
Fairfield Competition Act 1998 investigation decision summary

This is a summary of the ‘no grounds for action’ decision made by Ofwat on 21 December 2015, giving notice of Ofwat’s decision for the purpose of Rule 10(4) of the Competition and Markets Authority’s Competition Act 1998 Rules. Ofwat has decided to close its investigation into whether Anglian Water Services Limited (Anglian) infringed the prohibition imposed by section 18 of the Competition Act 1998 (CA98).

Procedural history

On 6 December 2011, Ofwat produced a Statement of Objections (SO) in which it provisionally found that a margin squeeze had taken place in November 2007 in relation to the price terms offered to Independent Water Networks Limited (IWN) for the bulk supply of water and discharge of sewerage services to a residential development site in Milton Keynes (the Fairfield site).

Following receipt of the SO, between April and October 2010 Anglian provided written representations to Ofwat and attended an oral hearing. Update meetings and further submissions took place in 2013, and in September 2013 Ofwat sent supplementary notices in accordance with section 26 CA98 to IWN and the developer of the site, Redlawn Land Limited (Redlawn). A further supplementary notice was sent to IWN in March 2014.

On 24 April 2014, Ofwat issued a Supplementary Statement of Objections (SSO). The SSO set out Ofwat’s provisional view that there had been an infringement of the CA98 on the narrower basis of a margin squeeze in relation to the provision of sewerage services. Anglian provided submissions in response to the SSO in July 2014.

The regulatory framework, and the Fairfield site

Under the Water Industry Act 1991, water and sewerage services in England and Wales are normally delivered by appointed companies who hold a monopoly position

for regulated supplies within defined geographical boundaries. An exception is that the developer of an unserved site, such as a new housing development, may choose whether to obtain water and sewerage services and associated new infrastructure from the regional incumbent or a new entrant. Such new entrants are unable to access upstream supply services directly, and must procure a bulk supply of water and/or sewerage services from the regional incumbent in order to be in a position to bid to provide services to a new development.

Anglian is the appointed water and sewerage provider in its region in the East of England. The Fairfield site was the site of a new development within Anglian's region which had not previously been served by a water and/or sewerage company. In 2007, Redlawn, a developer, invited bids from companies to provide water and sewerage services to the site.

Ofwat's investigation concerned whether Anglian, as the appointed provider, implemented an unlawful margin squeeze given the terms of its bid to Redlawn and its offer to supply upstream water and sewerage services to IWN, a rival bidder and potential new entrant.

Assessment

A margin squeeze occurs where a vertically integrated, dominant undertaking sets its input prices and its prices in a downstream market at levels which mean that an equally efficient operator (EEO) which paid the input prices offered by the dominant undertaking could not achieve a sufficient margin when competing with the dominant undertaking's downstream prices. Throughout its investigation, Ofwat applied the relevant margin squeeze case law, which suggests that a margin squeeze occurs if an EEO would not have been able to trade profitably (taking into account both costs and revenues), when faced with the dominant undertaking's conduct and pricing.

In the SSO, Ofwat provisionally concluded that there were separate and distinct product markets for water and sewerage services at both the upstream and downstream levels, and that the relevant geographic market was limited to the Fairfield site. However, considerations of market definition were not critical in this case: as the regional incumbent, Anglian was undoubtedly dominant at the upstream level regardless of the precise product and geographic market definitions used.

Ofwat went on to carry out separate margin squeeze assessments for water and sewerage services. It also assessed whether Anglian had engaged in a margin squeeze at two distinct periods during the competitive bidding processes: first, when Anglian submitted a (revised) commercial offer to Redlawn in November 2007; and

second, when Anglian provided draft bulk supply and discharge agreements to IWN in early February 2008.

As a result of its investigation and analysis, Ofwat concluded there was not sufficient evidence of a margin squeeze in respect of water services alone, or water and sewerage services when considered on a combined basis. However, Ofwat's provisional view in the SSO was that there had been a margin squeeze in relation to the provision of sewerage services alone.

Since the SSO, however, Ofwat has reconsidered whether a margin squeeze in respect of a single service was likely to have had an actual or potential effect on the competitive process at Fairfield. Ofwat has taken into account, in particular, Anglian's submissions in response to the SSO and evidence received from Redlaw.

This evidence indicated that, on the particular facts of this case, the developer would have been highly reluctant to appoint separate companies to provide water and sewerage services and would therefore have evaluated bids on a combined basis. It therefore appears unlikely that any margin squeeze implemented in respect of sewerage services only (or water services only), but not in respect of water and sewerage services on a combined basis, would have made it materially more difficult or impossible for IWN to secure the appointment at the Fairfield site.

Accordingly, and having regard to the need for strong and compelling evidence to prove an infringement, Ofwat has concluded that there is insufficient evidence to find that any margin squeeze in respect of sewerage services (or water services) on its own would have generated actual or potential anti-competitive effects sufficient to justify a finding of abuse.

Ofwat emphasises, however, that this conclusion turns on the particular facts of this case. Where a developer is willing to appoint separate companies to provide water and sewerage services, Ofwat would consider whether any margin squeeze implemented in respect of one service might have generated anti-competitive actual or potential effects.

Conclusion

Accordingly, Ofwat has decided to close its investigation into whether Anglian Water Services Limited (Anglian) infringed the prohibition imposed by section 18 of the Competition Act 1998 (CA98).

Ofwat
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