

Guidance on Ofwat's approach to Competition Law in the Water and Wastewater sector in England and Wales Consultation

Business Stream response

We welcome Ofwat's guidance document to their approach to competition law, which provides much useful clarity on how this will be applied once the market has opened. There are two key points that we would like to comment on:

1. Market Definition

As the consultation notes, market definition is an important step for Chapter II determinations, and the a critical aspect of this will be the geographic definition. If each water region is treated as an individual market, then the incumbent will start off with close to 100% market share, whereas if the market as defined as the whole of England, then no company will start off with more than 38% share at the outset. This would clearly have significant implications for how any competition case would be considered. There are arguments in favour of both approaches: there is a single set of market codes and licence conditions for the whole of England, with a single market operator; on the other hand, there are very significant differences between the regions in terms of tariffs, margins, pricing structures and wholesale policies and these differences could well lead to customers in certain areas seeing far less competitive activity, leaving them worse off. It is therefore important to keep an open mind in terms of which definition is the appropriate one in a given case, and to ensure that the market monitoring arrangements provide the type of information (such as switching levels by region) that would help to inform these decisions.

2. Challenges in submitting a competition case

The level of evidence required to open a competition investigation creates a high bar to clear, and this was a point acknowledged by the CMA at the competition event held by Ofwat in November. The costs for a complainant in terms of both time and resources will be substantial, meaning that a formal complaint under the Competition Act is likely to be used as a last resort only, and in cases where the evidence is clear and the damage caused is substantial. In addition, the timescales around a full investigation can be lengthy, as demonstrated by the Albion Water case, which can also be a powerful disincentive to raise a complaint. In the example of Aquavitae, the complainant was driven out of business before the complaint was resolved. It should be noted that in the recent energy market investigation, the referral to the CMA was driven by the regulator itself, rather than by one of the competitors to the incumbent companies. This demonstrates the fact that while it is an important backstop, competition law cannot be relied upon to ensure a well-functioning market that is not distorted by any participant misbehaviour. It can only function as part of a suite of enforcement tools available to the relevant authorities, and it is crucial that Ofwat is able to proactively intervene in a targeted and proportionate manner to risks of harm to customers, the market or other competitors as they arise as opposed to requiring complainants to produce conclusive evidence of actual harm before taking action.