COMPETITION LAW IN THE WATER SECTOR

Professor Richard Whish
King’s College London
21 November 2016
COMPETITION LAW IN THE WATER SECTOR

LEGAL LANDSCAPE

- COMPETITION ACT 1998: CONCURRENT POWERS GIVEN TO OFWAT (AND OTHER SECTORAL REGULATORS) TO ENFORCE COMPETITION LAW

- 2000-2013: RELATIVELY FEW COMPETITION LAW INFRINGEMENT DECISIONS BY SECTORAL REGULATORS (NONE BY OFWAT)

- ENTERPRISE AND REGULATORY REFORM ACT 2013: DUTY OF PRIMACY OF COMPETITION LAW
COMPETITION LAW IN THE WATER SECTOR

LEGAL LANDSCAPE

- NATIONAL AUDIT OFFICE REPORT, FEBRUARY 2016: THERE SHOULD BE MORE ENFORCEMENT OF COMPETITION LAW!
  - ENCOURAGE GREATER FLEXIBILITY OF RESOURCING AND A MORE COHERENT APPROACH ACROSS THE REGIME
  - BUILD ON THE STRATEGY OF RAISING AWARENESS OF COMPETITION LAW
  - TAKE FURTHER ACTION TO STEP UP THE FLOW OF SUCCESSFUL ENFORCEMENT CASES
COMPETITION LAW IN THE WATER SECTOR

LEGAL LANDSCAPE

- WATER ACT 2014: RETAIL COMPETITION TO BE INTRODUCED IN THE NON-RESIDENTIAL SECTOR FOR WATER AND WASTEWATER FROM 1 APRIL 2017

- UPDATED GUIDANCE ON COMPETITION LAW IN THE WATER SECTOR
CONCURRENCY

THE DUTY OF PRIMACY: SCHEDULE 13 OF THE ERRA

BEFORE MAKING AN ENFORCEMENT ORDER, OFWAT SHOULD ASK ‘WHETHER IT WOULD BE MORE APPROPRIATE TO PROCEED UNDER THE COMPETITION ACT 1998’

SECTION 52 OF THE ERRA ENABLES THE SECRETARY OF STATE TO REMOVE THE CONCURRENCY POWERS OF ANY REGULATOR
CONCURRENCY

- TWO RECENT COMPETITION ACT INVESTIGATIONS BY OFWAT
  - BINDING COMMITMENTS FROM BRISTOL WATER PLC, 23 MARCH 2015
  - NO GROUNDS FOR ACTION_DECISION IN RELATION TO ANGLIAN WATER SERVICES LTD, 22 DECEMBER 2015
ONE OF THE COMMENTS OF THE NAO REPORT WAS ABOUT COMPETITION LAW AWARENESS

- 23% OF BUSINESSES IN 2014 FELT THAT THEY KNEW COMPETITION LAW WELL

A SPECIFIC RECOMMENDATION OF THE NAO REPORT WAS TO BUILD ON RAISING AWARENESS

CMA IS ACTIVELY INVOLVED IN VARIOUS AWARENESS-RAISING ACTIVITIES
COMPETITION LAW IN THE WATER SECTOR

COMPLIANCE

How does a company achieve compliance?

- There must be a competition law compliance policy
- Adopted - and believed in! - at the board
- And then actively implemented throughout the organisation
- On a repeated basis
- To be complied with in the spirit, not just the letter, of the policy

Richard Whish
21 November 2016
COMPETITION LAW IN THE WATER SECTOR

COMPLIANCE

BUT!

- TRUCKS CARTEL, COMMISSION DECISION OF 19 JULY 2016: FINES OF €2.93 BILLION ON TRUCKS CARTEL FOR A 14 YEAR CARTEL
- MAN NOT FINED AS THE WHISTLEBLOWER: WOULD HAVE BEEN FINED €1.4 BILLION
- SCANIA STILL CONTESTING THE CASE: BIG FINE TO FOLLOW?
- FOLLOW-ON ACTIONS FOR DAMAGES: €98 BILLION?

Richard Whish
21 November 2016
WHAT ABOUT THE ‘ROGUE EMPLOYEE’?
SEE CASE C-542/14 SIA ‘VM REMONTS’, 21 JULY 2016

PARA. 24 ‘FOR THE PURPOSES OF A FINDING OF INFRINGEMENT OF EU COMPETITION LAW ANY ANTI-COMPETITIVE CONDUCT ON THE PART OF AN EMPLOYEE IS THUS ATTRIBUTABLE TO THE UNDERTAKING TO WHICH HE BELONGS AND THAT UNDERTAKING IS, AS A MATTER OF PRINCIPLE, HELD LIABLE FOR THAT CONDUCT’
COMPLIANCE

- *REMONTS* CAN EXTEND TO THE ACTIVITIES OF THIRD-PARTY SERVICE PROVIDERS AS WELL AS EMPLOYEES

- SO EFFECTIVE COMPETITION LAW TRAINING IS ESSENTIAL THROUGHOUT THE ORGANISATION

- IS THIS A PARTICULAR CHALLENGE IN VERTICALLY-INTEGRATED UTILITY SECTORS?
A GREAT DEAL OF EUROPEAN COMMISSION ENFORCEMENT ACTION UNDER ARTICLE 102 TFEU IS AGAINST VERTICALLY-INTEGRATED UTILITIES

- FRANCE TELECOM, DEUTSCHE TELEKOM, TELEFONICA, DEUTSCHE BAHN, DEUTSCHE POST, ORANGES POLSKA, TELIASONERA ETC.

SPECIFICALLY THIS IS ABOUT NON-DISCRIMINATION AGAINST THE DOWNSTREAM COMPETITOR
COMPLIANCE

- NOTE IN PARTICULAR: THE FACT THAT A PRACTICE IS PERMITTED UNDER A SECTORAL RULE DOES NOT MEAN THAT IT DOES NOT INFRINGE COMPETITION LAW!
  - DEUTSCHE TELEKOM; TELEFONICA

- NOTE ALSO: A COMPLAINANT TODAY CAN TAKE ITS CASE NOT ONLY TO THE CMA/A SECTORAL REGULATOR, BUT ALSO ON A STANDALONE, FAST-TRACK BASIS TO THE COMPETITION APPEAL TRIBUNAL
HOW MUCH ASSISTANCE CAN COMPANIES EXPECT FROM THE GUIDANCE OF COMPETITION AUTHORITIES AND REGULATORS?

THERE IS AN INEVITABLE TENSION BETWEEN THE DESIRABILITY OF LEGAL CERTAINTY AND THE CORRECT ASSESSMENT OF THE LIKELY ECONOMIC EFFECTS OF PARTICULAR CONDUCT.
COMPLIANCE

- GUIDANCE CANNOT TELL YOU EVERYTHING THAT YOU WANT TO KNOW!
  - THE LAW DEVELOPS
  - GUIDANCE IS WITHOUT PREJUDICE TO EVOLVING JURISPRUDENCE OF THE COURTS
  - SEE INTEL/POST DANMARK II/ THE EUROPEAN COMMISSION’S ENFORCEMENT PRIORITIES ON THE APPLICATION OF ARTICLE 102
COMPETITION LAW IN THE WATER SECTOR

THANK YOU FOR YOUR ATTENTION!