

Notice of final decision on transfer

1. Pursuant to regulation 7(4) of the Competition Act 1998 (Concurrency) Regulations 2014 (the **Concurrency Regulations**), the Gas and Electricity Markets Authority (**GEMA**) hereby gives notice of the following matters:
 - 1.1. GEMA, having approached the Competition and Markets Authority (**CMA**), proposed to agree with the CMA to transfer the Case to the CMA as described further in the Notice of 5 May 2016 (**Provisional Transfer Notice**);
 - 1.2. pursuant to regulation 7(2)(b) of the Concurrency Regulations, recipients of the Provisional Transfer Notice had the opportunity to make written representations on the proposal to transfer the Case to the CMA. The deadline for the provision of representations was 5pm on Thursday 19 May 2016;
 - 1.3. GEMA and the CMA (jointly the **Authorities**) have taken into account the representations made in accordance with sub-paragraph 1.2 above; and
 - 1.4. have decided that the case should be transferred from GEMA to the CMA with effect from 14 June 2016 (the **Transfer Date**).

Factual background

2. GEMA is currently undertaking an investigation under the Competition Act 1998 (the **CA 98**) to determine whether two or more third party intermediaries (**TPIs**) are or at some point since at least 2010 have been parties to an agreement or concerted practice relating to bidding and/or negative matching¹ for search advertising which have as their object or effect the prevention, restriction or distortion of competition (the **Case**). In this context, agreements or concerted practices relating to bidding include agreements not to compete in relation to particular search terms used for the purposes of online search advertising.
3. In accordance with the procedure set out in the Concurrency Regulations, GEMA and the CMA agreed in September 2015 that GEMA was best placed to exercise Part 1 functions in relation to this matter. This agreement was reached having regard to the general principles and factors detailed in the CMA's guidance, *Regulated Industries: Guidance on concurrent application of competition law to regulated industries* (CMA 10, March 2014) (the **Concurrency Guidelines**).²
4. GEMA first exercised Part 1 functions in relation to the Case in October 2015. As part of its investigation of the Case, GEMA has exercised its powers pursuant to section 26 of the CA 98 requiring the production of documents and the provision of information (**Section 26 Notices**). GEMA has exercised this power in respect of a number of undertakings.
5. The Case is currently at an early stage in the information-gathering phase. GEMA has been engaged in the review of information and documents relating to the subject-matter of the investigation. This includes information and documents provided in response to the Section 26 Notices in addition to information provided voluntarily.

¹ Where an advertiser indicates to a search engine operator that it does not want its website to appear in the search results for specific keywords.

² See

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288958/CMA10_Guidance_on_concurrent_application_of_competition_law_to_regulated_industries.pdf

6. GEMA has itself procured search advertising during the period under investigation in this Case. GEMA procures search advertising pursuant to its functions under the Gas Act 1986, Electricity Act 1989 and other relevant legislation. It acts consistently with its principal objective to protect the interests of existing and future consumers by bringing relevant information to the attention of consumers pursuant to and to facilitate the exercise of its powers, in particular, under section 35(1) of the Gas Act 1986 and section 48(1) of the Electricity Act 1989 to publish advice and information which would promote the interests of consumers.
7. In this context, GEMA has become aware of past communications, during the period covered by the investigation, between some of its staff and representatives of some TPIs. These communications, which predate the opening of the investigation, were in relation to encouraging those TPIs to change their behaviour in relation to bidding on search advertising keywords relevant to GEMA.
8. In light of the above, GEMA proposed to agree with the CMA to transfer the Case from GEMA to the CMA. The reasons for that proposal were set out in the Provisional Transfer Notice and are described further below. Recipients of the Provisional Decision Notice were given until 5pm on 19 May 2016 to make representations on the proposal to agree a transfer. The representations received have been taken into account by the Authorities.

Legal framework

9. The Concurrency Regulations provide, at regulation 7(1), that a competent person who has exercised Part 1 functions under the CA 98 in respect of a case (referred to as the transferor, in these circumstances, GEMA) may agree with another competent person (referred to as the transferee, in these circumstances, the CMA) to transfer the case to the transferee. This is subject to the requirements of regulation 7 which are described further below.
10. Where the transferor and transferee propose to agree a transfer, the transferor must:
 - 10.1. notify the undertaking which is the subject of the exercise of Part 1 functions in that case (the undertaking concerned) and any other person likely to be materially affected by transfer³, of the proposed transfer; and
 - 10.2. give such recipients of the notice the opportunity to make written representations upon the proposal within no less than 10 working days of the date of that notice.
11. The Concurrency Regulations go on to require, at regulation 7(3), that the transferor and the transferee must take into account any written representations made before agreeing the transfer.
12. Regulation 7(4) requires the transferor to inform the recipients of the notice referred to above at paragraph 10.1 in writing of the decision and the reasons for it. Where the transfer is agreed, the transferee is to exercise jurisdiction in respect of the case from the date of the transfer.

³ Regulation 7(5) of the Concurrency Regulations states that the transferor is under no obligation to notify or inform any person if the transferor has not informed that person it has exercised Part 1 functions in respect of that case.

Proposal to agree a transfer - the provisional decision

13. In the Provisional Transfer Notice, GEMA explained that it considered that there continued to be grounds to investigate the matters covered by this Case and that it was in the public interest to do so. Furthermore, GEMA explained that it considered itself able to continue with the Case.
14. It also noted however that the communications made with TPIs of which it had recently become aware, may lead parties to call into question GEMA's impartiality and objectivity in continuing with the Case. In its opinion this had the potential to distract from progressing the substantive matters under investigation. It considered that the CMA, on the other hand, had the ability to take forward the Case without the possibility of its impartiality and objectivity being called into question on this basis.
15. GEMA explained that it believed firmly that there was no bar to it continuing with the Case. Given however that the CMA is not affected by these matters GEMA said that it considered and the CMA accepted that it was appropriate and in the interests of all relevant persons to propose a transfer of the case to the CMA.

Written representations

16. Not all recipients of the Provisional Decision Notice provided a response. One response was received which did not object to the proposal, although the majority of recipients were not in favour of the proposal to agree to transfer the case from GEMA to the CMA. A range of issues were raised by respondents. These issues have been grouped into the main themes summarised below.

No evidence of infringement

17. Some respondents argued that the Case should be closed entirely on the basis that there was no evidence of an infringement of the Chapter I prohibition of the CA 98 (and Article 101 TFEU), rather than being transferred. Different points were raised in support of this. In particular, one respondent argued that there was no evidence of its involvement in agreements⁴ (raising a number of arguments supportive of this view) while another argued that to the extent such agreements existed they did not amount to an infringement of the Chapter I prohibition of the CA 98 or Article 101 TFEU. The latter respondent argued that as a consequence of this GEMA did not have the power to transfer the Case under regulation 7 of the Concurrency Regulations.

Inference of lack of impartiality or objectivity should not prevent GEMA continuing with the Case

18. None of the respondents indicated that they considered that the inference of lack of impartiality or objectivity should prevent GEMA continuing with the Case (although not all respondents expressly addressed the point in their responses). Some respondents thought that GEMA should be able to consider and analyse the effects of its own conduct for the Case.

GEMA is best placed to undertake the Case

19. A number of responses referred to the criteria set out in paragraph 3.22 of the Concurrency Guidelines. In particular, they referred to GEMA's experience and expertise as being relevant to their objections to the proposed transfer. In general,

⁴ As defined in the CA 98 to also include concerted practices.

they considered that there were likely to be significant efficiencies associated with continuing to make use of this expertise which would be lost if the Case were transferred to the CMA.

Case would not meet the CMA's prioritisation criteria

20. One respondent noted that if the decision were made to transfer the Case, the CMA should consider whether the Case met its own prioritisation criteria. In the opinion of that respondent the Case did not meet the CMA's criteria taking into account the likelihood of success (which it considered to be low), resources required (which it considered to be extensive), the level of consumer harm (which it considered to be low or non-existent) and the level of strategic significance (which it considered to be low). A further respondent questioned whether this was a case in which the CMA would need to consider whether to exercise Part 1 functions referring to the small nature of the Case.

Practical matters if the case was transferred

21. Some respondents questioned the extent to which investigatory steps would need to be undertaken again if the Case were transferred. Related to this point was a concern among respondents of delays in the progress of the Case while a CMA team familiarised itself with the matters under investigation.

Consideration of these representations

22. In accordance with regulation 7(3) of the Concurrency Regulations, each of GEMA and the CMA has taken into account these representations in reaching the final decision on transfer. In summary, GEMA does not consider that these representations have altered its position (as set out in the Provisional Transfer Notice) that the most appropriate course of action is to transfer the Case from GEMA to the CMA, and the CMA agrees. GEMA considers that the representations received do not remove GEMA's concerns, as set out at paragraph 14 above. Specific observations on the key themes identified above are set out below although GEMA also notes that not all of the recipients responded to the consultation.

23. GEMA does not accept the approach proposed by those who argued that the investigation should be closed entirely or in relation to any individual undertaking (as defined in the CA 98). GEMA takes the position that the threshold for investigations under section 25 of the CA 98 continues to be met in this Case in relation to all undertakings. It also notes that it would be necessary to undertake further evidence gathering to reach the conclusions suggested by the respondents, such as that there are no grounds for action in this Case. In any event GEMA does not consider itself obliged to undertake a detailed assessment in order to transfer the Case, noting that a requirement to adopt this approach would seem to frustrate the purpose of regulation 7 which, alongside regulation 6, is to allow for the effective allocation of cases between competent persons.

24. GEMA acknowledges that none of the respondents indicated that they considered that the inference of lack of impartiality or objectivity should prevent GEMA continuing with the Case. GEMA also notes the representations made that GEMA's sector experience and expertise makes it best placed to continue with the investigation. Each of these is an important factor relevant to the decision but GEMA does not consider respondents' views to be determinative on the application of them. GEMA considers that these representations relate to the expected disruption to the Case and confirm the need for it to undertake a careful balancing exercise between the risks of disruption associated

with a transfer to the CMA at this point against the risks of future disruption if the Case is retained by GEMA.

25. GEMA notes that these representations reflect the respondents' current views on impartiality and there is the possibility that these may change as the Case moves forward or that others may question GEMA's impartiality. It would be prudent to bear in mind, and guard against, the risk of GEMA's impartiality being questioned either now by others or in the future by any person. This would have the potential to distract from progressing the substantive matters under investigation. If that were to arise at a relatively late stage of the investigative process it may be more disruptive to transfer the Case than it is currently, when the investigation is at a relatively early stage. The Authorities consider this to be a significant risk and accordingly afford it appropriate weight in the overall assessment. By transferring the Case now, the CMA has the ability to take forward the Case without the possibility of its impartiality and objectivity being called into question at a later date by any person, including respondents, parties that did not respond, or by third parties.
26. GEMA notes the representations regarding GEMA's expertise. GEMA acknowledges that some disruption may occur on the transfer of the Case, although this can be mitigated through appropriate handover measures and secondments of relevant team members. The CMA plans to take such steps to minimise any disruption or duplication. GEMA also considers that the extent of such disruption would likely be greater and more likely to occur at a later stage of the investigation.
27. Overall, GEMA considers that the risk of future disruption if the Case were retained by GEMA is more significant than the equivalent risk associated with transferring the case to the CMA now.
28. Having taken into account the representations, the CMA agrees with the reasons set out by GEMA for transferring the Case to the CMA and accordingly agrees with GEMA that the transfer should occur.
29. GEMA considers, and the CMA agrees, that the issue of the CMA's assessment of the case against its prioritisation criteria is a separate matter to the decision to transfer. Once transferred, the CMA will apply its prioritisation criteria in deciding whether the investigation continues to be a priority.
30. The Authorities also wish to clarify certain practical matters raised in the representations. Documents on GEMA's case file will be transferred to the CMA. In addition, the Authorities note that they intend to agree secondments of staff from GEMA to the CMA to assist with the transfer process, to provide appropriate expertise and to minimise the risk of any loss of Case specific knowledge.

Final decision and next steps

31. In light of the above, the final decision is that the provisional decision should be confirmed and the Case should be transferred from GEMA to the CMA.
32. The transfer will take effect on the Transfer Date.

James Waugh

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Duly authorised on behalf of the Gas and Electricity Markets Authority

13 June 2016