State may remove concurrency powers from a regulator and assign them to the CMA.

Once ERRA13 came into force, most of the affected regulators agreed a memorandum of understanding with the CMA, setting out the ways in which information and specialist staff resources could be shared between the CMA and the regulator in question in different types of case.

The future of concurrency in the UK

The key issues arising now are:

- the potential effectiveness of the new concurrency arrangements;
- how to assess the effectiveness of the new regime.

One of the ways in which ERRA13 enhances concurrency is through the UKCN, where the regulators and CMA meet regularly to discuss and coordinate their activities. The arguments for and against concurrency set out above are likely to become more important the greater the level of coordination, and all parties will have to be aware of the potential problems of 'over-cosiness'. However, in practice, these may be outweighed by the scope of the different entities to make better use of scarce competition policy and industry-specific regulatory expertise. In addition, the regulators have set up their own group—the UK Regulatory Network (UKRN)—at which the CMA is only an observer.

One important issue is the fact that sector regulators often have objectives other than the promotion of competition. An example of this is the Payment Systems Regulator, which has the objective of promoting innovation in the payments sector. Innovation in payments systems may well have wider benefits beyond the payment systems being regulated, and in some circumstances these may clash with the Payment Systems Regulator's competition objective.

This is not a new problem. Ofgem and Ofwat have environmental sustainability objectives, and Royal Mail

has a universal service obligation. To the extent that these are set out in primary legislation, competition policy must be exercised taking account of these constraints. This happens more generally with competition policy and its handling of public policy objectives set out in legislation.

The UKCN may well have a useful role in the area where competition policy is constrained by explicit public policy objectives. The benefit is that this should help to ensure that the framework under which decisions are made is clear to all parties.

Market study powers and CA98 cases

There seems to be general agreement that use of market study powers by the sector regulators, as set out in EA02 and reinforced in ERRA13, has been—and will continue to be—beneficial. These powers are generally seen to be important and effective.

There is more disagreement over CA98 powers. In general, there can be clear advantages to firms and individuals making appeals to regulators under the regulatory regime. Investigations under competition law do not have specified time limits and hence can potentially take years. In addition, unlike in CA98 cases, damages can be awarded as a result of a regulatory appeal action.

However, since regulators possess CA98 powers, their use may well act as a deterrent against planned anticompetitive actions by firms (consider, for instance, anticartel actions in competition policy). This means that, while regulators might not use their CA98 competition powers very often, the fact that they possess and may well employ them can have a significant deterrent effect against anticompetitive behaviour in regulated industries—and this effect should be enhanced by ERRA13 and the establishment of the UKCN.

Assessing the effectiveness of concurrency arrangements

It is clear that the enhanced ERRA13 concurrency arrangements will need to be evaluated. The CMA is obliged to provide an Annual Concurrency Report. In 2014 it produced a 'Baseline' Report and in April 2015 produced its first full report. These reports, among other things, list the number of competition complaints to sector regulators under the new regime (by regulator), and both report and discuss outcomes.

Looking more widely, there is a powerful case for more extensive evaluation. This covers process issues such as:

- whether there has been significant sharing of information and know-how between regulators, and between regulators and the CMA;
- evidence for the consistency of competition regulation across the sector regulators.

More importantly, there is a need for proper evaluation of outcomes such as increased competition, through evidence such as increased switching, new entry and reduced prices. However, the economic evaluation of concurrency per se is far from straightforward, as it is very difficult to specify the counterfactual to a CA98 case or a market study. Nevertheless, outcome evaluation is crucial—the more so if regulators wish to place significant reliance on it as a deterrent against anticompetitive behaviour.

Concurrency has been, and will continue to be, the subject of much debate. It remains controversial and the new expanded arrangements will be under considerable scrutiny. All of these mean that strong monitoring and evaluation will be crucial for assessing how successful the ERRA13 enhancement of UK concurrency is.

Jon Stern

This article is largely based on Stern, J. (forthcoming), 'Sectoral Regulation and Competition Policy: The UK's Concurrency Arrangements – An Economic Perspective', *Journal of Competition Law and Economics*. Jon Stern is an Honorary Visiting Professor at the Centre for Competition and Regulatory Policy, Department of Economics, City University, London. The opinions are solely those of the author.

¹ See Stern, J. (2014), 'The Use of Competition Powers by Sector Regulators – The Origins, Experience and Potential Future of the UK's Concurrency Arrangements', CCRP Working Paper No. 27, Annex Table 3.

² For a recent survey from a legal perspective, see Dunne, N. (2014), 'Recasting Competition Concurrency under the Enterprise and Regulatory Reform Act 2013', *The Modern Law Review*, 77:2.

³ Monitor has more restricted concurrency powers than the other regulators, and only has observer status at UKCN. See UK government (2014), 'United Kingdom Competition Network (UKCN) Statement of Intent', 3 December, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/382445/UKCN_Statement_of_Intent.pdf.