

COMPETITION LAW IN THE WATER SECTOR

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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**

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- ◉ 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

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- ◉ 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

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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

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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

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COMPLIANCE

- 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

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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

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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?

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COMPLIANCE

- ◉ 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’

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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?**

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COMPLIANCE

- ◎ **COMPETITION LAW IN 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**

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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

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COMPLIANCE

- ◉ 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

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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

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THANK YOU FOR YOUR ATTENTION!