

Review of the competition concurrency arrangements

Call for inputs

24 August 2023

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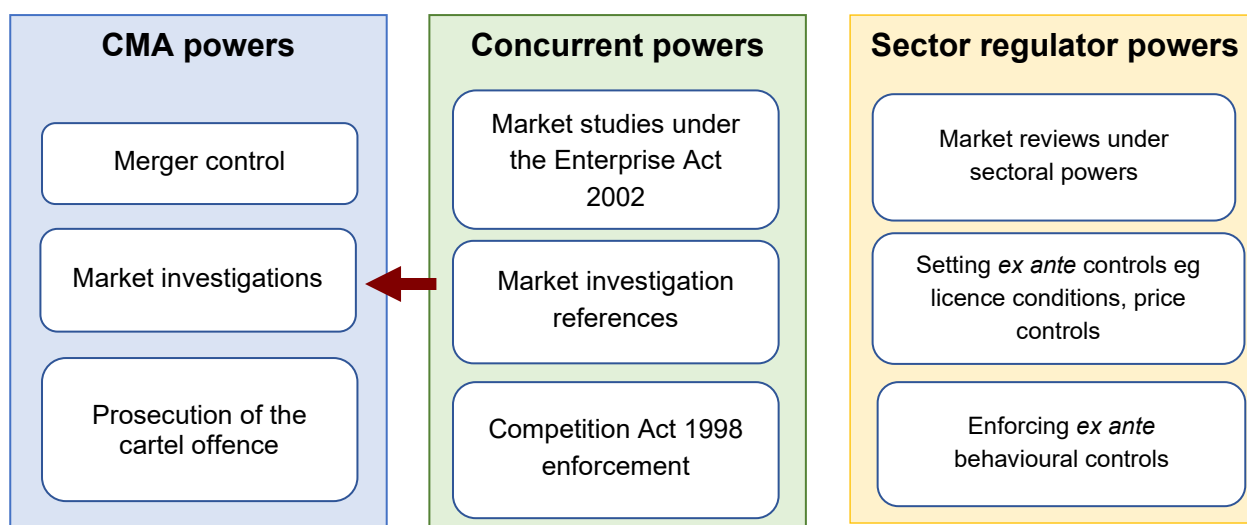
1. Introduction

1. 'Concurrency' is the framework in which responsibility for the promotion of competition in the regulated sectors is shared between the sector regulators and the Competition and Markets Authority (CMA). As part of concurrency, the sector regulators and the CMA share certain powers to promote competition, and there are arrangements for cooperation on the exercise of these powers.
2. The Enterprise and Regulatory Reform Act 2013 introduced a range of significant reforms to enhance the concurrency arrangements. These reforms came into force in 2014. 2024 will therefore mark ten years of these enhanced concurrency arrangements being in operation.
3. The CMA is taking the opportunity to review the overall operation and effectiveness of concurrency. We intend to report on our conclusions in Spring 2024. We are publishing this call for inputs to seek views and evidence to assist the CMA with its review. Further details on the specific issues on which we would be grateful to receive views are set out in this document.
4. A wide range of stakeholders have an interest in the concurrency arrangements, competition in the regulated sectors, as well as the competition regime and sector regulation more broadly. We would like to hear as diverse a range of perspectives on these issues as possible by **20 October 2023**. Further details on how to respond to this call for inputs are included towards the end of this document.

2. Background

5. 'Concurrency' refers to the framework in which responsibility for the promotion of competition in the regulated sectors is shared between the sector regulators and the CMA. The 'concurrent powers' are those powers which are shared between the sector regulators the CMA. Like the CMA, the sector regulators can, in the sectors for which they are responsible:
 - a. apply the prohibitions on businesses engaging in anti-competitive agreements or on the abuse of a dominant market position (respectively, the Chapters I and II prohibitions of the Competition Act 1998, which are referred to in this document as the 'Chapter I prohibition' and the 'Chapter II prohibition'); and
 - b. conduct market studies under Part 4 of the Enterprise Act 2002, and if appropriate, make a market investigation reference requiring the CMA to conduct an in-depth investigation into whether any feature, or combination of features, of a market in the UK for goods or services prevents, restricts, or distorts competition.

Illustration of the concurrent powers in their wider context ¹



6. The following table lists each of the sector regulators with concurrent powers, and the areas in which they have jurisdiction to apply these powers:

¹ The left and righthand boxes in this diagram are included to place the concurrent powers in their wider context. They are not intended to not capture *all* powers outside of the concurrent powers. For instance, the CMA has a wider set of powers than those listed in the lefthand box, and sector regulators may have functions and powers not included in the righthand box (such as the administration of Government schemes).

Regulator	Summary of concurrent jurisdiction²
Civil Aviation Authority (CAA)	Airport operation and air traffic services
Financial Conduct Authority (FCA)	Financial services in the UK and the provision of claims management services in Great Britain
Gas and Electricity Markets Authority (referred to as Ofgem)	Electricity and gas in Great Britain
Office of Communications (Ofcom)	Broadcasting, electronic communications and postal services
Office of Rail and Road (ORR)	Services relating to railways in Great Britain
Payment Systems Regulator (PSR)	Participation in payment systems
Northern Ireland Authority for Utility Regulation (NIAUR)	Electricity, gas, water and sewerage services in Northern Ireland
Water Services Regulation Authority (Ofwat)	Water and sewerage services in England and Wales

7. The sharing of concurrent powers between the sector regulators and the CMA is underpinned by various procedural mechanisms, set out in law, guidance and bilateral memoranda of understanding between the sector regulators and the CMA. These are described further below. Collectively, these are often referred to as the ‘concurrency arrangements’.

Reforms to concurrency in 2014

8. Concurrent competition powers being shared between the sector regulators and the principal competition authority is a longstanding feature of the UK’s competition regime. However, the Enterprise and Regulatory Reform Act 2013³, introduced a series of reforms to the arrangements by which the sector regulators and the CMA use these powers. These reforms came into effect in 2014.
9. The key legislative reforms included the introduction of:
- a. Rules on the allocation of Competition Act 1998 cases between the sector regulators and the CMA, and cooperation on ongoing cases. These included rules on the sharing of information on potential cases,

² These are summaries of the concurrent jurisdiction of the sector regulators. The precise jurisdiction of each of the sector regulators is defined in statute.

³ Some of the reforms are set out in accompanying secondary legislation: see The Competition Act 1998 (Concurrency) Regulations 2014.

and consultation between the sector regulators and the CMA on key case decisions.⁴

- b. An obligation on sector regulators to consider whether it would be more appropriate to proceed using its Competition Act 1998 powers, before they can take certain regulatory actions (typically, enforcement of a regulatory requirement).⁵ This obligation is sometimes referred to as the 'primacy obligation', reflecting the Government's stated policy intent that the obligation reflected the primacy of competition law.
- c. A requirement on the CMA to report annually on the operation of the concurrency arrangements. The Government explained that these annual reports would demonstrate how general competition law is being applied in the regulated sectors, and how the sector regulators and the CMA are working together to improve the operation of the competition regime. It also stated that the reports would give the sector regulators and the CMA an incentive to work effectively together and help ensure that Parliament can hold them to account.⁶

10. In addition to these legislative reforms, a series of changes were made to the cooperation arrangements between the CMA and the sector regulators.

These included:

- a. The adoption of memoranda of understanding between each sector regulator and the CMA including more practical details on cooperation in relation to the exercise of their concurrent powers.⁷
- b. The publication by the CMA of general guidance on the operation of the concurrency arrangements.⁸
- c. The establishment of the UK Competition Network as a forum for multilateral engagement between the sector regulators and the CMA.⁹

⁴ These rules were made via secondary legislation: The Competition Act 1998 (Concurrency) Regulations 2014

⁵ Some of the sector regulators had obligations of this kind before 2014, but it was not consistent across regulators.

⁶ Copies of the annual concurrency reports for each of the last nine years (and a baseline report issued in 2014) are accessible here: <https://www.gov.uk/government/collections/uk-competition-network-ukcn-documents>

⁷ The various individual MOUs are hosted on the webpage for the UK Competition Network: <https://www.gov.uk/government/groups/uk-competition-network>

⁸ *Regulated Industries: Guidance on concurrent application of competition law to regulated industries (CMA10)*. Available at the following link:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892735/Guidance_on_concurrent_application_of_competition_law_to_regulated_industries.pdf

⁹ Further information on the UKCN, including its 'Statement of Intent' from December 2013, are available on its webpage: <https://www.gov.uk/government/collections/uk-competition-network-ukcn-documents>

- d. The establishment of a dedicated team within the CMA to manage its relationships with the sector regulators.

This Review

11. 2024 will mark ten years since the enhanced concurrency arrangements were introduced. It is a good opportunity to consider the objectives and performance of concurrency more broadly, and over a longer time frame than the CMA's annual concurrency reports.
12. We are mindful of the increased public attention on the work of the sector regulators, and ongoing debates on the overall effectiveness of the UK's regulatory framework. We are also mindful that this review of concurrency will be carried out at the same time as the Government conducts a review of economic regulation in the energy, water and telecoms sector.¹⁰ The wider debates on the UK's regulatory framework are important. However, the CMA does not intend to make a general appraisal of the performance of UK's framework for sector regulation through this review. The focus of this review is squarely on the concurrent competition powers.
13. We want to hear as many points of view on concurrency as possible. The regulated sectors are a key part of the UK economy. The goods and services supplied in the regulated sectors – often essential - form a large part of household budgets, particularly for the least well-off and most vulnerable people in our society. The role of concurrency in promoting competition in the regulated sectors therefore affects a diverse range of stakeholders. We are publishing this call for inputs to gather views and evidence on concurrency.¹¹ The specific issues on which we would be grateful to hear stakeholders' views are highlighted in the following section.

¹⁰ Further details on the review of economic regulation by the Department for Business and Trade are available on its website: <https://www.gov.uk/government/publications/economic-regulation-policy>

¹¹ The CMA is aware that the Digital Markets, Competition and Consumers ('DMCC') Bill is currently before Parliament. The Bill does not specifically amend the existing concurrency arrangements. However, if enacted, it will among other things introduce a number of reforms to the CMA and concurrent regulators' investigative powers, both in respect of Competition Act 1998 investigations and markets work under the Enterprise Act 2002. For the avoidance of the doubt, the DMCC Bill is outside of the scope of this call for inputs.

3. Questions for stakeholders

14. We consider that the concurrency arrangements can be considered against two broad objectives:
- a. how concurrency improves the effectiveness of the sector regulators in promoting competition in their respective sectors; and
 - b. how concurrency improves the effectiveness of the UK's competition regime.
15. We would welcome views from stakeholders on each of these in turn.

Concurrency as part of sector regulation

- **Question 1:** Have the concurrent Competition Act 1998 enforcement powers proven to be effective tools to remedy specific cases of anti-competitive harms in the regulated sectors? As part of this issue, how do sector regulators evaluate whether competition law enforcement would be a more appropriate course than either: (i) enforcing an existing *ex ante* rule (ii) setting a new *ex ante* rule, and are the choices that sector regulators make effective?
- **Question 2:** Does the ability for sector regulators to conduct market studies under the Enterprise Act 2002 help them achieve their objectives?
- **Question 3:** Does the ability for sector regulators to refer markets to the CMA for a market investigation help them achieve their objectives?
- **Question 4:** Sector regulators also carry out market reviews under sectoral legislation. Does concurrency have an impact on how sector regulators carry out these reviews? For example, does it affect the extent to which competition issues are a focus in these reviews?
- **Question 5:** Does concurrency have an impact on how sector regulators carry out their wider regulatory functions, particularly in terms of the promotion of competition in the regulated sectors?
- **Question 6:** What impact, if any, does maintaining the skills and expertise to exercise the concurrent powers have in terms of costs to sector regulators?

Concurrency within the competition regime

- **Question 7:** Are existing mechanisms to coordinate between the CMA and sector regulators sufficient to ensure consistent outcomes and coherence in the competition regime?
- **Question 8:** To what extent does the cooperation between the CMA and the sector regulators that results from the concurrency arrangements give rise to

(i) more effective competition law enforcement; and (ii) benefits that extend beyond more effective competition law enforcement?

- **Question 9:** To what extent does concurrency enable the leveraging of the different expertise and experience of the CMA and sector regulators in competition law enforcement?
- **Question 10:** To what extent does concurrency improve overall deterrence for breaching competition law both (i) across the economy and (ii) within the regulated sectors specifically?
- **Question 11:** Does concurrency have an impact on the overall number of Competition Act 1998 investigations, market studies and/or market investigation references, compared to if these powers were reserved solely to the CMA?
- **Question 12:** To what extent does the sharing of concurrent powers result in efficiencies or inefficiencies in the use of public resources across the competition regime? For instance, would the resources currently employed across regulators for the purposes of concurrency be used more or less effectively if concentrated in a single body?
- **Question 13:** What impact, if any, does having multiple enforcers of competition law have on the costs associated with ensuring compliance with competition law from the perspective of businesses?
- **Question 14:** What benefits does the ability for sector regulators to conduct market studies and refer markets to the CMA for market investigations have for the operation of the markets regime? Are there any downsides in the sector regulators having concurrent powers to conduct market studies and make market investigation references?

Improvements to concurrency

16. In addition to reviewing the concurrency arrangements, we would also like to use this review to consider possible improvements to concurrency. To the extent these issues have not been addressed in answers to previous question, we would be interested in responses to the following questions:

- **Question 15:** Are there improvements which could be made to how the sector regulators exercise their concurrent powers?
- **Question 16:** Are there improvements which could be made to the framework in which the sector regulators exercise their concurrent powers eg resourcing or funding for the concurrent functions, or the scope of the concurrent jurisdictions?

- **Question 17:** Are there improvements which could be made to the way in which the CMA exercises its leadership role in the concurrency arrangements, including, for instance, its preparation of the annual concurrency report?
- **Question 18:** Are there improvements which could be made to the arrangements for cooperation (including both those arrangements with a statutory basis and those set out in guidance and the memorandums of understanding)?
- **Question 19:** Are there improvements which could be made to the arrangements for multilateral cooperation, particularly through the UKCN?

Other issues

17. We recognise that stakeholders may have different perspectives on the objectives of the concurrency arrangements, including the metrics which should be used to measure performance against these objectives. We would welcome feedback from stakeholders on the overall framework for the CMA's review.
- **Question 20:** Are there other issues which the CMA has not identified and should consider when assessing the effectiveness of concurrency? If so, please explain further.

4. How to respond and next steps

18. The CMA welcomes responses from interested parties to the specific questions identified above. Where possible, please provide supporting evidence or examples for your views where possible.
19. We would be grateful to receive responses to this call for inputs by **20th October 2023**.
20. Responses should be submitted by email to: concurrencyreview@cma.gov.uk
21. We plan to hold meetings with stakeholders and roundtables to discuss the issues set out in this call for inputs. Stakeholders should therefore let us know in their submissions if they would be interested in taking part.
22. When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
23. In accordance with our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive.

Use of information and personal data

24. Any personal data you provide to the CMA will be handled in accordance with our obligations under the UK General Data Protection Regulation and the Data Protection Act 2018. Our [personal information charter](#) set out the standards you can expect from us when we collect, use or share personal data and provides details of your rights in relation to that personal data and how to contact us.
25. 'Personal data' is information that relates to an identified or identifiable the living individual. We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take CFI responses into account and to ensure that we properly consult on matters relevant to the advice requested by the Secretary of State before it is finalised.
26. Please note that information provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration representations made by you in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.