

Regulated Industries: Guidance on concurrent application of competition law to regulated industries

March 2014

CMA10

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This publication is also available at: www.gov.uk/cma.

Since this Guidance was published, the Financial Conduct Authority (FCA) and the Payment Systems Regulator (PSR) have acquired concurrent competition powers under the Financial Services (Banking Reform) Act 2013.

The FCA acquired concurrent competition powers to enforce against breaches of the UK and EU prohibitions on anti-competitive agreements and abuses of a dominant position under the Competition Act 1998 and to conduct market studies and make market investigation references under the Enterprise Act 2002 from 1 April 2015. The PSR acquired concurrent powers to conduct market studies and market investigation references under the Enterprise Act 2002 on 1 April 2014; it acquired powers to enforce against breaches of the UK and EU prohibitions on anti-competitive agreements and abuses of a dominant position on 1 April 2015.

References in the document to the Regulators should be read as including the FCA and PSR (unless the context indicates otherwise).

Since 1 April 2016, Monitor has been operating with the NHS Trust Development Authority as part of a single integrated organisation known as NHS Improvement.

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1 INTRODUCTION

- 1.1 For a number of industries the application and enforcement of Article 101 of the Treaty on the Functioning of the European Union (the TFEU) and Article 102 of the TFEU in the United Kingdom and of Chapter I and Chapter II of the Competition Act 1998 (CA98) (as amended by the Enterprise and Regulatory Reform Act 2013 (the ERRA13)) is carried out by the sectoral regulators listed in paragraph 2.1 (Regulator or Regulators (where referred to collectively)) concurrently with the Competition and Markets Authority (the CMA).¹ EC Regulation 1/2003 (Modernisation Regulation)² requires the designated national competition authorities of the Member States (NCAs) and the courts of the Member States to apply and enforce Article 101 and Article 102 of the TFEU as well as national competition law when national competition law is applied to agreements which may affect trade between Member States or to abuse prohibited by Article 102 of the TFEU. The CMA and the Regulators with concurrent competition powers under the CA98 are designated as NCAs with the power to apply Articles 101 and 102 of the TFEU. Throughout this guidance, references to the CMA should be taken to include the Regulators in relation to their respective industries, unless otherwise specified.
- 1.2 The CMA has set out in this guidance document general information for the business and legal communities and other interested parties on the application and enforcement of Articles 101 and 102 of the TFEU and Chapters I and II of the CA98 in the United Kingdom by the CMA and the Regulators.
- 1.3 In particular, this guidance sets out information about which regulated sectors are affected by the concurrency provisions and the scope of the concurrent powers and explains the way in which the concurrent application and enforcement of competition law works in practice.
- 1.4 Chapter 2 of this guidance sets out the concurrent powers of the Regulators.
- 1.5 Chapter 3 describes the operation of the concurrency regime. In particular, it outlines:

¹ Section 54 of the CA98 (combined with sector-specific legislation) provides that, in relation to the regulated sectors described in paragraph 2.1, the same provisions are applied and enforced, concurrently with the CMA, by the Regulators for communications matters, gas, electricity, water and sewerage, railway, air traffic, airport and healthcare (in respect of England only) services.

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (OJ L1, 4.1.2003, p.1).

- the procedures for making complaints and the way in which they are dealt with under concurrent powers
- the coordination and leadership role of the CMA in relation to concurrent competition law application and enforcement, for the purpose of enhancing the efficient application and enforcement of Articles 101 and 102 of the TFEU and Chapters I and II of the CA98 in the regulated sectors.³ This includes the forms of support that may be available to the Regulators and the availability of the CMA's collective case decision making model and procedural complaints procedure to the Regulators⁴
- the circumstances in which the CMA or a Regulator may decide to investigate a suspected infringement of competition law and the procedure for agreeing case allocation between the CMA and the Regulators
- the procedures for sharing information in respect of the application of Articles 101 and 102 of the TFEU and Chapters I and II of the CA98 between the CMA and the Regulators, including the categories of information that will be shared and when, and how that information will be dealt with by the CMA and the Regulators
- the process for and possible content of the annual report on the operation of the concurrency regime that the CMA is required to prepare⁵
- the operation and role of the United Kingdom Competition Network (UKCN). The UKCN is a forum which enables the Regulators and the CMA to share expertise, ideas and experience for the purpose of ensuring a consistent and high-quality approach to competition policy and enforcement in the regulated sectors, and to coordinate matters relating to concurrency⁶
- how the Regulators work with the CMA and with each other, using the powers in the CA98, including under the Competition Act 1998

³ See section 54 of the CA98 (as amended by the ERRA13) and the Concurrency Regulations.

⁴ For further information on the CMA's approach to investigating and enforcing suspected infringements of Chapter I and Chapter II of the CA98 see *CMA guideline Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), available at: www.gov.uk/cma.

⁵ See paragraph 16 of Schedule 4 of the ERRA13.

⁶ The UKCN Statement of Intent document is enclosed as Annexe B.

(Concurrency) Regulations 2014 (the Concurrency Regulations) (SI 2014/536),⁷ and

- how the CMA and the Regulators will work in the European Union (EU) with other NCAs who have been given the responsibility of applying Article 101 and Article 102 of the TFEU in their territories.
- 1.6 Chapter 4 explains how the use of these powers interacts with the Regulators' sectoral powers and duties and the powers under the Enterprise Act 2002 (EA02).
- 1.7 Chapter 5 describes the restrictions on the disclosure of information which are set out in the Modernisation Regulation and within the EA02.
- 1.8 Annexe A contains the Concurrency Regulations.
- 1.9 The UKCN Statement of Intent document, which provides further information about the UKCN, is included in Annexe B.
- 1.10 This guidance document supersedes the OFT's previous guide on concurrent competition law enforcement entitled *Concurrent Application to Regulated Industries*.⁸ You may find it useful to read this document alongside other CMA, OFT and/or CC documents, including the CMA guideline *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8) (CMA CA98 Procedures Guidance)*,⁹ *The Application of the Competition Act in the Telecommunications Sector (OFT417)*, *The Application of the Competition Act in the Water and Sewerage Sectors (OFT422)*, *Application in the Energy Sector (OFT428)*, *Application in Services Relating to Railways (OFT430)*, and *Application to the Northern Ireland Energy Sectors (OFT437)*, (Regulated Sector Publications).¹⁰
- 1.11 This is the CMA's current practice as at the date of publication of this document. It may be revised from time to time to reflect changes in best practice or the law and the CMA's developing experience. Please refer to www.gov.uk/cma to ensure you have the latest version of this guidance.

⁷ See Annexe A. The Concurrency Regulations are also available to download at www.legislation.gov.uk/id/uksi/2014/536.

⁸ *Concurrent Application to Regulated Industries* (OFT 405).

⁹ *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8)* available at: www.gov.uk/cma.

¹⁰ Regulated Sector Publications are available at: www.gov.uk/cma. Their content is not substantively affected by the ERRA13.

- 1.12 This guidance is intended to explain these provisions to those who are likely to be affected by them and to indicate how the CMA expects them to operate. Further information on how the CMA has applied and enforced competition law in particular cases may be found in the CMA's decisions, as available on the CMA's webpages.¹¹
- 1.13 The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when dealing with suspected competition law infringements in the regulated sectors but that, when the facts of an individual case reasonably justify it, the CMA may adopt a different approach.
- 1.14 This guidance will take effect from 1 April 2014. The new approach established by the ERRA13 and outlined in this guidance will apply to all ongoing and future cases.
- 1.15 This document is not a definitive statement of, or a substitute for, the law itself. A range of publications on how the CMA carries out this substantive assessment is available on the CMA's webpages. In particular, this guidance is not a substitute for the TFEU, nor for regulations made under it. Neither is it a substitute for European Commission (Commission) notices and guidance. Furthermore, this guidance is not a substitute for the CA98 or the EA02 and the regulations and orders made under those Acts. It should be read in conjunction with these legal instruments, EU case law and United Kingdom case law. Anyone in doubt about how they may be affected by the TFEU, the CA98 or the EA02 should seek independent legal advice.

¹¹ The CMA maintains a register of CA98 decisions, available at: www.gov.uk/cma.

2 THE CONCURRENT POWERS

2.1 The industry sectors where the Regulators have concurrent powers with the CMA as at 1 April 2014¹² are:¹³

Agreements¹⁴ or conduct relating to:	Statute	Regulatory Body
The provision of airport operation services	The Civil Aviation Act 2012	CAA ¹⁵
The supply of air traffic services	The Transport Act 2000	CAA
The provision of health care services in England	The Health and Social Care Act 2012	Monitor
Commercial activities connected with the generation, transmission or supply of electricity in Northern Ireland	The Electricity (Northern Ireland) Order 1992	NIAUR
Commercial activities connected with the supply of water or securing a supply of water or with the provision or securing of sewerage services in Northern Ireland	Water and Sewerage Services (Northern Ireland) Order 2006	NIAUR
The conveyance,	The Gas (Northern	NIAUR

¹² The identity of the concurrent regulators and scope of their concurrent powers may be subject to change. Please refer to the CMA's webpages for an up-to-date summary of all concurrent regulators and their concurrent powers on www.gov.uk/cma. On 18 December 2013, the Financial Services (Banking Reform) Act received Royal Assent, awarding the Financial Conduct Authority concurrent powers from 1 April 2015 to make Market Investigation References under EA02 and to enforce CA98 in respect of financial service activities.

¹³ The table is organised alphabetically by reference to each Regulator's acronym.

¹⁴ References in this guidance to 'agreement' should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices.

¹⁵ See CAA publication *The CAA's concurrent competition powers for airport operation services and air traffic services* (CAP 1016) for more information on the meaning of 'airport operation services' and 'air traffic services', as well as on the CAA's concurrent competition powers.

storage or supply of gas in Northern Ireland	Ireland) Order 1996	
Activities connected to electronic communications, broadcasting and postal services matters	The Communications Act 2003	Ofcom
The shipping, conveyance or supply of gas and activities ancillary thereto	The Gas Act 1986	Ofgem
Commercial activities connected with the generation, transmission or supply of electricity	The Electricity Act 1989	Ofgem
Commercial activities connected with the supply of water or securing a supply of water or with the provision or securing of sewerage services	The Water Industry Act 1991	Ofwat
The supply of services relating to railways	Railways Act 1993 (as amended by the Transport Act 2000)	ORR

2.2 The Regulators have all the powers of the CMA to apply and enforce Article 101 and Article 102 TFEU and the CA98 in order to deal with anti-competitive agreements or abuses of a dominant position which relate to activities in relation to their respective sectors, with the exceptions noted in paragraph 2.4 below. In many cases, the undertakings whose agreement or conduct is relevant will be licensees, franchisees or similar right holders under one of the statutes listed above, although it is the subject matter to which the agreement or conduct relates rather than the identity of the undertakings involved which will determine whether there is concurrent jurisdiction.

2.3 A Regulator may:

- consider complaints about possible infringements of any of Article 101 of the TFEU, Article 102 of the TFEU, the Chapter I prohibition and/or the Chapter II prohibition
- impose interim measures to prevent significant damage
- carry out investigations both on the Regulator's own initiative and in response to complaints. The Regulators have the same powers as the CMA to require the production of documents and information, to interview individuals that have a connection with a business under investigation and to search premises. Further details about these powers are given in the CMA CA98 Procedures Guidance (CMA8)¹⁶
- impose financial penalties, taking account of the statutory guidance on penalties issued by the CMA¹⁷
- give and enforce directions to bring an infringement to an end
- accept commitments that are binding on an undertaking
- adopt confidential informal advice and publish an opinion
- agree to settle a case where the business under investigation is prepared to admit that it has breached Article 101 and/or Article 102 of the TFEU, and/or the Chapter I prohibition and/or the Chapter II prohibition in the United Kingdom and to agree to a streamlined administrative procedure to govern the remainder of the investigation, in return for which the Regulator may agree to impose a reduced penalty on the business.¹⁸

2.4 The CMA alone, however, has powers to issue guidance on penalties, to issue guidance on commitments and to make procedural rules (the CA98 Rules).¹⁹ The CA98 Rules set out the procedures to be followed in carrying

¹⁶ Available at: www.gov.uk/cma.

¹⁷ See *Guidance as to the appropriate amount of a penalty* (OFT 423) and *Administrative Penalties: Statement of policy on the CMA's approach* (CMA4), available at: www.gov.uk/cma.

¹⁸ See CMA CA98 Procedures Guidance (CMA8) for more details on settlement, available at: www.gov.uk/cma.

¹⁹ See *The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014* (SI 2014/458), available at: www.legislation.gov.uk/id/uk/si/2014/458.

into effect the provisions of the CA98.²⁰ In issuing guidance on penalties, in issuing guidance on commitments and in making and amending the CA98 Rules, the CMA is required to consult publicly and with the Regulators.²¹

2.5 Once it has been decided which United Kingdom authority will exercise **Part 1 functions** in relation to a case,²² no other authority can exercise any of the **prescribed functions** in relation to that case. 'Part 1 functions' are any functions under Part 1 of the CA98 which are or would be exercisable concurrently (see definition in Regulation 2 of the Concurrency Regulations). 'Prescribed functions' arise from the CA98 and are defined in Regulation 2 of the Concurrency Regulations. They are

- the opening of a formal investigation pursuant to section of the CA98
- the withdrawal of an exclusion from the Chapter I prohibition in relation to an individual agreement, and
- the making of certain formal decisions, including requiring that an infringement be brought to an end, ordering interim measures, accepting commitments by decision and imposing fines.

2.6 Once jurisdiction in relation to a case has been allocated to a particular authority, Regulation 6 of the Concurrency Regulations prevents another authority from exercising Part 1 functions in relation to that case unless the case is formally transferred to that authority (Regulation 7 of the Concurrency Regulations) or the CMA decides to take over a case from a Regulator under Regulation 8 of the Concurrency Regulations.²³

2.7 While not the subject of this guidance, the Regulators also have the power to carry out market studies and make market investigation references in their

²⁰ See further paragraph 3.12 below. Subject to the minimum procedural requirements that Regulators must follow in CA98 investigations as set out in the CA98 Rules, each Regulator may conduct investigations in accordance with its own procedures.

²¹ In addition, only the CMA and the Serious Fraud Office may prosecute suspected infringements of the criminal cartel prohibitions under section 190 of the EA02.

²² See paragraphs 3.23 to 3.36 for further information on case allocation.

²³ See further paragraphs 3.26 to 3.29 for information on the CMA's power to take a case under Regulation 8 of the Concurrency Regulations.

respective sectors under Part 4 of the EA02 (see *Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach* (CMA3)).²⁴

- 2.8 In addition, the Regulators may make regulatory references to the CMA or be appealed to the CMA in relation to certain price controls, access charges and other licence modifications (Regulatory Cases).²⁵ The CMA is also required to review qualifying mergers in certain regulated sectors (Regulatory Mergers). This guidance does not consider Regulatory Cases or Regulatory Mergers further. Should you wish to find out more about the procedure for Regulatory Cases or Regulatory Mergers, please refer to the CMA's webpages and, where it exists, to the relevant sector-specific guidance document.

²⁴ *Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach* (CMA3), available at: www.gov.uk/cma

²⁵ As at 1 April 2014 the CMA has responsibility for Regulatory Cases in the aviation, communications, energy, railways, health and water sectors. Please refer to the CMA's webpages for the latest guidance in respect of these duties: www.gov.uk/cma

3 CONCURRENCY IN PRACTICE

- 3.1 The ERRA 2013 introduced a number of measures to improve the use of general competition powers in the regulated sectors and to improve coordination between the authorities which have those powers.²⁶ In line with this, the Government issued a 'strategic steer' to the CMA in October 2013 which stated that 'the CMA should engage in a broad strategic dialogue with the Regulators and look for opportunities to promote effective competition'.²⁷ It is one of the strategic goals of the CMA, announced on its establishment on 1 October 2013, to extend the frontiers of competition into new areas, including by working with Regulators to ensure fuller use of competition law and policy in sectoral markets.²⁸ Moreover, the Regulators and the CMA, working together in the new UKCN established in 2013 (with Monitor having observer status), have declared that their mission in the UKCN 'will be to promote competition for the benefit of consumers and to prevent anti-competitive behaviour both through facilitating use of competition powers and development of pro-competitive regulatory frameworks, as appropriate.'²⁹
- 3.2 The CMA will play a leading role to promote and coordinate the effective application of competition law in the regulated sectors. Cooperation between the CMA and the Regulators is central to the effective operation of the concurrency regime. The CMA's leadership role will facilitate the efficient allocation of resources, the appropriate sharing of information between the Regulators and the CMA, and the development of high standards of excellence in the application and enforcement of Article 101 and Article 102 of the TFEU, Chapter I and/or Chapter II of the CA98 within the regulated sectors.
- 3.3 The Concurrency Regulations contain provisions for the co-ordination of the performance by the CMA and the Regulators of their concurrent functions under the CA98. These provisions include:

²⁶ Department for Business Innovation and Skills, *Growth, competition and the competition regime – Government response to consultation*, March 2012, paragraph 8.4.

²⁷ Department for Business, Innovation and Skills, *Strategic steer for the Competition and Markets Authority 2014-17*, in Annex 1 to *its Response to consultation on statement of specific priorities for the CMA*, 1 October 2013, paragraphs 6 and 9.

²⁸ Statement by Alex Chisholm, Chief Executive of the CMA, *CMA mission and strategy*, 1 October 2013.

²⁹ UK Competition Network, *Statement of Intent*, 2 December 2013. See Annexe B of this Guidance.

- allowing for the exchange of information between the CMA and the Regulators, both for the purpose of determining who has jurisdiction to exercise Part 1 functions³⁰ in relation to a case under the CA98 and/or EU law (Regulation 3) and, generally, for the purpose of facilitating the performance by the CMA and the Regulators of their Part 1 functions
- determining who should exercise Part 1 functions in relation to a case (Regulation 4)
- resolving disputes as to who should exercise Part 1 functions in relation to a case, including specifying the circumstances in which the CMA must decide which competent person is to exercise Part 1 functions in relation to a case (Regulation 5)
- preventing the simultaneous exercise by more than one authority of Part 1 functions in relation to a case (Regulation 6)
- transfer of a case from one authority to another (Regulation 7)
- providing the CMA with the power in certain circumstances to take over a case that has been allocated to a Regulator (Regulation 8)³¹
- requiring the putting in place of information sharing arrangements between the CMA and the Regulators for the purpose of enhancing transparency and coordination in relation to the concurrent application of Article 101 and Article 102 of the TFEU and Chapter I and Chapter II of the CA98 generally and in relation to any particular case (Regulation 9)
- use of staff of the CMA or a Regulator by the CMA or another Regulator allowing for staff to be shared between the CMA and Regulators, or between Regulators (not involving the CMA). This includes the secondment of any officer³² of the CMA or a Regulator by the Regulator or the CMA or another Regulator for any duration agreed between the relevant authorities (Regulation 10).

3.4 The Concurrency Regulations set out the process for determining which of the United Kingdom authorities will act in any particular case. Where Article 101

³⁰ See paragraph 2.5 above for an explanation of this term.

³¹ The exercise of this power would prevent the Regulator from investigating (or continuing to investigate) the case unless and until the CMA transferred the case back to the Regulator.

³² 'Officer' is used in this guidance to mean any member of staff of the CMA or a Regulator, any board member of the CMA or a Regulator, or any Panel member of the CMA.

and/or Article 102 of the TFEU may apply, the case will also be subject to the case allocation principles for determining whether the United Kingdom NCA or an NCA from another Member State is well placed to act. The case allocation principles for determining which NCA in the European Competition Network is well placed to act are set out in the Commission's Notice on *Cooperation within the Network of Competition Authorities*.³³ Further details on case allocation within the European Competition Network are provided in the competition law guidance *Modernisation (OFT442)*.³⁴

3.5 The Concurrency Regulations are not intended to deal comprehensively with all aspects of the relationship between the CMA and the Regulators. Matters which are not addressed specifically in the Concurrency Regulations will be dealt with by means of Memoranda of Understanding between the CMA and the individual Regulators.

3.6 This document does not provide guidance on the Memoranda of Understanding between the CMA and the Regulators. However, the CMA expects that Memoranda of Understanding between itself and the Regulators under the new concurrency arrangements will outline in detail a framework for cooperation and coordination between the CMA and each Regulator within the relevant regulated sector in relation to various issues that are likely to include the:

- concurrent application and enforcement of competition law by the Regulator and the CMA
- prevention of anti-competitive behaviour and/or promotion of competition within the relevant regulated sector
- exchange of information between a Regulator and the CMA for the purpose of facilitating effective cooperation and coordination of activities and enforcement within the relevant regulated sector
- exchange of staff between the CMA and a Regulator for the purpose of enhancing the effective application and enforcement of competition law and other legal powers as appropriate

³³ OJ C101, 27.04.2004, p.43.

³⁴ OFT guideline *Modernisation (OFT442)*, available at: www.gov.uk/cma.

- procedure for sharing experience and expertise between the CMA and a Regulator, including through the use of meetings, joint training and the exchange of research, analysis, guidance and similar documents.

3.7 The Memoranda of Understanding may be reviewed from time to time by the CMA and a Regulator to ensure that they remain effective and appropriate. The Memoranda of Understanding will be available on the CMA's webpages³⁵ and the website of each relevant Regulator.

Ensuring consistency of decision-making

Primacy of EU Law

- 3.8 In applying Articles 101 and 102 of the TFEU the CMA, the Regulators and the national courts are bound by the fundamental principle of the primacy of EU law and must follow the case law of the European Court interpreting EU legislation, and must have regard to any relevant decision or statement of the Commission. As a consequence, and in addition to the Article 3 obligations set out in chapter 4 below, an agreement or conduct prohibited by Article 101 or Article 102 cannot be permitted under national law. The CMA and the Regulators cannot therefore permit an agreement or conduct which is otherwise prohibited under Article 101 or Article 102.³⁶
- 3.9 The Modernisation Regulation contains further provisions to ensure consistency in the application of EU law by NCAs. Article 16(2) of the Modernisation Regulation provides that where the Commission has taken a decision on an agreement or conduct under Article 101 or Article 102 of the TFEU, NCAs (including the CMA and the Regulators) cannot take a decision under Article 101 or Article 102 of the TFEU in respect of the same agreement or conduct which would run counter to the decision adopted by the Commission.
- 3.10 Chapter 4 provides further details on Article 3 of the Modernisation Regulation.

³⁵ www.gov.uk/cma

³⁶ The CMA and the Regulators may exercise their discretion either not to investigate, or to close an investigation into, conduct that is otherwise prohibited under Article 101 or Article 102 of the TFEU on administrative priority grounds.

Consistency provisions under United Kingdom Law

3.11 In addition, section 60 of the CA98 sets out principles for ensuring that the United Kingdom authorities deal with questions arising in relation to the application of the Chapter I and Chapter II prohibitions of the CA98 in such a way as to ensure consistency with the treatment of corresponding questions arising in EU law in so far as this is possible, having regard to any relevant differences between any of the provisions concerned. This is considered in more detail in the competition law guidance *Modernisation* (OFT442).³⁷

Decision-making procedure

3.12 Where the CMA exercises Part 1 functions in relation to a case within a regulated sector, it will apply its procedures for making any decisions in relation to that case in accordance with the CA98 and the CA98 Rules.³⁸

3.13 Where a Regulator exercises Part 1 functions in relation to a case, that Regulator must make any decisions in relation to that case in accordance with the relevant requirements of the CA98, the CA98 Rules and any relevant sector-specific legislation applicable to the Regulators' exercise of Part 1 functions,³⁹ will do so based upon their own procedures. These procedures may, under the CA98 Rules applicable to the Regulators, include provisions for a decision-making role for CMA staff, CMA board members or CMA panel members.⁴⁰ In imposing any penalties under the CA98, the Regulators must have regard to the CMA's penalties guidance for the time being in force (see *OFT's guidance as to the appropriate amount of a penalty* (OFT423)).⁴¹

³⁷ OFT guideline *Modernisation* (OFT442), available at: www.gov.uk/cma

³⁸ See the CMA CA98 Procedures Guidance (CMA8) (available at: www.gov.uk/cma) for more details on settlement and on the CMA's investigation and decision-making procedures under Chapter I and/or Chapter II of the CA98. For CA98 Rules, see *The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014, SI N. 458*.

³⁹ Relevant sector-specific legislation may include, for example, legislation under which a Regulator is granted concurrent powers (see further the table at paragraph 2.1 above), and which outline a Regulator's duties in relation to the prevention of anticompetitive behaviour and/or promotion of competition (or similar duty) within their sector.

⁴⁰ Similarly, where the CMA may use Regulators' staff, board or panel members (or equivalent) when making decisions in relation to a concurrent case.

⁴¹ OFT guideline *OFT's guidance as to the appropriate amount of a penalty*, available at: www.gov.uk/cma

Appeals

3.14 Most final decisions taken by the CMA or a Regulator under Article 101, Article 102 of the TFEU and/or under the CA98 are subject to appeal to the Competition Appeal Tribunal (the CAT) on both the substance of the decision and on any penalties imposed.⁴²

UKCN practice and procedure

3.15 The UKCN brings together the CMA with the CAA, the FCA, Ofcom, Ofgem, Ofwat, the ORR and the Utility Regulator of Northern Ireland. All these Regulators are subject to new duties imposed on them by the concurrency provisions of the ERRA 13 and, with the exception of the health care regulator Monitor, have statutory duties in relation to the promotion of competition. The health care regulator, Monitor, which has a statutory duty to prevent anti-competitive behaviour, will attend the UKCN with observer status.

3.16 The UKCN is a new forum to promote competition and assist in deterring anti-competitive behaviour in regulated sectors⁴³ by:

- facilitating a consistent approach by the Regulators and the CMA in the exercise of their functions and powers under the CA98 and Part 4 of the EA02
- developing the practical working arrangements between the Regulators and the CMA
- providing a forum for discussion of matters of common interest and the sharing of information where appropriate and where legally permitted and required
- coordinating the provision of advice and information on the application of the Chapter I prohibition and the Chapter II prohibition and Article 101 and Article 102 of the TFEU to the public.

3.17 A UKCN Statement of Intent document is set out in Annexe B of this guidance.

3.18 The UKCN deals with issues such as:

⁴² See sections 46 and 47 of the CA98.

⁴³ Note however that Monitor has a duty to exercise its functions with a view to preventing anti-competitive behaviour which is against the interests of people who use health care services in England, but not to promote competition.

- **the development and application of competition policy in the regulated sectors** – the UKCN provides a forum for the Regulators and the CMA to share expertise, ideas and experience for the purpose of preventing anti-competitive behaviour and/or promoting competition in the regulated sectors for the benefit of consumers and users of regulated services, by ensuring a consistent and high-quality approach to competition policy and enforcement in those sectors
- **general principles of information sharing** – subject to the obligations under the Modernisation Regulation and/or Part 9 of the EA02, information about cases in progress is shared. This includes matters of general policy and the way in which Articles 101 and 102 of the TFEU and the prohibitions in the CA98 are interpreted, applied and enforced. In each instance, this is with a view to ensuring consistency of decision-making. Information about the CA98 complaints received and investigations in progress or contemplated is also shared to facilitate the performance by the CMA and the Regulators of their functions under Part 1 of the CA98, for example to ascertain whether there is concurrent jurisdiction.

3.19 The UKCN may form working groups as appropriate in order to consider specific issues of the application of competition law, and/or the promotion of competition and tackling anti-competitive practices in one or more regulated sector.

3.20 At all times, the members of the UKCN are mindful of the confidentiality provisions of the EA02 and their obligations to safeguard information provided by other NCAs which are contained in the Modernisation Regulation (see chapter 5 below).

Case handling

General principles of case allocation

3.21 The CMA and the Regulators will always consult with each other before acting on a case where it appears that they may have concurrent jurisdiction. They must consult with each other under the Concurrency Regulations before exercising any of the prescribed functions in relation to a case. The CMA expects that such consultation will include the circulation of details of complaints.

3.22 Under the concurrency arrangements, the general principle is that the CMA or the relevant Regulator will be responsible for a case depending on which of them is better or best placed to do so.⁴⁴ The factors considered in determining which of the CMA or Regulators deals with the matter will be assessed by the CMA and relevant Regulator as appropriate and include:

- the sectoral knowledge of a Regulator and the CMA
- whether the case affects more than one regulated sector and/or non-regulated sectors not subject to concurrent competition law⁴⁵
- previous contacts between the parties or complainants and a Regulator or the CMA
- experience in dealing with any of the undertakings which may be involved in the proceedings
- experience in dealing with any similar issues which may be involved in the proceedings
- whether the CMA considers it necessary to exercise Part 1 functions in relation to a case in order to develop United Kingdom competition policy or to provide greater deterrent and precedent effect for the benefit of competition and consumers, either within the relevant regulated sector, or more widely
- whether the case being allocated to the CMA and supported by the relevant Regulator (or vice versa) will provide the best combination of competition and sector-specific expertise.

Procedure for agreeing which authority will deal with a complaint or investigation

3.23 When a complaint has been made to the CMA or a Regulator and it gives rise to concurrent jurisdiction between two or more United Kingdom authorities,

⁴⁴ In contrast to the other concurrent sectors (where either the CMA or the relevant Regulator may take responsibility for a case depending on which one is better or best placed to do so), under the Concurrency Regulations Monitor will normally be responsible for any case that is principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England, though Monitor may nevertheless agree with the CMA that the CMA shall act in a case.

⁴⁵ This may include, for example, a case affecting a regulated sector across the United Kingdom, including any nations which benefit from devolved powers.

the complainant will be informed, as a matter of policy, which authority is handling the complaint. In line with the information sharing arrangements between the CMA and the Regulators, the CMA and the relevant Regulator may engage in discussions as they consider appropriate in relation to any particular complaint or matter.⁴⁶

- 3.24 It is expected that agreement will ordinarily be reached promptly as to which United Kingdom authority is better or best placed to deal with a particular complaint and in any event, in no more than two months after receipt of the complaint by the first authority to receive it. In circumstances where Regulation 4 of the Concurrency Regulations applies and agreement cannot be reached between the relevant authorities within a reasonable time (which may differ from the two-month period above), the CMA will decide which United Kingdom authority should deal with a case (Regulation 5) and it will have regard to the principles set out in paragraph 3.22 in doing so. The CMA may decide in some circumstances that it is to exercise Part 1 functions in relation to that case during the initial case allocation process. Where there is dispute, the CMA may not however decide that it or another Regulator other than Monitor is to exercise Part 1 functions in any case which is principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.⁴⁷ The CMA will follow the process outlined in paragraphs 3.26 to 3.29 below in making such a decision.
- 3.25 Where either the CMA or a Regulator proposes to commence a competition investigation on its own initiative into a regulated sector, the CMA or the relevant Regulator will inform the other of that investigation and engage in discussions as they consider appropriate in respect of the investigation. As a general principle, the authority which is best placed to deal with the case will have jurisdiction over that case in accordance with the case allocation principles under Regulation 4 of the Concurrency Regulations.

Circumstances in which the CMA may exercise jurisdiction where a case has already been allocated to a Regulator

- 3.26 Pursuant to Regulation 8 of the Concurrency Regulations, where a Regulator has been allocated a case under Regulation 4, the CMA may nonetheless take over that case where it is satisfied that doing so would further the

⁴⁶ See further paragraphs 3.41 to 3.54 below for further information.

⁴⁷ Though the CMA and Monitor may nevertheless agree that the CMA is to act in such a case: see Regulation 4(2) of the Concurrency Regulations.

promotion of competition within any market or markets in the United Kingdom for the benefit of consumers. For example, the power might be exercised where (consistent with the EU Commission's powers to take cases from NCAs) the CMA considers itself best placed to make a decision that sets an appropriate precedent, in particular when similar issues arise across different sectors or parts of the United Kingdom or in order to enforce the CA98 prohibitions more effectively. For example, because the Regulator lacks the necessary resources. However, the CMA may not take over a case from Monitor under Regulation 8 where the case is principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

- 3.27 The CMA may make such a decision after consultation with the Regulator, the undertaking concerned and any other persons likely to be materially affected by the transfer at any stage before a Regulator has issued a Statement of Objections.⁴⁸ After a Statement of Objections has been issued, the CMA cannot exercise Part 1 functions in relation to that case, unless the Regulator wishes to transfer the case to the CMA.⁴⁹
- 3.28 The CMA will consult with the relevant Regulator(s) in respect of its proposed decision to take over a case as soon as it reasonably can after reaching such a view and will give reasons for that proposed decision (Regulation 8 of the Concurrency Regulations). The CMA and the Regulator(s) will also discuss potential arrangements for further cooperation in relation to the case in the event that the CMA does take over that case. If, following such consultation, the CMA still proposes to take over the case, it is required under Regulation 8 to notify each of the following interested parties that it is taking over a case: the relevant Regulator(s), the undertaking(s) being investigated, and any other person likely to be materially affected by the transfer (which may include the complainant(s)). The CMA will work closely with the relevant Regulator(s) and interested parties in reaching a decision on whether it is to exercise Part 1 functions in relation to a case. In practice, the CMA expects that the circumstances in which it would take over a case under Regulation 8 are likely to be rare.
- 3.29 Any decision by the CMA to exercise Part 1 functions pursuant to Regulation 5 or Regulation 8 of the Concurrency Regulations is not irreversible. While the

⁴⁸ A Statement of Objections outlines the CMA's or Regulator's provisional conclusions in relation to the suspected infringement of competition law. The Statement of Objections is a formal procedural step in a case pursuant to Rule 5 of the CA98 Rules.

⁴⁹ Regulation 8 of the Concurrency Regulations.

CMA expects that this may happen only in exceptional circumstances, the CMA and a Regulator may agree to transfer that case back from the CMA to the relevant Regulator. The CMA will follow the procedures laid down in Regulation 7 where it decides to transfer a case back to any relevant Regulator.

Consequences of allocation of a case to the CMA or a Regulator

- 3.30 Neither the CMA nor the Regulators may exercise any of the prescribed functions in relation to a case where it appears that they may have concurrent jurisdiction until the question of which authority is to exercise Part 1 functions in relation to the case has been determined under Regulations 4 or 5 of the Concurrency Regulations (Regulation 6). Once the matter has been determined under Regulations 4 or 5, Regulation 6 also prohibits any other United Kingdom authority from exercising Part 1 functions in relation to that case unless it is formally transferred to that authority under the procedures laid down in Regulation 7 or the CMA decides that it is likely to be the best placed authority to act under the procedures set out in Regulation 8.
- 3.31 As a matter of policy, once jurisdiction of a case has been allocated to the CMA or a Regulator, the relevant authority will be responsible for the investigation, decision making and enforcement for that case, unless the case is subsequently transferred from that authority to another (for example, pursuant to Regulation 8). Notwithstanding the exercise of Part 1 functions by one of the CMA or a Regulator, the CMA and the other relevant Regulators will consult each other and may cooperate further as appropriate in respect of a case. This cooperation may occur, for example, through joint attendance at meetings, regular discussions throughout the investigation, cooperation in the collection and/or review of evidence, and the use of secondments.

Procedure for transferring cases between authorities

- 3.32 The Concurrency Regulations set out the procedure which must be followed in the cases of transfers under Regulation 7. When the CMA and a Regulator intend to transfer a case, the undertaking which is the subject of the investigation and any other person likely to be materially affected by the transfer (which may include any complainant) will be given an opportunity to make representations on the proposed transfer, and will be notified of the outcome. This will not be the case where the undertaking has not yet been informed that it is the subject of the investigation (Regulation 7). Those making such representations should assume that such representations will be seen by both or all of the authorities concerned. Any other person likely to be

materially affected by the transfer (which may include any complainant) will also be notified of any transfer.

Cooperative working between the CMA and the Regulators

- 3.33 The CMA and each Regulator may agree arrangements for the use of staff or members of the CMA or a Regulator by the CMA or another Regulator, allowing for staff to be shared between the CMA and Regulators, or between Regulators (not involving the CMA). This includes through the secondment of any officer of the CMA or a Regulator by the Regulator or the CMA or another Regulator for any duration agreed between the relevant authorities.
- 3.34 Such secondments may be agreed on a case by case basis for any duration and for the purposes agreed between the CMA and the Regulator and/or between Regulators. Under Regulation 10, secondments may be for the purpose of exercising any function under Part 1 of the CA98. For example, the CMA and a Regulator may agree to share staff in this way to provide case support, investigatory expertise, specialist guidance (such as may be provided by economically or legally qualified staff of either the CMA or a Regulator) or to make any decision in relation to a case. The CMA may also agree to the use by a Regulator of the CMA's procedural complaints process, including providing a Regulator with access to the Procedural Officer to determine any dispute or complaint that falls within the competence of the Procedural Officer under Rule 8 of the CA98 Rules.⁵⁰
- 3.35 In addition to the use of staff by a Regulator or the CMA, the CMA and each Regulator may agree arrangements for the provision of training, guidance, advice or any other form of support on a case by case basis, or more generally.
- 3.36 The full provisions for the use of staff and provision of support by the CMA and/or a Regulator are outlined in Memoranda of Understanding between the CMA and each Regulator.

⁵⁰ Rule 8 of the CA98 Rules sets out the CMA's procedural complaints process. Further guidance on the procedural complaints process and the role of the Procedural Officer is set out in Chapter 15 of the CMA CA98 Procedures Guidance (CMA8) for more details on settlement and CA98 Rules, both available at: www.gov.uk/cma

Complaints

- 3.37 Complaints about breaches of competition law may be made either to the CMA and copied to the relevant Regulator, or directly to the relevant Regulator and copied to the CMA.⁵¹ Complainants should only make one complaint in relation to any particular agreement or conduct, unless the complainant has access to substantial new factual evidence which it did not possess at the time of the original complaint. The principles relating to case handling will apply as outlined above. Complainants will be told as soon as is practicable which authority is dealing with the case. They will also be notified of any subsequent change.
- 3.38 The principles of case allocation set out in the Commission's *Notice on Cooperation within the Network of Competition Authorities*⁵² will also be taken into account where Article 101 and/or Article 102 of the TFEU may apply. Pursuant to those case allocation principles, a United Kingdom NCA can be considered well-placed to act in relation to a complaint where the following three cumulative criteria are met:
- the agreement or conduct has substantial, direct, actual or foreseeable effects on competition and is implemented within or originates from within the United Kingdom
 - the United Kingdom NCA is capable of bringing effectively to an end the entire infringement
 - the United Kingdom NCA can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.
- 3.39 It follows that the CMA or a Regulator will only deal with a complaint where there exists a material link between the infringement and the United Kingdom.⁵³ For further details on case allocation within the European

⁵¹ Complaints about breaches of sector legislation alone should be sent directly to the relevant Regulator.

⁵² OJ C101, 27.04.2004, p.43.

⁵³ The CMA or a Regulator will determine whether there is a material link between the suspected infringement and the United Kingdom on a case-by-case basis, and will assess whether the suspected infringement may affect trade within the United Kingdom, and/or prevent, restrict or distort competition within the United Kingdom.

Competition Network see the competition law guideline *Modernisation* (OFT442).⁵⁴

- 3.40 Submissions that urgent interim measures are needed to prevent 'significant damage' as a result of a breach of Article 101 and/or Article 102 of the TFEU, the Chapter I prohibition and/or the Chapter II prohibition of the CA98 will be treated in the same way as complaints. That is, the CMA or a Regulator with jurisdiction over the case will require there to be a material link between the infringement and the United Kingdom in order to consider the use of interim measures. The CMA or a Regulator will apply the legal framework to the facts of the case in determining whether the legal test for interim measures is met.⁵⁵ Further guidance on interim measures and the CMA and Regulators' approach to seeking interim measures is given in the CMA CA98 Procedures Guidance (CMA8).⁵⁶

Information sharing

Purpose of sharing information

- 3.41 The timely and appropriate exchange of information between the Regulators and between each Regulator and the CMA for the purpose of exercising concurrent functions is essential for the efficient and effective functioning of the United Kingdom concurrency regime, for example to:
- establish transparent, cooperative and effective working practices between the CMA and the Regulators, or between the Regulators
 - facilitate the effective allocation or reallocation of complaints or investigations pursuant to the Concurrency Regulations
 - enable the CMA or a Regulator to provide effective support and guidance in the context of a case or more generally
 - facilitate the effective sharing or secondment of any officer of the CMA or a Regulator by the Regulator or the CMA or another Regulator, including for the purpose of making decisions in relation to the exercise by that Regulator of Part 1 functions

⁵⁴ OFT guideline *Modernisation* (OFT442), available at: www.gov.uk/cma

⁵⁵ Section 35 of the CA98.

⁵⁶ Available at: www.gov.uk/cma

- facilitate the efficient use by a Regulator of the CMA's Procedural Officer, where a Regulator wishes to make use of the CMA's procedural complaints process.⁵⁷

Information sharing in practice

- 3.42 Regulation 9 requires that each competent person must put in place arrangements for sharing with other competent persons certain kinds of information in connection with concurrent cases under the CA98. A 'competent person' means each of the CMA or any of the Regulators.⁵⁸
- 3.43 The full arrangements for the sharing of information will be outlined in individual Memoranda of Understanding between the CMA and each of the Regulators. However, the CMA envisages that each Memorandum of Understanding will provide for regular, timely and appropriate exchange of information between Regulators and the CMA connected with the exercise of concurrent competition functions, and that there will be adequate safeguards in place in relation to the information exchanged.⁵⁹ Regulators and the CMA will maintain open lines of communication through the UKCN and by way of strong bilateral partnerships.
- 3.44 In particular, the CMA envisages that the Memoranda of Understanding will specify that each competent person will provide the details of any information in their possession giving them reasonable grounds to suspect that Article 101 and/or Article 102 of the TFEU, and/or the Chapter I prohibition and/or the Chapter II prohibition of the CA98 may have been infringed to any other competent person who has or may have concurrent jurisdiction in respect of the possible infringement. The CMA envisages that this information will be shared even if the competent person in possession of the information does not propose to exercise any prescribed functions in respect of the case.
- 3.45 Such notification should take place in a timely manner and, in all cases, within 15 working days of the competent person reaching the view that there are reasonable grounds to suspect that such a competition law infringement may

⁵⁷ Rule 8 of the CA98 Rules sets out the CMA's procedural complaints process. Further guidance on the procedural complaints process and the role of the Procedural Officer is set out in Chapter 15 of the CMA CA98 Procedures Guidance (CMA8) for more details on settlement and CA98 Rules, both available at: www.gov.uk/cma

⁵⁸ See Regulation 2 of the Concurrency Regulations and section 54(7) of the CA98.

⁵⁹ Further detail on confidentiality and disclosure of information is set out in chapter 5 of this guidance.

have taken place.⁶⁰ In addition, each competent person may share information in respect of any complaint or case prior to undertaking an assessment as to whether that competent person has reasonable grounds to suspect that a competition law infringement may have taken place.

- 3.46 Following any such notification, the competent person(s) in receipt of such information may request further information in relation to the case from the other competent person. In practice, most such information exchanges are likely to occur between the Regulators and the CMA and vice versa, since the CMA shares concurrent jurisdiction with each Regulator. Nevertheless, there may also be exchanges between Regulators in appropriate circumstances, for example if a case raises issues in more than one regulated sector.
- 3.47 Neither the competent person providing the information, nor any competent person in receipt of that information will be required to take any further action in respect of the possible infringement and the exchange of information between the CMA and a Regulator does not imply that a case or complaint will be prioritised or investigated. Furthermore, these information sharing arrangements will be without prejudice to the procedure for determining which competent person will exercise prescribed functions in relation to a case discussed in paragraphs 3.23 to 3.29 above.
- 3.48 In addition to information on potential infringements, the CMA and Regulators will share certain information connected with the exercise of concurrent competition functions at appropriate stages in a case, in accordance with Regulation 9 of the Concurrency Regulations. The CMA expects that details of these arrangements will be contained in each Memorandum of Understanding.
- 3.49 However, in summary, where the CMA or a Regulator has opened an investigation into a suspected infringement pursuant to section 25 of the CA98⁶¹ and proposes to take any of the following steps in relation to that

⁶⁰ The notification requirements will apply where the threshold for a CA98 investigation is met. Section 25 of the CA98 sets out the legal test for the CMA or a Regulator to commence an investigation of a suspected infringement of the prohibitions under Chapter I or Chapter II of the CA98, or Article 101 or Article 102 of the TFEU.

⁶¹ Section 25 of the CA98 sets out the legal test for the CMA or a Regulator to commence an investigation of a suspected infringement of the prohibitions under Chapter I or Chapter II of the CA98, or Article 101 or Article 102 of the TFEU. The information sharing arrangements do not apply to any complaint or preliminary investigation in which the investigating competent person concluded that there were no reasonable grounds for suspecting that there has been an infringement of the prohibitions under Chapter I or Chapter II of the CA98, or Article 101 or Article 102 of the TFEU in accordance with section 25 of the CA98.

investigation, the CMA and the Regulator will each share information with the other competent person who would, but for the allocation of the case under the Concurrency Regulation to another competent person, have concurrent jurisdiction in the case⁶² and the CMA expects that the Memoranda of Understanding will include the following provisions:

- **Statement of Objections** – where the CMA or a Regulator proposes to issue a Statement of Objections to a party in relation to a suspected infringement of Article 101 and/or Article 102 of the TFEU, and/or the Chapter I prohibition or the Chapter II prohibition of the CA98, it will share a draft of its proposed Statement of Objections with each other competent person who had concurrent jurisdiction in the case, prior to the case being allocated under the Regulations. Such information will be shared no later than 15 working days prior to the date on which the investigating competent person proposes to issue the Statement of Objections to a party. The CMA and any other competent person in receipt of such information may, but is not required to, provide comments or guidance to the investigating competent person in response to the information shared with it. Any such comments will be made no later than 10 working days following receipt of the proposed Statement of Objections.⁶³ The investigating competent person will not issue any Statement of Objections for a period of 10 working days after sharing information with each other competent person in relation to that draft Statement of Objections. Irrespective of the level of engagement between the CMA and a Regulator in any case, the decision to issue a Statement of Objections will be taken by the competent person with jurisdiction over the case.⁶⁴
- **Notice or decision** – similarly, where the CMA or a Regulator proposes to issue any preliminary or final commitment decision or notice, infringement decision or notice, no grounds for action decision or notice, or decision or notice not to proceed with a case (including in relation to any case closure decision or notice based on administrative priority grounds) (Proposed

⁶² See paragraphs 3.23 to 3.29 for a discussion of the case allocation process under the Regulations.

⁶³ The CMA considers that the documents containing such comments will be 'internal documents' for the purposes of the CMA Rules and therefore may be withheld from access to the file following a Statement of Objections: see Rule 1(1) and Rule 6(2) of the CMA Rules (SI 2014/458).

⁶⁴ Subject to the CMA exercising its discretion to take over a case under Regulation 8 of the Concurrency Regulations. For more information see paragraphs 3.26 to 3.29 above.

Decision or Notice),⁶⁵ it will share a draft of its proposed decision or notice with each other competent person who would, but for the allocation of the case under the Concurrency Regulation to another competent person, have concurrent jurisdiction in the case.⁶⁶ Such information will be shared no later than 10 working days prior to the date on which the investigating competent person proposes to issue any Proposed Decision or Notice. The CMA and any other competent person in receipt of such information may, but is not required to, provide comments or guidance to the investigating competent person in response to the information shared with it. Any such comments will be made no later than 10 working days following receipt of the Proposed Decision or Notice.⁶⁷ The investigating competent person will not issue the proposed decision or notice for a period of 10 working days after sharing information with each other competent person in relation to that draft Proposed Decision or Notice.

3.50 In addition, the CMA and the Regulators may share additional information at any appropriate stage during an investigation and in a timely manner agreed between them as required. Such information may include:

- information in relation to any CA98 complaint received by the CMA or a Regulator and any investigation undertaken at the CMA or a Regulator's own initiative, or in response to a complaint
- details of any notices issued pursuant to sections 26, 26A and 27 of the CA98, and the use of powers to enter premises pursuant to sections 28 and 28A of the CA98
- before commencing an investigation into any suspected infringement of Article 101, Article 102, the Chapter I prohibition or the Chapter II prohibition, notification of a proposed decision to commence an investigation, including the information on which the proposed decision to open an investigation was made
- before issuing a case opening notice pursuant to section 25A of the CA98
- any application or request received by the CMA or a Regulator to seek interim measures to prevent 'significant damage'in relation to any case

⁶⁵ See Regulations 9(1)(b) to 9(1)(j) of the Concurrency Regulations for a description of the range of notices and decisions to which the information sharing requirements relate.

⁶⁶ See paragraphs 3.23 to 3.29 for a discussion of the case allocation process under the Regulations.

⁶⁷ See footnote 61 above.

- a regular summary of the progress and substance of any investigation into any suspected infringement of Article 101 and/or Article 102 of the TFEU, the Chapter I prohibition or the Chapter II prohibition of the CA98 conducted by the CMA or a Regulator. Subject to confidentiality considerations, this may include providing information of the CMA's or the Regulator's working assumptions and general approach to the investigation.
- 3.51 The CMA or a Regulator may request information that they may reasonably require from any other competent person relating to an individual investigation at any stage during the investigation to facilitate the performance of its functions under the CA98. The competent person to whom the request is made will respond appropriately to such a request for further information.
- 3.52 The exchange of information between the CMA and the Regulators does not imply that any infringement of Article 101 and/or Article 102 of the TFEU, the Chapter I prohibition and/or the Chapter II prohibition of the CA98 has taken place. Similarly, such information sharing does not impose an obligation on each competent person to consider a matter in more detail than it would otherwise have done.
- 3.53 The exchange of information between the CMA and the Regulators connected with the exercise of concurrent competition functions is governed by Part 9 of the EA02, which ensures that adequate safeguards are in place to prevent the unlawful disclosure of information by the CMA or a Regulator. Further details on Part 9 of the EA02 are set out in paragraphs 5.5 to 5.7 below.⁶⁸
- 3.54 In addition to these obligations, the exchange of information between the CMA and the Regulators is subject to procedural safeguards, including the use of confidentiality obligations that restrict the distribution and use of the information received. Moreover, any information contained in a leniency application made to the CMA will be treated in accordance with the principles and protections set out in OFT1495, *Applications for Leniency and No-Action in Cartel Cases*.⁶⁹

⁶⁸ See also *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6), and in particular Chapter 6 on disclosure to UK public authorities.

⁶⁹ OFT1495 has been adopted by the CMA: see *Proposed Treatment of existing Office of Fair Trading and Competition Commission guidance, Summary of responses to the consultation* (CMA12) available at www.gov.uk/cma

Annual concurrency report

- 3.55 The CMA is required to prepare an annual report containing an assessment of how the concurrency arrangements have operated during the prior year.⁷⁰ This report must include information about the activities of the CMA and the Regulators in relation to the exercise of all concurrent functions (that is, under both Part 1 of the CA98 and Part 4 of the EA02).⁷¹
- 3.56 The report evaluates the operation of competition concurrency and key competition issues in concurrent sectors in the United Kingdom. It is intended to facilitate continuing improvement to the concurrency regime, the promotion of competition in the regulated sectors (or the preventing of anti-competitive behaviour in health-care services in England, in the case of Monitor), and to strengthen transparency and accountability within the Regulators and the CMA.
- 3.57 In each report, the CMA will outline the landscape of the CMA's and the Regulators' duties, powers and general market conditions in each concurrent sector. The report will outline the actions taken by the Regulators and the CMA during the reporting period to promote competition in the concurrent sectors (or, again, the preventing of anti-competitive behaviour in health-care services in England, in the case of Monitor).⁷² The report will set out and assess the relevant outcomes in relation to promotion of competition and/or the preventing of anti-competitive behaviour and application of competition law to the concurrent sectors achieved during the reporting period.
- 3.58 The CMA may include the following type of information in the report in respect of the operation of concurrency under the CA98. This information will be aggregated and presented, as appropriate, in relation to each Regulator and the CMA:
- the number (and description) of decisions in which the use of competition powers under Part 1 of the CA98 was considered by a Regulator to be more appropriate than regulatory powers

⁷⁰ See paragraph 16 of Schedule 4 of the ERRA13.

⁷¹ Paragraph 16(3) of Schedule 4 of the ERRA13 prescribes the information that must be included in the annual report.

⁷² Monitor has a duty to exercise its functions with a view to preventing anti-competitive behaviour which is against the interests of people who use health care services in England, but not to promote competition.

- the number (and description) of decisions in which the use of regulatory powers was considered to be more appropriate than competition powers under Part 1 of the CA98 (in cases where competition powers could have been exercised)
- the number of formal investigations under the CA98 commenced in each concurrent sector
- whether the CMA and/or a Regulator issued any notices pursuant to sections 26, 26A and 27 of the CA98, or used powers to enter premises pursuant to sections 28 and 28A of the CA98 in those sectors
- whether the CMA and/or a Regulator accepted any commitments in relation to a case pursuant to section 31A of the CA98
- the number of notifications between the Regulators and the CMA (and vice versa) that an infringement of any or all of the Chapter I and/or Chapter II prohibitions or Article 101 and Article 102 of the TFEU may have taken place
- the number of statements of objection/statements of competition concerns issued in concurrent sectors by the CMA and the Regulators
- the number (and description) of final decisions notified by the CMA and the Regulators
- summaries of infringement decisions pursuant to Part 1 of the CA98 made in concurrent sectors, including a description of any financial penalty and/or other remedies imposed
- whether there have been secondments and/or joint projects between the CMA and the concurrent Regulators (or between the Regulators) and if so, how many people were involved, for what purpose and for how long
- whether any appeals have been brought to the CAT in respect of decisions under Part 1 of the CA98 in any of the concurrent sectors and the outcomes of any such appeals.

3.59 The annual report will also comment on the general operation of the co-operation arrangements discussed in this guidance. The CMA may offer its view on the nature and quality of such co-operation during the reporting year. It will also provide a high-level summary of the work of the UKCN during the relevant reporting year. The annual report will not, however, include any information that could jeopardise ongoing cases under Part 1 of the CA98, or

the effectiveness of actual or proposed regulatory activity in any of the concurrent sectors.

3.60 The CMA will also report on the operation of concurrency in the regulated sectors under Part 4 of the EA02 (that is, market studies and market investigation references). In particular, the annual report may contain the following type of information:

- whether the CMA and/or any Regulator has exercised any powers to issue a market study notice pursuant to section 130A of the EA02 in any of the concurrent sectors
- whether the CMA and/or any Regulator has exercised any powers to make a market investigation reference pursuant to section 131 of the EA02 in any of the concurrent sectors
- whether the CMA and/or any Regulator has accepted undertakings in lieu of a market investigation reference pursuant to section 154 of the EA02 in any of the concurrent sectors
- whether the CMA and/or any Regulator has, following an issue of a market study notice pursuant to section 130A of the EA02 in any of the concurrent sectors, decided not to make a market investigation reference in any of the concurrent sectors at the conclusion of that market study.

3.61 The annual report will generally not refer to any Regulatory Case or Regulatory Merger made to, or determined by, the CMA during the relevant reporting period.

3.62 The CMA will cooperate and consult with the Regulators in preparing the annual report. The CMA will prepare a draft report that it will send to the Regulators asking them to provide any comments or suggestions on the content or conclusions of the annual report. The CMA will consider any comments or suggestions it receives from a Regulator and may seek further clarification on those comments or suggestions as appropriate. The CMA will prepare a final version of the annual report for publication that takes account of its consultation with the Regulators as appropriate. The annual report will be made available on www.gov.uk/cma.

4 REGULATORS' OTHER POWERS AND DUTIES

Statutory sectoral duties

4.1 The duties of the Regulators under the individual statutes listed in the table in chapter 2 above are set out in those statutes. In general, the Regulators must ensure that there is sufficient provision of the regulated service throughout the United Kingdom, they must promote or facilitate competition,⁷³ and they must protect the interests of customers, consumers or users. The Regulators are not generally required to have regard to those sectoral duties when exercising Part 1 functions⁷⁴ under the CA98. However, they may have regard to matters covered by their sectoral duties if they are matters to which the CMA could have regard in exercising its powers under the CA98. Consistent with the intention of the legislation to strengthen the primacy of general competition law, the Regulators⁷⁵ are required to consider whether the use of their CA98 powers is more appropriate before using their sectoral powers to promote competition. The duty is tailored to the individual regimes, which have differently formulated duties on and powers for the regulators, and is discussed below.

Relationship between the Regulators' powers under the CA98 and their other functions and powers contained in sector specific legislation

- 4.2 In some circumstances, a particular agreement or practice may fall within the scope of a Regulator's sector specific legislation as well as within the Chapter I prohibition, the Chapter II prohibition, Article 101 and/or Article 102 of the TFEU. Regulated companies may, for example, have licences which prevent them from showing undue preference to, or undue discrimination against, any class of persons. Some types of price discrimination, for example, may also infringe the Chapter II prohibition and/or Article 102 of the TFEU. Further details are given in the competition law guidance *Abuse of a dominant position* (OFT402).⁷⁶
- 4.3 In some circumstances, sector-specific legislation requires a Regulator to enforce a licence condition or a statutory provision; sometimes, however, it

⁷³ Note however that Monitor has a duty to exercise its functions with a view to preventing anti competitive behaviour which is against the interests of people who use health care services in England, but not to promote competition.

⁷⁴ See paragraph 2.5 above for an explanation of this term.

⁷⁵ With the exception of Monitor at this time.

⁷⁶ OFT guideline *Abuse of a dominant position* (OFT402), available at: www.gov.uk/cma

may be more effective or provide greater deterrent and precedent effect for the benefit of competition and consumers to use the powers available under the CA98. Before making any final or provisional enforcement order, a Regulator must consider whether, in a particular case, it is more appropriate to proceed under the CA98 (and take action in relation to an infringement of the Chapter I prohibition, the Chapter II prohibition, Article 101 and/or Article 102). Where a Regulator considers that it would be more appropriate to proceed under the CA98, they cannot then proceed with licence enforcement under sector-specific regulation; they must instead use their legal powers under the CA98.⁷⁷

- 4.4 Each Regulator will determine whether it may be more appropriate to proceed under the CA98 on a case-by-case basis. In order to ensure the efficient and effective allocation of resources, a Regulator will consider which potential investigation and enforcement route would be most appropriate in a particular case when it commences an investigation in its sector. A Regulator will also keep under review the question of which route of investigation and enforcement is the most appropriate during the course of any investigation.
- 4.5 Where a Regulator has commenced an investigation or enforcement action pursuant to sector-specific powers but concludes during the course of that investigation or enforcement action that it would be more appropriate to proceed under the CA98 in respect of the relevant facts and evidence, they may begin proceedings under the CA98. In these circumstances the Regulators and the CMA will follow the case handling procedures for determining jurisdiction in a concurrent case as described in paragraphs 3.21 to 3.40 above. As a general principle, the authority which is best placed to deal with the case will have jurisdiction over that case in accordance with the case allocation principles under Regulation 4 of the Concurrency Regulations.
- 4.6 Where a Regulator proceeds under the CA98, they will be required to bear in mind their obligations as NCAs under the Modernisation Regulation, in particular under Article 3(1) in cases where trade between Member States may be affected (see paragraph 4.8 below) and those as Regulators under national law. The Regulators' approach to this process will be set out in their sector-specific guidance on the application of competition law to their particular sectors. If it appears during an investigation by a Regulator using its sector-specific powers that action under the CA98 is more appropriate (or, in

⁷⁷ This duty will not be applied to Monitor at this time. However, the Secretary of State may commence this duty at a future date upon Government agreement.

the reverse case, under its sector-specific powers), the parties will be informed.

- 4.7 A decision by a Regulator to make any enforcement or penalty order under that Regulator's relevant sector powers does not prohibit the CMA from undertaking an investigation under the CA98 in relation to the same or similar facts.⁷⁸

Relationship between EU competition law and sector specific legislation

- 4.8 The relationship between EU competition law and national law is governed by Article 3 of the Modernisation Regulation. Article 3(1) provides that where the CMA and the Regulators apply national competition law to agreements which may affect trade between Member States, they must also apply Article 101 of the TFEU. Where they apply national competition law to conduct prohibited by Article 102 of the TFEU they must also apply Article 102. In applying their sectoral powers the Regulators will need to consider the extent to which, if any, the use of these powers may be considered to be the application of national competition law for the purposes of Article 3.
- 4.9 It is important to consider what happens in the event that the application of national competition law would lead to a stricter outcome than the position under EU law. The position is different according to whether Article 101 or Article 102 of the TFEU applies.
- 4.10 When applying Article 101 of the TFEU and national competition law in parallel, the CMA and the Regulators may not prohibit an agreement if the agreement would be permitted under Article 101 of the TFEU. An agreement could be permitted under Article 101 of the TFEU because the agreement in question does not restrict competition within the meaning of Article 101(1) of the TFEU, the conditions in Article 101(3) of the TFEU are met or the agreement is covered by an EU block exemption regulation.
- 4.11 However, the CMA and the Regulators are permitted under Article 3(2) to apply national law which is stricter than Article 102 of the TFEU to unilateral conduct. In the United Kingdom the unilateral conduct of undertakings may, for example, be examined under the market investigation provisions of the EA02 (see paragraphs 4.17 to 4.21 below).

⁷⁸ In the event that any such CMA investigation resulted in directions, interim measures and/or financial penalties being imposed on the relevant undertaking, any such enforcement action would be subject to the statutory requirements under Chapter III of Part 1 of the CA98.

4.12 Article 3 does not, however, preclude the application of national law that predominantly pursues objectives different from those pursued by Articles 101 and 102 of the TFEU. This means that the Regulators may still apply powers set out in their sector-specific legislation to agreements which are compatible with EU competition law provided they do so predominantly in pursuit of objectives different from that pursued by Article 101 and Article 102 of the TFEU (the protection of competition on the market). The interaction of Article 3 and national competition law is dealt with in more detail in the competition law guideline *Modernisation* (OFT442).⁷⁹

Exceptions in the CA98 for services of ‘general economic interest’

4.13 In line with Article 106(2) of the TFEU, the CA98 provides, in Schedule 3, an exclusion from the Chapter I and Chapter II prohibitions:

- where an undertaking has either been entrusted with a service of general economic interest, or has the character of a revenue-producing monopoly (that is, an undertaking that has been granted monopoly powers by the State to raise money for the State)⁸⁰
- insofar as the application of the prohibitions in the CA98 would obstruct the performance of the particular task assigned to the undertaking.

4.14 The CMA and the Regulators are required to apply these principles when applying the exclusion in Schedule 3.

4.15 The fact that the CA98 may not apply to certain activities of a regulated business in these circumstances does not, however, mean that the Regulators cannot apply their sectoral powers to those activities. Indeed, it is precisely in these situations that the Regulators' ability to ensure services are available to consumers throughout the United Kingdom on reasonable terms through use of their sectoral powers is particularly relevant. Further information on the exclusions under the CA98 and Article 106(2) of the TFEU can be found in the competition law guideline *Services of general economic interest exclusion* (OFT421).⁸¹

⁷⁹ OFT guideline *Modernisation* (OFT442), available at: www.gov.uk/cma.

⁸⁰ For further details see competition law guidance *Services of general economic interest exclusion* (OFT 421), available at: www.gov.uk/cma.

⁸¹ OFT guideline *Services of general economic interest exclusion* (OFT 421), available at: www.gov.uk/cma

Regulators and the European Competition Network

4.16 The CMA and the Regulators are designated as NCAs with the responsibility to apply Articles 101 and 102 of the TFEU in accordance with the provisions in the Modernisation Regulation in relation to their respective sectors. They are obliged to apply EU competition rules in close cooperation with the Commission and other NCAs. To this end, the Commission and designated competition authorities of the Member States have formed the European Competition Network (the ECN) which facilitates close cooperation in the enforcement of Articles 101 and 102 of the TFEU in the EU. Further details on the ways in which the Regulators can participate in the work of the ECN can be found in the Commission's *Notice on Cooperation within the Network of Competition Authorities*⁸² and the competition law guidance *Modernisation (OFT442)*.⁸³

Market Studies and Market investigation references

4.17 The EA02 makes provision for a system of market investigations by the CMA. Under the EA02 (and the provisions of the sector-specific legislation which give the Regulators concurrent powers under the EA02), the CMA and the Regulators may undertake market studies, and may make market investigation references to the Chair of the CMA for the constitution of a CMA group to conduct an in-depth market investigation into single or multiple markets for goods or services in the United Kingdom. In the case of the Regulators, market investigation references may only be made in relation to their respective sectors. Regulators may make single market or cross-market references within their respective sectors where the test for such a reference is met.⁸⁴ The purpose of these investigations is to examine the market(s) and (where required) implement appropriate remedies where the CMA determines that the structure of the market(s) or the conduct of the suppliers or customers is harming competition.

4.18 When making a reference, the CMA or the Regulator concerned must have reasonable grounds for suspecting that any feature or combination of features of a market or markets in the United Kingdom prevents, restricts or distorts

⁸² OJ C101, 27.04.2004, p.43.

⁸³ OFT guideline *Modernisation (OFT442)*, available at: www.gov.uk/cma

⁸⁴ For further information on single market and cross-market references, including the threshold for making a market investigation reference under the EA02, see further CMA guideline *Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach (CMA3)*, available at: www.gov.uk/cma

competition in relation to the supply or acquisition of any goods or services in the United Kingdom (or a part of the United Kingdom).

- 4.19 Before initiating a market study or making a market investigation reference to the Chair of the CMA for the constitution of a CMA group, the CMA or the Regulator concerned will first consider whether a matter warrants investigation as an infringement of Article 101, and/or Article 102 of the TFEU, the Chapter I prohibition or the Chapter II prohibition. Regulators may, in addition, wish to exercise their discretion to consider whether it would be more appropriate to deal with an issue under any sector specific legislation or rules (subject to concluding that it would be more appropriate to deal within an issue under the CA98, in which case the Regulator must proceed under the CA98).⁸⁵
- 4.20 Where the CMA or a Regulator identifies any conduct and/or receives information that an infringement of the CA98 or Article 101 or Article 102 of the TFEU may have taken place and believes it has sufficient grounds to conduct an investigation under the CA98, the CMA or the Regulator will proceed under the CA98 in the first instance. Any decision to conduct an investigation under the CA98 will not prevent the CMA or the Regulator from reviewing the same or similar market(s), conduct or arrangements pursuant to its market studies and market investigations powers under Part 4 of the EA02 if such a review is appropriate and reasonable. Any such action is only likely to occur in unusual circumstances, for example where:
- proceeding under the CA98 is not likely to address adequately the competition concerns identified
 - the CMA or the relevant Regulator considers that the legal threshold for such an investigation is met
 - such an investigation would be proportionate and appropriate in the circumstances.⁸⁶
- 4.21 Further details concerning these powers under the EA02 can be found in *Markets Studies and Market Investigations: Supplemental guidance on the*

⁸⁵ This duty will not be applied to Monitor at this time, however the Secretary of State may commence this duty at a future date upon Government agreement.

⁸⁶ Please see footnote 81 above.

*CMA's approach (CMA3)*⁸⁷ and in the competition law guideline *Modernisation (OFT442)*.⁸⁸

Concurrent super-complaints

- 4.22 The EA02 provides for a super-complaint to be made by a designated consumer body if any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers.⁸⁹
- 4.23 The Regulators with concurrent competition powers have a duty to respond to super-complaints made to them under the EA02 if the complaint concerns a regulated sector in relation to which that Regulator has functions (as set out in the table in chapter 2).⁹⁰ The coordination of super-complaint duties will be based on policies agreed and applied through the UKCN. Information on the super-complaint process can be found in *Super-complaints: guidance for designated consumer bodies (OFT514)*.⁹¹

⁸⁷ *Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach (CMA3)*, available at: www.gov.uk/cma

⁸⁸ OFT guideline *Modernisation (OFT442)*, available at: www.gov.uk/cma

⁸⁹ Section 11 of the EA02.

⁹⁰ The Enterprise Act 2002 (Super-complaints to Regulators) Order 2003 (SI 2003/1368).

⁹¹ OFT guideline *Super-complaints: guidance for designated consumer bodies (OFT514)*, available at: www.gov.uk/cma

5 CONFIDENTIALITY AND DISCLOSURE OF INFORMATION

5.1 In the course of any investigation under the CA98, the CMA or the Regulator will indicate the purpose for which any requested document or information is required, and under which powers they are sought. Further detail on the information seeking powers is given in the competition law guideline *Powers of investigation* (OFT404)⁹² and in the CMA CA98 Procedures Guidance (CMA8).

Disclosure under the Modernisation Regulation

5.2 The power of all members of the ECN to exchange and use information which has been collected for the purpose of applying Article 101 or 102 of the TFEU is important to the functioning of the ECN. Regulators will fulfil their role as NCAs in relation to their sectors, as described in paragraph 4.16 above.

5.3 Information on the exchange and use of confidential information within the Network can be found in the Commission's *Notice on Cooperation within the Network of Competition Authorities*⁹³. Information on confidentiality and the disclosure of information can be found in the competition law guideline *Modernisation* (OFT442).⁹⁴

5.4 The exchange between the CMA and the Regulators of information obtained by them under Part I of the CA98 is governed by Part 9 of the EA02 rather than the Modernisation Regulation. Further details on Part 9 of the EA02 are set out in paragraphs 5.5 to 5.7 below.

Confidentiality and disclosure under national law

5.5 The Concurrency Regulations provide for broad information sharing between the CMA and a Regulator in respect of investigations under the CA98.⁹⁵ In all cases, the CMA and the Regulators will treat any information so disclosed in accordance with their legal duties.

5.6 The EA02 sets out the requirements for safeguarding certain information and lays down the requirements that have to be met before public authorities, including the CMA and the Regulators, may disclose such information. These

⁹² OFT guideline *Powers of investigation* (OFT404), available at: www.gov.uk/cma

⁹³ OJ C101, 27.04.04, p. 43.

⁹⁴ OFT guideline *Modernisation* (OFT442), available at: www.gov.uk/cma

⁹⁵ For further information on the information sharing provisions, see paragraphs 3.41 to 3.54 above.

are set out in Part 9 of the EA02 which applies to information which has been gathered for the purpose of the CMA's and the Regulators' EA02 functions, and for the purposes of the CMA's and the Regulators' competition and consumer functions under specified legislation (including the CA98). Further information on confidentiality and the disclosure of information can be found in *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6),⁹⁶ as well as in the CMA CA98 Procedures Guidance (CMA8).⁹⁷

- 5.7 Where information has been obtained under Part I of the CA98 or under the EA02, its disclosure by a Regulator for sector-specific purposes is subject to the restrictions set out in Part 9 of the EA02 rather than the provisions of any sector-specific legislation. In particular, this means that a Regulator may only disclose such information where it is permitted to do so pursuant to sections 239 to 243 of the EA02 and must have regard to the considerations relevant to disclosure set out in section 244 of the EA02.

⁹⁶ *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6), available at: www.gov.uk/cma.

⁹⁷ CMA CA98 Procedures Guidance (CMA8), available at: www.gov.uk/cma.

ANNEXE(S)

A THE COMPETITION ACT 1998 (CONCURRENCY) REGULATIONS 2014⁹⁸

The Secretary of State, in exercise of the powers conferred by sections 54(4), (5) to (6B) and 71 of the Competition Act 1998,⁹⁹ makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Competition Act 1998 (Concurrency) Regulations 2014 and come into force on 1st April 2014.

Interpretation

2. —(1) In these Regulations—

“the Act” means the Competition Act 1998;

“the CMA’s Rules” means the Competition and Markets Authority’s Rules set out in the Schedule to the Competition Act 1998 (Competition and Market Authority’s Rules) Order 2014;¹⁰⁰

“notify” means to notify in writing (including electronically) and “notice” shall be construed accordingly;

“Part 1 functions” means any functions under Part 1 of the Act which are, or (but for provision under these Regulations) would be, exercisable concurrently by two or more competent persons;¹⁰¹

“prescribed functions” means—

- (i) any of the functions of the CMA under section 25 of the Act;

⁹⁸ SI 2014/536 made on 6 March 2014 and to come into force on 1 April 2014. Available at www.legislation.gov.uk/id/ukSI/2014/536.

⁹⁹ 1998 c. 41. Section 54 is amended by Schedule 25 to the Enterprise Act 2002 (c. 40), section 371 of the Communications Act 2003 (c.21), Schedule 7 to the Water Act 2003 (c. 37), Schedule 2 to the Railways and Transport Safety Act 2003 (c. 20), section 74 of the Health and Social Care Act 2012 (c. 7), section 51 of and Schedules 5 and 15 to the Enterprise and Regulatory Reform Act 2013 (c. 24), section 67 of and Schedule 8 to the Financial Services (Banking Reform) Act 2013 (c. 33) (the amendments made by Financial Services (Banking Reform) Act 2013 are not yet in force) and S.I. 2004/1261.

¹⁰⁰ SI 2014/458.

¹⁰¹ “competent person” is defined in section 54(7) of the Competition Act 1998.

- (ii) the function of making a decision, as defined in section 46(3) of the Act;
- (iii) any of the functions of the CMA under paragraph 4 of Schedule 1 to the Act or under an order made under section 50 of the Act; and

“relevant competent persons” has the meaning given in regulation (2).

(2) References in these Regulations to “health care”, “the NHS” and the provision of health care services for the purposes of the NHS each have the meaning given in section 64 of the Health and Social Care Act 2012.¹⁰²

Information regarding potential cases

3. For the purpose of determining which competent persons have jurisdiction to exercise Part 1 functions in respect of a case or for the purpose of facilitating the performance by another competent person of its Part 1 functions, a competent person may send to any other competent person details of any information in its possession that an infringement of—

- (a) the Chapter I prohibition,¹⁰³
- (b) the Chapter II prohibition,
- (c) the prohibition in Article 101(1), or
- (d) the prohibition in Article 102,

may have taken place.

Determination of the exercise of Part 1 functions

4. —(1) If a competent person proposes to exercise any of the prescribed functions in respect of a case and it considers that another competent person has or may have concurrent jurisdiction to exercise Part 1 functions in respect of that case, it must inform that other competent person in writing of its intention to exercise prescribed functions in respect of that case.

¹⁰² 2012 c. 7.

¹⁰³ “the Chapter I prohibition”, “the Chapter II prohibition”, “Article 101(1)” and “Article 102” are all defined in section 59 of the Competition Act 1998. Relevant amendments were made to section 59 by SI 2012/1809.

- (2) Where a competent person has informed another competent person of its intention to exercise prescribed functions in accordance with paragraph (1) in respect of a case, all such competent persons (“the relevant competent persons”) must agree who is to exercise Part 1 functions in respect of that case.
- (3) When agreement has been reached in accordance with paragraph (2), the CMA must as soon as practicable inform in writing the other relevant competent persons which competent person is to exercise Part 1 functions in respect of the case.

Dispute

5. —(1) If the relevant competent persons are not able to reach agreement in accordance with regulation 4(2) within a reasonable time, the CMA must notify the other relevant competent persons that it intends to determine which relevant competent person is to exercise Part 1 functions in respect of the case.
 - (2) Any relevant competent person may make representations in writing to the CMA no later than 5 working days after the date upon which the CMA notifies its intention to make a determination in accordance with paragraph (1).
 - (3) The CMA must within 10 working days of notifying its intention in accordance with paragraph (1)—
 - (a) determine which competent person is to exercise Part 1 functions in respect of the case; and
 - (b) inform in writing all other relevant competent persons—
 - (i) which competent person is to exercise jurisdiction in respect of the case,
 - (ii) the date of the determination, and
 - (iii) the reasons for the determination.
 - (4) In making a determination in accordance with paragraph (3)(a) the CMA—
 - (a) must take into consideration any representations made in accordance with paragraph (2); and

(b) (subject to paragraph (5)) may decide that it is to exercise Part 1 functions in respect of the case rather than another relevant competent person, where the CMA is satisfied that its doing so would further the promotion of competition, within any market or markets in the United Kingdom, for the benefit of consumers.

(5) Where Monitor is one of the relevant competent persons, the CMA may not make a determination in accordance with paragraph (1) and (3)(a) that a competent person other than Monitor is to exercise Part 1 functions in relation to the case unless the CMA is satisfied that the case is not principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

Avoidance of double jeopardy

6. —(1) Where two or more competent persons may have concurrent jurisdiction to exercise Part 1 functions in respect of a case, no competent person shall exercise any prescribed functions in respect of that case before agreement has been reached in accordance with regulation 4(2) or a determination has been made in accordance with regulation 5(3)(a) as to which competent person is to exercise Part 1 functions in respect of that case.

(2) Subject to regulations 7 and 8, once agreement has been reached in accordance with regulation 4(2) or a determination has been made in accordance with regulation 5(3)(a) as to which competent person is to exercise Part 1 functions in respect of a case, no other competent person shall exercise any Part 1 functions in respect of that case.

Transfer

7. —(1) A competent person who has exercised any Part 1 functions in respect of a case (“the transferor”) may agree with another competent person who but for regulation 6 would have, concurrent jurisdiction to exercise Part 1 functions in respect of that case (“the transferee”) to transfer the case to the transferee.

(2) If the transferor and the transferee propose to agree a transfer in accordance with paragraph (1), the transferor must first—

(a) 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 the transfer, of the proposed transfer, and

- (b) 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.
- (3) The transferor and transferee must take into account any written representations made in accordance with paragraph (2)(b) before agreeing the transfer.
- (4) Once the transferor and transferee have reached a decision about the proposed transfer, the transferor must—
 - (a) inform the recipients of the notice under paragraph (2) in writing of their decision and the reasons for it, and
 - (b) if the transfer has been agreed, that the transferee is to exercise jurisdiction in respect of the case from the date of the transfer.
- (5) The transferor is not under any obligation to notify any person in accordance with paragraph (2) or to inform any person in accordance with paragraph (4) if the transferor has not informed the that person that it has exercised Part 1 functions in respect of the case.

Circumstances in which the CMA may decide that it is to exercise Part 1 functions

- 8. —(1) The CMA may direct a regulator¹⁰⁴ to transfer a case in respect of which the regulator is exercising Part 1 functions to the CMA where the CMA is satisfied that—
 - (a) it exercising the Part 1 functions rather than the regulator would further the promotion of competition, within any market or markets in the United Kingdom, for the benefit of consumers; and
 - (b) where the regulator is Monitor, the case is not principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.
- (2) If the CMA proposes to exercise the power in paragraph (1) the CMA must first consult the regulator who is exercising Part 1 functions in respect of the case, explaining the reasons why the CMA considers it appropriate to exercise that power.

¹⁰⁴ “regulator” is defined in section 54(1) of the Competition Act 1998.

- (3) If, following the consultation referred to in paragraph (2), the CMA still proposes to exercise the power in paragraph (1), the CMA must—
- (a) notify—
 - (i) the regulator who is exercising Part 1 functions in respect of the case,
 - (ii) the undertaking which is the subject of the exercise of Part 1 functions in the case (the undertaking concerned), and
 - (iii) any other persons likely to be materially affected by the transfer, of what it proposes,
 - (b) 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, and
 - (c) take into account any representations made in accordance with paragraph (3)(b).
- (4) Once the CMA has reached a decision whether to exercise the power in paragraph (1) the CMA must—
- (a) inform the recipients of the notice under paragraph (3)(a) in writing of its decision and the reasons for it; and
 - (b) if the CMA has decided to exercise the power in paragraph (1) , inform such recipients in writing that the CMA is to exercise jurisdiction in respect of the case from the date of the transfer.
- (5) The CMA is not under any obligation to notify or inform any person referred to in paragraph (3)(a)(ii) or (iii) in accordance with this regulation if the regulator has not informed that person that it has exercised Part 1 functions in respect of the case.
- (6) The CMA may not exercise the power in paragraph (1) in respect of a case where a regulator has given notice under section 31(1) of the Act that it proposes to make a decision (within the meaning given by section 31(2) of the Act) in that case.

Information sharing

9. —(1) Each competent person must put in place arrangements for sharing with other competent persons the following information in connection with concurrent cases¹⁰⁵—

(a) details of any information in the possession of the competent person that an infringement of—

- (i) the Chapter I prohibition,
- (ii) the Chapter II prohibition,
- (iii) the prohibition in Article 101(1), or
- (iv) the prohibition in Article 102,

may have taken place, whether or not the competent person proposes to exercise any of the prescribed functions in respect of the case;

(b) a draft of any notice which the competent person proposes to give under section 31 of the Act (decisions following an investigation) or rule 5 of the CMA's Rules (statement of objections), before the notice is given;

(c) a draft of any commitments which the competent person proposes to accept under section 31A of the Act (commitments) before those commitments are accepted;

(d) a draft of any notice which the competent person proposes to give under section 35(3) (notice of interim measures), before the notice is given;

(e) a draft of any notice which the competent person proposes to give under rule 10(1) of the CMA's Rules (notice of infringement decision), before the notice is given;

(f) a draft of any notice which the competent person proposes to give under rule 10(4) of the CMA's Rules (notice of no grounds for action decision), before the notice is given;

¹⁰⁵ “concurrent case” is defined in section 54(6C) of the Competition Act 1998.

- (g) a draft of any notice which the competent person proposes to give under rule 15(3) or (6) of the CMA's Rules (notice of proposed cancellation of parallel exemption and notice of decision), before the notice is given;
- (h) a draft of any notice of a decision by the competent person not to proceed with a case, before the notice is given;
- (i) a draft of any notice which the competent person proposes to give under section 112 of the Enterprise Act 2002¹⁰⁶ as applied by section 40A(9) of the Act (notice of administrative penalty), before the notice is given;
- (j) such other information in the possession of the competent person as any other competent person may reasonably require to facilitate the performance of its functions under the Act.

(2) This regulation does not affect any power or duty to disclose information which exists apart from this regulation.

Use of staff

10.—(1) A competent person who wishes to exercise Part 1 functions in respect of a case (“the appointor”) may appoint an officer of another competent person (“the appointee”) to act as his officer in relation to that case provided that the competent person of which the appointee is an officer gives his written consent to the appointment on or before the date upon which the appointment commences.

(2) An appointee—

(a) is an officer of the appointor for the purposes of sections 27 to 29 inclusive of the Act, and

(b) may exercise such other functions in relation to the case as may be agreed as if the appointee were an employee of the appointor.

(3) Any act or omission of the appointee within the terms of the appointment is to be deemed to be an act or omission of the appointor.

¹⁰⁶ 2002 c. 40.

Service of Notices

- 11.—(1) Any notice to be served on any person under regulations 7 and 8 may be served by post or by sending it by electronic means to an electronic address notified by the person for the purpose.
- (2) A letter containing that notice is to be deemed to be properly addressed if it is addressed to that person at its registered office or last known residence or last known place of business in the United Kingdom.

Revocation and transitional provision

- 12.—(1) The Competition Act 1998 (Concurrency) Regulations 2004¹⁰⁷ (“the 2004 Regulations”) are revoked.
- (2) Where a competent person (other than the CMA) is entitled to exercise prescribed functions within the meaning of and in accordance with the 2004 Regulations in respect of a case before the date these Regulations come into force, that competent person is to be treated as having jurisdiction to exercise Part 1 functions in respect of that case for the purposes of these Regulations as though an agreement to that effect had been reached in accordance with regulation (2) of these Regulations.
- (3) Where the Office of Fair Trading is entitled to exercise prescribed functions within the meaning of and in accordance with the 2004 Regulations in respect of a case before the date these Regulations come into force, the CMA is to be treated as having jurisdiction to exercise Part 1 functions in respect of that case for the purposes of these Regulations as though an agreement to that effect had been reached in accordance with regulation (2) of these Regulations.

Jenny Willott
Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs

Date 6 March 2014 Department for Business, Innovation and Skills

¹⁰⁷ SI 2004/1077; amended by SI 2012/1809.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision for the Competition and Markets Authority (“CMA”) and the regulators who can exercise functions of the CMA under Part 1 of the Competition Act 1998 (c 41) (“the Act”) concurrently with it to co-ordinate the performance of those functions.

The relevant regulators are listed in section 54(1) of the Act and as at 1st April 2014 are the Office of Communications, the Gas and Electricity Markets Authority, the Water Services Regulation Authority, the Office of Rail Regulation, the Northern Ireland Authority for Utility Regulation, the Civil Aviation Authority and Monitor.

Regulation 3 provides for a competent person (which means the CMA or any of the regulators) to circulate information for the purposes of determining which of their number may exercise Part 1 functions (as defined in regulation 2) in relation to a case or for the purpose of facilitating the performance by another competent person of its Part 1 functions.

Regulation 4 sets out the steps that must be taken before a competent person exercises prescribed functions (as defined in regulation 2) in relation to a case.

Regulation 5 provides the procedure for determining which competent person is to exercise Part 1 functions in a particular case when agreement has not been reached on this issue in accordance with regulation 4 and provides that the CMA may only determine that a competent person other than Monitor is to exercise Part 1 functions in relation to the case if the CMA is satisfied that the case is not principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

Regulation 6 makes provision for the circumstances in which the exercise of prescribed functions by a competent person in relation to a case precludes the exercise of Part 1 functions by another competent person.

Regulation 7 makes provision for a competent person who has exercised Part 1 functions in relation to a case to transfer that case to another competent person.

Regulation 8 makes provision for the CMA to determine that it rather than a regulator who has exercised Part 1 functions in relation to a case is to exercise Part 1 functions in relation to that case and provides that the CMA cannot determine that it rather than Monitor should exercise Part 1 functions in respect of a case unless the CMA is satisfied that the case is not principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

Regulation 9 provides for arrangements to be established by competent persons for sharing information in relation to concurrent cases (as defined in section 54(6C) of the Act).

Regulation 10 makes provision for the appointment of an officer of one competent person to act as the officer of another competent person in relation to a case.

Regulation 11 makes provision for the service of notices.

Regulation 12 revokes the Competition Act 1998 (Concurrency) Regulations 2004 (SI 2004/1077) and makes transitional provision in relation to cases where a competent person is already exercising Part 1 functions.

The impact assessment completed for Parts 3 and 4 of the Enterprise and Regulatory Reform Bill, introduced to Parliament on 23rd May 2012, includes an assessment of the effect that the changes to the concurrency arrangements will have on the costs of business and the public and voluntary sector and can be found at the website: www.gov.uk/government/publications/strengthening-competition-and-creating-a-single-market-authority.

B STATEMENT OF INTENT OF THE UNITED KINGDOM COMPETITION NETWORK (UKCN)

1. The statutory basis for the UKCN

The Enterprise and Regulatory Reform Act 2013 (ERRA13) was enacted in April 2013. The Act creates the Competition and Markets Authority (CMA) as a Non-Ministerial Government Department to replace the Office of Fair Trading and the Competition Commission,¹⁰⁸ with the main duty to: 'promote competition, both within and outside the United Kingdom, for the benefit of consumers.'¹⁰⁹The Act makes provision for the strengthening of the primacy of general competition law, so that the sector regulators are expressly required, where they are not already required to do so, to consider whether the use of their competition law powers is more appropriate before taking enforcement action under their sector-specific, regulatory powers.¹¹⁰

Certain sector regulators¹¹¹ have concurrent competition powers alongside the CMA to enforce Articles 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU) and the Competition Act 1998 (CA98) to make Market Investigation References (MIRs) to the CMA with respect to activities in their sectors, and concurrency in respect of super-complaints under the Enterprise Act 2002 (EA02).¹¹²

¹⁰⁸ Part 3, s. 26, ERRA13.

¹⁰⁹ Part 3, s. 25, ERRA13.

¹¹⁰ Schedule 14, ERRA 14. The primacy provision will not be commenced for Monitor until a later date on Government agreement.

¹¹¹ The present concurrent regulators, and the scope of their competition concurrency, are:

- Civil Aviation Authority (CAA) (air traffic control services and airport operation services)
- Monitor (the provision of health-care services in England)
- Ofcom (electronic communications and post)
- Ofgem (gas and electricity markets in Great Britain)
- Ofwat (water and sewerage markets in England and Wales)
- Office of Rail Regulation (ORR) (railway services in Great Britain)
- Utility Regulator, Northern Ireland (NIAUR) (gas, electricity, water and sewerage services in Northern Ireland)

¹¹² The various regulators are given their concurrent powers to deal with super-complaints by virtue of section 205 EA02 and the 2003 Regulations. Monitor does not have powers to deal with super-complaints.

ERRA13 amends the enabling power for the competition concurrency regulations, so as to:¹¹³

- require enhanced information sharing arrangements between the CMA and the sector regulators
- allow the CMA to decide who will act in a case in a concurrent sector, following consultation
- allow the CMA, in certain circumstances, to take over a case from a concurrent regulator.

The intent of these statutory reforms is to ensure that competition cases, business and the economy should benefit from greater consistency in approach through the use of general competition law and to ensure that the sector regulators consider whether a more appropriate way of proceeding would be under the competition law before using their sector-specific powers.

As soon as practicable after the end of each financial year, the CMA must prepare a report containing an assessment of how the concurrency arrangements have operated during the year.¹¹⁴

Under ERRA13, the Secretary of State (SoS) may make an order to remove the competition functions from the sector regulator if the SoS considers that it is appropriate to do so for the purpose of promoting competition, within any market or markets in the UK, for the benefit of consumers. This clause applies to all sectoral regulators with concurrent competition powers, with the exception of Monitor.¹¹⁵

2. Purpose of the UK Competition Network as agreed by regulatory heads

To give effect to the statutory requirements of ERRA13 and in order to strengthen the collaborative framework through which the sector regulators and CMA will work to further the interests of the consumer, the heads have agreed to establish a United Kingdom Competition Network (UKCN) and to develop a programme of work for the UKCN.

¹¹³ Chapter 5, s.51, ERRA 13.

¹¹⁴ Part 1, s.16, *Concurrency report*, ERRA 13.

¹¹⁵ Chapter 5, s.52, ERRA13.

The UKCN brings together the CMA with the CAA, FCA, Ofcom, Ofgem, Ofwat, ORR and the Utility Regulator of Northern Ireland. These sector regulators all have a duty to promote competition in the interests of consumers. The healthcare regulator, Monitor, which has a statutory duty to prevent anti-competitive behaviour, will attend the Network with observer status.

The mission of the UKCN will be to promote competition for the benefit of consumers and to prevent anti-competitive behaviour both through facilitating use of competition powers and development of pro-competitive regulatory frameworks, as appropriate.

The heads agreed to pursue this mission on the basis of six priority areas that are summarised in section 3, below.

3. Proposed areas of focus for UKCN Members

Within the overall mission of the UKCN, the UKCN will work individually and collectively in the following areas:

3.1 Strategic dialogue

The CMA and Sector Regulatory Heads should engage together within the UKCN in a broad strategic dialogue, identifying opportunities to use competition or regulatory powers to promote market mechanisms to further the interests of consumers¹¹⁶ with a view to:

- mutual understanding of market developments, opportunities to shape regulatory frameworks to further competition/prevent anti-competitive behaviour and otherwise use competition tools to benefit consumers/users and the wider economy
- understanding developments in the EU and international regimes
- identifying common challenges in relation to litigation
- taking into account other ex ante regulatory objectives such as ensuring safety of networks and services.

¹¹⁶ Monitor does not have a duty to promote competition but will act to prevent anti-competitive behaviour where this is against patients' interests.

3.2 Enforcement cooperation under competition law

To ensure consistent application of competition law in the United Kingdom in the areas of sector regulation, members of the UKCN will cooperate closely with respect to:

- cases, including the identification of potential CA98 and MIR cases in regulated sectors
- market studies (including, collaborative market studies where applicable)
- CMA proposals to allocate ongoing Competition Act cases to itself
- the role of the CMA taking cases in regulated sectors
- peer review of competition-related work products.

3.3 Enhancing capabilities

To ensure that UKCN members each have the capabilities needed to enforce competition powers correctly and effectively, members will contribute to:

- staff development and training
- establishing an effective information sharing and casework process structure (with suitable disclosure barriers)
- enhancing process handling, including considering the option of using a procedural adjudicator
- the sharing of staff through secondment programmes between the CMA and the sector regulators and between the sector regulators.

3.4 Sharing best practice

Aligned to effective enforcement coordination, UKCN members will adopt means by which to share best practice which may include:

- the development of model procedures

- sharing of research findings
- participation in international benchmarking of best practice
- joint workshops.

3.5 Advocacy

To ensure that the most significant competition and consumer issues are identified and expedited, UKCN members will:

- exchange ideas and expertise for competition advocacy
- support mutually, as appropriate, each others' competition advocacy work
- support mutually, as appropriate, each others' work on best regulatory practice including the fundamental principle of day-to-day operational independence from Government
- input into the Annual Concurrency Report.

3.6 Annual concurrency report

To ensure the timely publication of the annual Competition Concurrency Report under ERRA13, members of the UKCN will provide information with regard to:

- cases in progress as well as closed cases
- cases examined by sector regulators but where no infringement was found
- their contributions to developing a track record of competition cases and market investigations by UKCN members
- the operation of the concurrency arrangements
- the outcomes achieved alongside the delivery of the process
- the development of competition within their sectors in addition to specific cases in order to provide overall strategic context.

Annexe 1 – Background to the establishment of the UK Competition network following the reform of the UK competition landscape.

A.1 Government Competition Landscape Review

Competitive markets are a key driver of productivity, innovation and economic growth, providing greater choice and other benefits for consumers. In March 2011, the Government launched its consultation on reforming the UK competition regime¹¹⁷ with the overarching objective to maximise the ability of the competition authorities to secure vibrant, competitive markets that work in the interests of consumers and to promote productivity, innovation and economic growth.

One of the key proposals was the creation of a new Competition and Markets Authority (CMA) to replace the Competition Commission (CC) and the Office of Fair Trading (OFT). The Government considered that creating a single competition authority and modernising its competition toolkit would improve markets and help consumers and businesses by providing greater coherence in competition practice and a more streamlined approach to decision-making. It would also facilitate faster and less burdensome processes for businesses and a single strong centre of competition expertise that could help business understand their competition law obligations and provide national and international leadership.

The package of proposals included options to enhance the competition concurrency regime affecting the sector regulators following the National Audit Office 2010 Review of the UK Competition Landscape that recommended the introduction of appropriate incentives for the sector regulators to use their competition powers.

The consultation also considered that competition cases, business and the economy could benefit from more consistency in approach through the use of general competition law. One of the conclusions of the consultation was that the Government wanted to encourage sector regulators to work more closely with the CMA and to use their competition powers where they considered them to be appropriate.

Following the consultation, the Government set out its specific reforms before Parliament in May 2012, in the Enterprise and Regulatory Reform Bill.

¹¹⁷ *A Competition Regime for Growth: A Consultation on options for reform*, BIS, March 2011.

A.2 Enterprise and Regulatory Reform Act, 2013

New Primary Legislation

The Enterprise and Regulatory Reform Act 2013 (ERRA13) was enacted in April 2013. ERRA13 creates the CMA as a Non-Ministerial Government Department with the main duty to: 'promote competition, both within and outside the United Kingdom, for the benefit of consumers'. This duty reflects the CMA's position as the UK's principal competition authority and its leadership role in tackling anti-competitive behaviour as part of ensuring markets work well for consumers, as well as its domestic and international advocacy role.

ERRA13 gives the CMA an important role to play in working with and through partner agencies to deliver positive competition outcomes by ensuring greater coherence in competition policy and practice, increased case flow and flexibility in resource allocation, and to advocate the benefits of competition and markets across the economy. ERRA13 also maintains the regulatory appeal function currently exercised by the CC and in future to be exercised by the CMA. This is subject to a wider review of the appeals system for competition cases and regulatory decisions.¹¹⁸

The Primacy of general competition law

ERRA13 makes provision for the strengthening of the primacy of general competition law, so that the sector regulators are expressly required, where they are not already required to do so, to consider whether the use of their competition law powers is more appropriate before taking enforcement action under their sector-specific, regulatory powers.¹¹⁹

Changes to the Competition Concurrency Regime

ERRA13 is designed to ensure that the CMA and the sector regulators work more closely together and for there to be greater sharing of information between them in respect of potential and ongoing competition cases.

The Secretary of State also has powers to prescribe circumstances in which the CMA may decide that it, rather than a sector regulator, should bring a CA98 case. This will ensure the CMA can take action in cases where it is better placed to do so, and it is intended to further improve the robustness of decisions and to strengthen the regime.

¹¹⁸ *Streamlining regulatory and competition appeals: consultation on options for reform, BIS, June 2013.*

¹¹⁹ The primacy provision will not be commenced for Monitor until a later date.

It is envisaged that this power for the CMA to take over a case from a concurrent regulator will be used rarely in practice as the closer working and information sharing arrangements between the competition authorities will in any case ensure better and more consistent case management and competition enforcement outcomes for the benefit of consumers. Where the power is used, the CMA would have to consult the regulator before exercising this power and there will have to be a formal agreement with each regulator on how this will work in practice.¹²⁰

The Power to remove competition functions from concurrent sector specific regulators

ERRA13 also allows the Secretary of State to make an order to remove the competition functions from a sector regulator if it is considered that it is appropriate to do so for the purpose of promoting competition, within any market or markets in the UK, for the benefit of consumers.¹²¹

The Annual Competition Concurrency Report

Alongside this and in order to ensure transparency, accountability and greater certainty for business, the CMA will be required to report annually on the operation of the concurrency arrangements and on decisions on the use of concurrent competition powers by the CMA and sector regulators.

A.3 Government's strategic steer

To increase transparency, the Government has committed to issuing a non-statutory statement of strategic priorities for the CMA (the Steer)¹²² setting out how Government envisages the competition regime will fit into wider government economic policy.

The Steer is part of an overall accountability framework which also comprises the legal and performance management frameworks, for example, the CMA's duty to

¹²⁰ Where there is dispute, the CMA may not however decide that it or another Regulator other than Monitor is to exercise Part 1 functions which are primarily concerned with matters relating to the provision of health care services for the purposes of the NHS in England. The CMA and Monitor may nevertheless agree that the CMA is to act in such a case as will be reflected in the Concurrency Regulations.

¹²¹ This power applies to all sectoral regulators with concurrent competition powers except Monitor. Monitor does not have a duty to promote competition but will act to prevent anti-competitive behaviour where this is against patients' interests.

¹²² *Competition Regime: Consultation on CMA Priorities and Draft Secondary Legislation, BIS, July 2013.*

'promote competition, both within and outside the UK, for the benefit of consumers'. It provides an open and transparent statement which the CMA will be expected to have regard to, but the CMA retains full independence in how it approaches its work, and in its selection of cases, and the tools it uses to tackle them. Alongside this Steer will sit the Performance Management Framework established by BIS and HM Treasury.

As part of the Steer, the CMA will be expected to identify markets where competition is not working well and tackle the constraints on competition in these cases.

The Steer also proposes that the CMA should assess specific sectors where enhanced competition could contribute to faster growth (for example, knowledge intensive sectors, financial services and infrastructure sectors including energy) – working with the responsible Regulator where appropriate.

Alongside the Consultation on the CMA's new draft guidance, the Government invited comments on the Steer and certain key pieces of secondary legislation on 15 July.¹²³

A.4 The Competition powers of the sector regulators

The CMA will need to work with other sector regulators, to build up and continue to share competition expertise, including through joint enforcement work, training and research. This will include engagement with those sector regulators with concurrent competition powers listed in the table below and with regulators, such as the Financial Conduct Authority, that have a duty to promote competition in the interests of consumers but that do not have concurrent competition powers.

¹²³ A second tranche of consultations was launched on 17 September covering the new concurrency regulation, CMA Rules on Competition Act enforcement and CMA guidance on concurrency and Competition Act procedures. These consultations were closed on 11 November 2013 and responses are currently being reviewed.

Sector Regulators with Concurrent Competition Powers

Regulator	Scope of Concurrent Competition Powers
Civil Aviation Authority (CAA)	Air traffic services, and now under the Civil Aviation Act 2012, airport operation services in the United Kingdom.
Monitor	Health care services in England. ¹²⁴
Northern Ireland Authority for Utility Regulation (NIAUR)	Gas, electricity, water and sewerage services in Northern Ireland.
Office of Rail Regulation (ORR)	Railway services in Great Britain.
The Office of Communications (Ofcom)	Electronic communications, broadcasting and postal services in the United Kingdom.
The Office of Gas and Electricity Markets (Ofgem)	Gas and electricity in Great Britain.
Water Services Regulation Authority (Ofwat)	Water and sewerage in England and Wales.

The Financial Conduct Authority (FCA)

At present, the FCA is not specified as a sector regulator in ERA13 because it does not have concurrent CA98 nor MIR powers with the CMA.

The Government believes that the FCA should have a far stronger role in competition than the Financial Services Authority had. This commitment is reflected in the FCA having a statutory mandate to promote effective competition in the interests of consumers. The FCA may use any of its regulatory powers to promote competition. The FCA also has the power of referral to the CMA. The FCA will take the lead in addressing competition issues where it is better placed to do so. In

¹²⁴ There is a power for the Secretary of State to extend these powers to the area of social care in England.

addition, The Financial Services (Banking Reform) Bill, 2013 envisages FCA receiving concurrent competition powers from April 2015.¹²⁵

Monitor

Monitor has no duty to promote competition in the interest of consumers, unlike other sector regulators. Monitor's main duty is to protect and promote the interests of patients by promoting provision of health care services which is economic, efficient and effective, and maintains or improves the quality of healthcare services. Monitor must exercise its functions with a view to preventing anti-competitive behaviour in the provision of NHS-funded healthcare services which is against patients' interests. The Health and Social Care Act 2012 gives Monitor the power to take enforcement action under the provider licence and the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013. Monitor also has concurrent powers which enable it to enforce the CA98 and to make MIRs under the EA02.

A.5 Progress report of the Joint Regulators Group Work-Group on Concurrency to the May 2013 JRG meeting

The Regulators, under the aegis of the Joint Regulators Group (JRG), have worked with the CMA transition team and colleagues from the BIS and the OFT to consider in more detail how operational relationships can be optimised.

In May 2013, the JRG published a report¹²⁶ on progress so far on this work, as well as setting out directions for future consideration, including how a vision for enhanced cooperation might be realised and the key areas that needed to be addressed, in particular:

- **transparency:** in order to demonstrate to stakeholders that effective action is being taken on emerging issues
- **flexibility:** recognising the need to reflect differing regulatory and market conditions in each sector

¹²⁵ Financial Services (Banking Reform) Bill Government Amendments: FCA Concurrent Powers, Briefing to Peers:
www.gov.uk/government/uploads/system/uploads/attachment_data/file/245760/HoL_Policy_Brief_-_FCA_Concurrent_Powers.pdf

¹²⁶ Building Confidence that Consumers in Regulated Sectors are Effectively Protected from Competition Failures: Concurrent enforcement with the Competition and Markets Authority, *Progress report of the Joint Regulators Group Work-Group on Concurrency to the May JRG meeting*, June 2013.

- **pragmatism and practicalities:** for example in relation to the different levels of resources available to different regulators.

A.6 Meetings of the regulatory heads

Subsequent to the working level cooperation between JRG and the CMA transition team, the first meeting of the regulatory heads was held on 11 July 2013 and the UKCN Statement of Intent was approved by the Chief Executives at a workshop held on 18 September 2013.

The initial meeting was convened to discuss how best to respond to the various reforms to the competition legislation, including the creation of the CMA, revision of the concurrency regime and additional competition responsibilities for some of the sector regulators as indicated above.

The CMA and sector regulator heads agreed that:

- a 'step-up' in the role of competition concurrency in the areas covered by sector regulators would be sought, following the introduction of ERRA13
- each head should support the establishment of the UKCN and should involve themselves personally in the establishment and supervision of an appropriate programme of work and to manage the delivery of agreed actions.

At the workshop, the heads considered the draft UKCN Statement of Intent (UKCN Sol), developed following the July meeting. It was agreed that the UKCN Sol should be an evolving document, which should be updated to reflect new regulators/powers and reviewed at least annually. Following adoption by the heads, it was then submitted to each agency's Board for agreement.

Following agreement by each Board, the UKCN Heads agreed the publication of the latest version of the UKCN Sol and associated press release on 2 December 2013.